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

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT)
AND
SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

I.T.A. No.3092/Mum/2006
(Assessment year 2002-03)

Sanofi India Limited (formerly Aventis Pharma Limited) 54-A, Sir Mathuradas Vasanji Road Andheri (E), Mumbai-400 093 PAN : AACH2736F	vs	The ACIT, Range-8(1), Mumbai
APPELLANT		**RESPONDENT**

I.T.A. No.2072/Mum/2010 - Assessment year 2002-03
I.T.A. No.3187/Mum/2006 - Assessment year 2002-03

The ACIT, Circle-8(1), Mumbai	vs	Sanofi India Limited (formerly Aventis Pharma Ltd) 54-A, Sir Mathuradas Vasanji Road Andheri (E), Mumbai-400 093
APPELLANT		**RESPONDENT**

Appellant by	Shri JD Mistry (Sr.Adv) , along with S/Shri S. M. Shah & Paras Savla (AR)
Respondent by	S/Shri Ashish Heliwal and Sreenivasaraghavan Iyengar (DR)
Date of hearing	21-05-2021
Date of pronouncement	11-08-2021

O R D E R

Per : Saktijit Dey (JM) :

Captioned are a set of cross appeals and an appeal by the revenue arising out of two separate orders of learned Commissioner of Income Tax (Appeals), Mumbai. While the cross appeals arise out of quantum proceedings for assessment year 2002-03, the other appeal of the revenue is against deletion of penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 for the same assessment year.

ITA No.3092/Mum/2006 (Assessee's Appeal)

2. In ground 1, assessee has challenged addition made on account of adjustment to the arm's length price (ALP, hereafter) of export commission paid to the overseas associated enterprises (AE).

3. Briefly the facts are, the assessee is a subsidiary of Aventis Pharma Holding GmbH, which, in turn, is a wholly owned subsidiary of Hoechst AGTE. As stated by the Transfer Pricing Officer (TPO, in short), assessee is primarily engaged in manufacture and marketing of formulations across the therapeutic segment of anti infective, arthritis, cardiology, central nervous system, metabolism, oncology and respiratory. During the year under consideration, the assessee had entered into various international transactions with its AEs, such as, imports of actives/formulations from AE, export of formulations/bulk drugs to AE, payment of commission to Aventis Germany, reimbursement of expenses, purchase of shares, purchase of patent rights and trademarks from AE in Germany and France, reimbursement of expenses from AE. As it appears, the assessee aggregated the transactions relating to import and exports of active formulations, bulk drugs,

payment of commission, etc. and benchmarked them in the transfer pricing study report applying transactional net margin method (TNMM). Since, the operating margin shown by the assessee at 13.83% was more than the mean operating margin of the comparable companies worked out at 7.69%, the transactions were claimed to be at arm's length. Apparently, the TPO accepted the benchmarking of the assessee in respect of all international transactions, except, payment of export commission to AE. Insofar as this transaction is concerned, the TPO has treated it as a completely independent and separate transaction and proceeded to verify whether the export commission paid at 12.5% of the sales is at arm's length or not. In response to query raised, the assessee furnished a detailed submission along with supporting evidence justifying its claim that commission paid at 12.5% on sales is at arm's length. The TPO, however, did not accept the submissions of the assessee. After rejecting the benchmarking of the assessee, insofar as it relates to payment of export commission, the TPO observed that the assessee has not furnished any evidence to demonstrate that the AE, in any way, has helped in promoting the sales of the assessee. Thus, he was of the view that in such circumstances no commission payment is warranted. However, considering the quantum of export sales of the assessee and the services rendered by the AE, the TPO ultimately concluded that arm's length export commission of 3% on sales can be allowed. Accordingly, out of the total export commission paid of Rs.11,12,85,794/-, the TPO allowed an amount of Rs.2,97,08,590/-. The differential amount of Rs.8,15,77,203/- was proposed for adjustment to the ALP. The adjustment proposed by the TPO was added to the income of the assessee in the assessment order. The assessee contested the

aforesaid addition before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) determined the arm's length rate of commission at 5% on estimate basis. Thus, learned Commissioner (Appeals) granted partial relief to the assessee.

4. Shri J. D. Mistry, learned senior counsel appearing for the assessee submitted, while the assessee has benchmarked the payment of export commission by applying one of the prescribed methods, both, the TPO and learned Commissioner (Appeals) have determined the ALP purely on adhoc/estimate basis. He submitted, while doing so, both the TPO and learned Commissioner (Appeals) have failed to appreciate various documentary evidences filed by the assessee to demonstrate rendition of service by the AE for facilitating the export sales. Drawing our attention to various documentary evidences placed in the paper book, he submitted, the progressive growth in export sales clearly indicates rendition of service by the AE. He submitted, the assessee has specifically entered into an agreement with the AE for availing services for its export sales. He submitted, in pursuance to such agreement, the AE has rendered services to the assessee. He submitted, the payment of export commission at 12.5% on sales was also approved by the Reserve Bank of India (RBI) and is within the outer limit fixed by RBI in circular No.17 dated 19th May, 1999. Therefore, the payment of export commission should be considered to be at arm's length. He submitted, since payment of commission is closely linked to the transactions of exports and imports, they have to be aggregated for the purpose of benchmarking. Whereas, the TPO has selectively segregated payment of

commission as an independent transaction for benchmarking while accepting the other transactions. He submitted, when the TPO has accepted TNMM as the most appropriate method in respect of other closely linked transactions, he should not have segregated the payment of commission. The learned senior counsel submitted, the assessee has been paying export commission from assessment year 1992-93 onwards at the very same percentage and no adjustment has ever been made to the price of commission payment. He submitted, in the year 1999-2000, the TPO made similar adjustment; however, learned Commissioner (Appeals) allowed the entire commission paid at 12.5% finding it to be at arm's length. He submitted, in assessment year 2005-06, the TPO himself accepted the export commission paid at 12.5% to be at arm's length. Thus, he submitted, rule of consistency has to be followed.

5. The learned departmental representative strongly relied upon the observations of the TPO and submitted that the department, in its appeal, has challenged the partial relief granted by the first appellate authority. Thus, he submitted, the adjustment made by the TPO should be restored.

6. We have considered rival submissions in the light of decisions relied upon and perused materials on record. Undisputedly, assessee, during the year, had entered into various international transactions with its overseas AE. Insofar as import and export of formulations and bulk drugs and payment of export commission to the AE in Germany are concerned, the assessee treated them as closely linked and after aggregating them benchmarked under TNMM. It is evident, the assessee had entered into an agreement with its overseas AE in Germany termed as 'export guarantee agreement' for exploring foreign market

and facilitating its export sales. In terms with the agreement, the assessee has agreed to pay commission at 12.5% to the AE towards service rendered by the AE. Undisputedly, in the benchmarking done under TNMM, the transactions relating to import and export of formulations and bulk drugs as well as payment of export commission was found to be at arm's length. Before the TPO, the assessee has also furnished supporting evidence to demonstrate that assessee's foreign exchange outflow at 12.5% is much lesser than similar foreign exchange outflow of comparables at 34.05%.

7. Thus, it is patent and obvious, not only the assessee has benchmarked the subject transaction by adopting one of the methods prescribed under the statute, but, in course of proceedings before the TPO assessee has also furnished various other evidences to support its benchmarking and to further demonstrate that export commission paid at 12.5% is at arm's length. Whereas, the TPO has determined ALP of commission at 3% purely on adhoc/estimate basis without following any of the prescribed methods. Though, the TPO has observed that the assessee failed to furnish any direct documentary evidence to demonstrate that services were rendered by the AE to warrant payment of commission; however, he has immediately contradicted himself by stating that the AE has rendered nominal services. Thus, it is very much clear, the TPO while rejecting export commission paid at 12.5% and proposing adjustment, has not followed the statutory mandate. Rather, the decision of the TPO in determining the ALP of export commission at 3% is without any basis and purely on conjectures and surmises. The TPO has not shown any valid reason why assessee's claim that the transactions relating to import and export of formulations and bulk drugs as well

as payment of export commission being closely linked, should not be aggregated together for benchmarking purpose.

8. It is also relevant to observe, learned Commissioner (Appeals), while determining the ALP of export commission at 5% also fell into the same error as the TPO. The determination of ALP at 5% by learned Commissioner (Appeals) is also purely on adhoc/estimate basis without following any prescribed method. It is relevant to observe, before us, the assessee has furnished material which demonstrates that since assessment year 1992-93, the assessee had been paying commission on export sales at the same rate of 12.5%. However, in none of the assessment years till assessment year 2001-02, the TPO has proposed any adjustment to the rate at which export commission was paid to the AE. It is evident, only in assessment years 2002-03 & 2003-04, the TPO has proposed adjustment. It is further relevant to observe, in assessment year 2004-05, though, the TPO had made an adjustment to the rate of export commission by determining the ALP at 6.6%; however, in an appeal preferred by the assessee learned Commissioner (Appeals) has deleted such adjustment. Against the decision of learned Commissioner (Appeals), the department has not preferred any further appeal. It is also evident, in assessment year 2005-06, the TPO himself has accepted the commission paid at 12.5% to be at arm's length. Thus, even applying the rule of consistency and past history relating to similar transaction, the export commission paid at 12.5% has to be accepted to be at arm's length. In view of the aforesaid, we are inclined to delete the adjustment made to the ALP of export commission paid to the AE. This ground is allowed.

9. In ground 2, assessee has challenged the decision of learned Commissioner (Appeals) in not allowing full deduction of VRS and early retirement incentive granted to employees.

10. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that the assessee has claimed deduction of Rs.10,21,80,249/- towards voluntary retirement scheme (VRS) benefits. Relying upon the assessment order passed in the preceding assessment year, the assessing officer held that VRS expenditure can be allowed if it is paid in connection with the employees retiring from a going concern. Stating that the VRS expenditure was incurred in respect of a unit situated at Mulund, which has been closed down, the assessing officer disallowed the deduction. The assessee contested the disallowance before the first appellate authority. Relying upon the order passed by him in assessee's own case in assessment year 1999-2000, learned Commissioner (Appeals) held that assessee is eligible for deduction only in respect of the amount that has the character similar to the payment that the employees are otherwise eligible to receive on retirement or resignation even when there is no closure of the unit. Whereas, the balance amount which is paid towards VRS and early retirement incentive would be inadmissible. Accordingly, he restricted the disallowance to Rs.8,25,63,328/-.

11. The learned senior counsel of the assessee submitted, identical issue has been decided in favour of the assessee, in its own case in assessment years 2000-01 & 2001-02. Further, he submitted, the appeals filed against the aforesaid decisions of the Tribunal were not admitted by the Hon'ble High Court. Thus, he

submitted, the issue is squarely covered in favour of the assessee. In addition, he relied upon the following decisions:-

1. *K Ravindranathan Nair vs CIT 247 ITR 178 (SC)*
2. *CIT vs Foseco India Ltd 352 ITR 320 (Bom)*
3. *Foseco India Ltd vs ACIT ITA No.4667/M/2005*

12. The learned departmental representative, though, fairly submitted that the issue is covered by the earlier decisions of the Tribunal, however, relied upon the observations of the assessing officer and learned Commissioner (Appeals).

13. We have considered rival submissions and perused materials on record. As noted by us, identical issue came up for consideration before the Tribunal in assessee's own case for assessment year 2000-01 . The Tribunal, while disposing of the appeals, both, by assessee and revenue in ITA 3703/Mum/2004 and others vide order dated 16-04-2014 has held as under:-

> *"10.2 We have considered rival contentions and found from the record that expenditure on VRS debited and claimed in this year were duly approved by the Income Tax Department itself. Even during the relevant assessment year under consideration, we found that Mulund factory was working and the AO was not justified in observing that expenditure was incurred for closing that unit. We found that various manufacturing unit of assessee at Mulund, Ankleshwar and Goa and under loan licence agreement part of the corporate business and many of the projects which were being maintained at Mulund were continued to be produced under loan licence agreement As the expenditure so incurred on VRS was wholly and exclusively for the purpose of business, even if we consider the same under the provision of Section 37(1), same cannot be disallowed. Applying the proposition of law laid down by Hon'ble Supreme Court in the case of K. Ravindranathan Nair (supra) and Hon'ble High Court in the case of Foseco India Ltd.(supra) to the facts of the instant case, we do not find any merit in the action of the lower authorities for declining the assessee's claim for deduction of VRS and early retirement incentives paid to the workers. In the result ground taken by the assessee is allowed, whereas ground revenue is dismissed."*

14. Same view was again expressed by the Tribunal while deciding assessee's appeal for assessment year 2001-02 in ITA No.8978 and 8746/Mum/2004 vide order dated 23-07-2014. No factual difference has been brought to our notice in the impugned assessment year. Therefore, respectfully following the aforesaid decisions of the co-ordinate bench in assessee's own case, we allow the deduction claimed by the assessee. This ground is allowed.

15. In ground 3, assessee has challenged the disallowance of depreciation on obsolete assets.

16. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that the assessee has claimed depreciation of Rs.55,54,989/- on opening written down value (WDV) of block of assets. Noticing that similar claim made by the assessee was disallowed in the preceding assessment year on the ground that the assets were not utilized for the business, the assessing officer, followed the same and disallowed the depreciation claimed. Though, the assessee contested the disallowance; however, earned Commissioner (Appeals), following the decision taken by him in earlier assessment year, upheld the disallowance.

13. The learned senior counsel for the assessee submitted, while deciding identical issue in assessee's own case in assessment years 1998-99, 1999-2000, 2000-01 and 2001-02 claim of depreciation has been allowed. He submitted, the aforesaid decisions of the Tribunal have been accepted by the department and no further appeals have been filed before the Hon'ble High Court.

14. The learned departmental representative agreed with the aforesaid submissions of the assessee.

15. We have considered rival submissions and perused materials on record. It is evident, assessee's claim of depreciation on the opening WDV of block of assets has been disallowed simply for the reason that similar claim made by the assessee in preceding assessment years has been disallowed. As brought to our notice by learned senior counsel for the assessee, while deciding identical issue in assessee's own case in assessment years 1998-99 to 2001-02, the Tribunal has allowed assessee's claim of depreciation. In the latest order passed for the assessment year 2001-02 in ITA No.8978/Mum/2004 & 8746/Mum/2004 dated 28-07-2014, the Tribunal, following its earlier order, has allowed assessee's claim holding as under:-

> *"**8.1** We have considered rival contentions and found from the record that exactly similar issue has been decided by the Tribunal in assessee's own case for the assessment year 1998-99 and 1999-2000, wherein the Tribunal after considering the decision in the case of **G.R.Shipping Company and Inductotherm India Ltd, 73** 1TD **529,** held that depreciation was allowable on obsolete assets to the assessee. However, against this decision of the Tribunal, the ^department has not filed any further appeal before the Hon'ble High Sjpurt. Thereafter relying the same, the Tribunal in assessee's own se for the assessment year 2000-01 has decided the issue in favour of the assessee.*
> *8.2 As the facts and circumstances during the year under consideration are same, respectfully following the decision of the Tribunal in assessee's own case, we do not find any merit in the action of the AO for declining assessee's claim of depreciation on obsolete assets."*

16. Facts being identical, respectfully following the decisions of the Tribunal, as referred to above, we delete the disallowance. This ground is allowed.

17. In ground 4, the assessee has challenged disallowance of interest expenditure of Rs.7,264/- under section 14A of the Act.

18. Briefly the facts are, in course of assessment proceedings, the assessing officer noticing that the assessee had claimed interest expenditure of

Rs.1,14,058/-, concluded that a part of the interest expenditure would be attributable to exempt income earning activity, as, the assessee has utilized the borrowed funds for investing in shares. Accordingly, he made the impugned disallowance. Though, the assessee contested the aforesaid disallowance before learned Commissioner (Appeals) by stating that no part of the borrowed fund was utilized for investing in shares; however, learned Commissioner (Appeals), relying upon the alternative contention of the assessee and the revised computation in support of the claim, restricted the disallowance to Rs.7,264/-.

19. The learned senior counsel for the assessee submitted, similar disallowance made by the assessing officer in assessment years 1998-99 to 2001-02 have been allowed by the Tribunal. Further, he submitted, appeal against Tribunal's decision for assessment year 1998-99 was not admitted by the Hon'ble High Court and in other assessment years, the department has not filed any appeal.

20. The learned departmental representative fairly agreed with the aforesaid submissions of the learned senior counsel for the assessee.

21. Having considered rival submissions, we find, while deciding identical issue in preceding assessment years, the Tribunal has deleted the disallowance of interest expenditure made under section 14A of the Act. In the latest order passed for the assessment year 2001-02 (supra), the Tribunal, following its earlier decisions, has deleted the disallowance under section 14A, holding as under:-

> *"**10.** Ground No.5 is regarding disallowance U/S.14A. Learned AR stated that this issue has been decided by the Tribunal in assessee's own case for A.Y. 1990-91 and 1998-99 in favour of the assessee, against which the department has not filed any appeal before the High Court. Precise observation of the Tribunal for the A.Y. 1998-99 reads as under :-*

"22. The AO has not applied section 14A. In fact this section was not in the statute during that year. The learned CIT(Appeals) has factually analyzed the issue and has come to a conclusion that no expenditure can be attributable to the earning of tax free income. On this factual matrix, we agree with the learned counsel that the decision of the Hon'ble Bombay High Court in the case of Topstar Mercantile (P) Ltd. vs. ACIT 225 CTR (Bom) 351 applies and the Tribunal cannot set aside the issue for fresh adjudication for applying section 14A. The Hon'ble High court held as follows:

"In the absence of any adverse finding by the AO against the assessee vis-a-vis applicability of s. 14A Tribunal, while accepting the assessee's contention, was not correct in recording the direction to consider the applicability of s. 14A while remanding the matter."

23. Respectfully following the same, we uphold the order of the first appellate authority and dismiss this ground of the Revenue."

Against the above order of Tribunal, the Revenue has not filed any appeal before the High Court. As the facts and circumstances during the year under consideration are same, respectfully following the decision of the Tribunal in assessee's own case as discussed above, we do not find any merit in the disallowance made under Section."

22. Facts being identical, respectfully following the aforesaid decision of the co-ordinate bench, we delete the disallowance. This ground is allowed.

23. In ground 5, assessee has challenged disallowance of Rs.25,11,883/-, being expenditure incurred towards computer software charges.

24. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that assessee had claimed expenditure of Rs,2,04,09,371/- towards computer software. Being of the view that expenditure incurred by the assessee is of capital nature, the assessing officer disallowed assessee's claim and allowed depreciation @ 60%. While deciding the issue in appeal, learned Commissioner (Appeals) noticed that the assessing officer has observed that the expenditure was incurred towards purchase of software system for upgradation of the computer network. After considering the submissions of the assessee in the

context of facts and materials on record, learned Commissioner (Appeals) observed that the amount of Rs.25,11,883/- represent payment for acquisition of software and payment made to professionals for development of software. Thus, he held that the assessee's claim of deduction to this extent is not allowable, as, such payment would not be admissible.

25. Drawing our attention to page 192 of the paper book, learned senior counsel for the assessee submitted, the payments made were for purchase of application software and consultancy charges. Therefore, expenditure cannot be of capital nature. Further, he submitted, the issue is covered by the decision of the Tribunal in assessee's own case for assessment year 1999-2000. In addition, he relied upon the following decisions:-

1. *CIT vs Asahi India Glass Ltd 346 ITR 329 (Del)*
2. *CIT VS Amway India Enterprise 346 ITR 341 (Del)*
3. *CIT vs Raychem RPG Ltd 346 ITR 138 (Bom)*

26. The learned departmental representative fairly agreed that the issue is covered by the earlier decision of the Tribunal.

27. We have considered rival submissions in the light of decisions relied upon and perused materials on record. It is evident, the disallowance has been made on the reasoning that the expenditure incurred is of capital nature. Per contra, it is the claim of the assessee that the expenditure is not of capital nature. As we find from record, it is the claim of the assessee that the assessee had only license to use the software. It is also relevant to observe, while deciding similar issue in assessee's own case in assessment year 1999-2000 vide ITA No.4279/Mum/2004 dated 31-01-2014, the Tribunal has allowed assessee's claim, holding as under:-

"2.3,2 We have perused the records and considered the matter carefully- We find that similar expenditure on acquisition of software has been treated by the Tribunal as revenue expenditure in case of the assessee in A.Y. 1995-96 (supra). The nature of expenditure on acquisition software has also been examined in detail by the Hon'ble High Court of Delhi in case of the Amway India Enterprises (supra) and in case of the Asahl India Safety Glass Ltd (supra). In case of Asahi India Safety Glass Ltd, expenditure had been incurred on acquisition of application software for executing task in the field of accounts, purchases and inventory maintenance. The High Court held that the expenditure had not created any new asset or new source of income. It was held that expenditure was revenue in nature. Respectfully follow these judgement including the decision of Tribunal in assessee's own case in Assessment Year 1995-96 (supra), we set aside the order of CIT(A) and allowed the claim of the assessee."

28. Facts being identical, respectfully following the aforesaid decision of the co-ordinate bench, we delete the disallowance. This ground is allowed.

29. In ground 6, the assessee has challenged addition of Rs.1,83,43,096/- under section 145(3) of the Act on account of unutilised modvat credit.

30. Briefly the facts are, in course of assessment proceedings the assessing officer, on verifying materials on record, noticed that the assessee had unutilized modvat credit of Rs.6,37,43,762/-. Therefore, he asked the assessee to prepare the accounts in consonance with section 145A of the Act. After verifying the working of profit as per section 145A of the Act, as furnished by the assessee, the assessing officer observed that the difference in the profit of the company if the provisions of section 145A is followed is Rs.1,83,43,096/-. Accordingly, he added back the aforesaid amount representing unutilized modvat credit to the value of closing stock. Assessee contested the aforesaid addition before learned Commissioner (Appeals). Learned Commissioner (Appeals) disposed of the issue by directing the assessing officer to make adjustment to the stock, purchase, sale,

excise duty payment and if, after doing so, it results in any difference, then restrict the addition to that extent only.

31. The learned senior counsel of the assessee submitted that even if no adjustment is made on account of unutilized modvat credit, it will have no impact on the profit. In this regard, he relied upon the decision of the first appellate authority in assessee's own case for assessment years 2006-07 and 2007-08. Further, he submitted, no such adjustment has been made from assessment year 2008-09 onwards. He submitted, identical issue relating to adjustment made under section 145A was decided in favour of the assessee in assessment year 1999-2000 and department has not filed any appeal against the decision of the Tribunal. In addition, he relied upon the following decisions:-

1. *Hawkins Cookers Ltd vs ITO (2008) 14 DTR 206 (Mum)*
2. *CIT vs Mahalaxmi Glass Works (P) Ltd (2009) 318 ITR 116*

32. The learned departmental representative relied upon the observations of learned Commissioner (Appeals).

33. We have considered rival submissions and perused materials on record. Apparently, identical issue relating to adjustment under section 145A of the Act came up for consideration in assessee's own case in assessment year 1999-2000 (supra). The Tribunal, while deciding the issue in the order referred to above, has restored it to the assessing officer with the following observations:-

> *"2.9.1. We have heard both the parties, perused records and considered the matter carefully. The dispute is regarding adjustment on account of Modvat Credit u/s 145A of the Income-tax Act. Under the said provision, valuation of purchase and sale of goods and inventory has to tie made on the basis of method of accounting regularly followed and further adjustment is required to be made to include the amount of any tax, duty, cess to bring the goods to the place of its location condition on the date of*

the valuation. Therefore, under the provision u/s 145A adjustment on account of lax, duty etc has to be made at all stages that is, opening stock, purchases and safes and losing stock. It has been held by the Hon'ble High Court of Delhi In case of Mahavir Aluminium Ltd. (295 ITR 77) that adjustment u/s 145A has to be made both to tha opening stock and closing stock. This issue therefore in our view requires fresh exarnination. We, therefore, set aside the order of CIT(A), and restore the matter to or passing a fresh order after allowing opportunity of hearing to assessee."

34. Facts being identical, respectfully following the aforesaid decision of the co-ordinate bench, we restore the issue to the assessing officer with similar directions. This ground is allowed for statistical purpose.

35. The core issue in ground 7 is with regard to part disallowance of deduction claimed under section 80HHC of the Act. However, this ground has three sub grounds.

36. Briefly the facts are, in course of assessment proceedings, the assessing officer noticed that the assessee has claimed deduction under section 80HHC of the Act. After calling upon the assessee to furnish the details of income forming part of the business profit on which the assessee has claimed deduction under section 80HHC of the Act and verifying them, the assessing officer noticed that the assessee has included sales tax set off in the business profits as well as in the turnover for claiming deduction under section 80HHC of the Act. Further, he observed, the assessee has also included bad debts recovered during the year and processing charges in the business profit and total turnover for claiming deduction under section 80HHC of the Act, instead of reducing 90% of such income, in terms of Explanation (baa) of section 80HHC. Whereas, the assessing officer was of the view that it has to be reduced by 90% for claiming deduction under section 80HHC. Noticing the above, the assessing officer called upon the

assessee to explain, why 90% of the sales-tax set off, bad debts recovered and processing charges should not be reduced from the business profits for computing deduction under section 80HHC of the Act. Though, the assessee objected to the proposed disallowance; however, the assessing officer, rejecting the submissions of the assessee reduced 90% out of the income received from sales-tax set off, DEPB entitlements, bad debts and processing fee by resorting to of Explanation (baa) of section 80HHC while computing deduction under the said provision. Assessee contested the aforesaid decision of the assessing officer before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record as well as the extant statutory provision, learned Commissioner (Appeals) upheld the decision of the assessing officer with regard to sales-tax set off, bad debts and processing charges. Insofar as DEPB entitlement is concerned, learned Commissioner (Appeals) held that the assessee would only be entitled to include the value of DEPB benefit receivable during the year in the business profits for claiming deduction under section 80HHC of the Act. He held, the unutilized DEPB entitlement, valued at Rs.4,73,55,104/-, would not be eligible for deduction under section 80HHC of the Act in view of clause (baa) of Explanation to the said section. Thus, learned Commissioner (Appeals) granted partial relief to the assessee with regard to the claim of deduction under section 80HHC of the Act in respect of DEPB entitlement.

37. The learned senior counsel for the assessee submitted, identical issue in assessee's own case has been decided by the Tribunal in assessment years 2000-01 and 2001-02. In this regard, he drew out attention to the relevant observations

of the Tribunal. Further, he submitted, as far as the income from processing charges is concerned, the Tribunal has directed to only reduce the net receipts from eligible business profit as per Explanation (baa) to section 80HHC of the Act. He submitted, insofar as income from recovery of bad debt is concerned, the same cannot be reduced from business profit as it is not hit by Explanation (baa) to section 80HHC of the Act. Apart from relying upon the decisions of the Tribunal in assessee's own case, learned senior counsel relied upon the following decisions as well:-

1. *CIT vs Punjab Stainless Steel 364 ITR 144 (SC)*
2. *CIT vs Laxmi Machine Tools 290 ITR 667 (SC)*

38. Insofar as deduction claimed on DEPB entitlement, learned senior counsel submitted, the departmental authorities have committed a fundamental mistake in holding that the assessee has received such income from sale of DEPB license / entitlement. Proceeding further, he submitted, the assessee has not sold any DEPB entitlement, but has received DEPB entitlement which has been credited as income on accrual basis. Further, drawing our attention to the observations of the assessing officer, learned senior counsel submitted, the assessing officer himself has stated that the income received from DEPB entitlement does not fall under sections 28(iiia), 28(iiib) & 28(iiic) of the Act. Further, the receipts from DEPB entitlement cannot be considered to be in the nature of brokerage, commission, rent, charges or any other receipt of similar nature so as to bring it within the purview of Explanation (baa) to section 80HHC. He submitted, though, learned Commissioner (Appeals) has agreed with the assessee that DEPB entitlement does not come within the ambit of Explanation (baa); however, he has erroneously

held that the assessee would be entitled to claim such deduction only on the DEPB entitlement received and utilized during the year. Thus, he submitted, since the receipt from DEPB entitlement is not covered under Explanation (baa) to section 80HHC of the Act, 90% of such receipts cannot be reduced for computing deduction under section 80HHC of the act. In support of such contention, he relied upon a decision of the Hon'ble Supreme Court in case of Topman Exports vs CIT 342 ITR 49 (SC) and the decisions of the Tribunal in assessee's own case in assessment years 2000-01 and 2001-02.

39. The learned departmental representative, on the other hand, strongly relied upon the observations of the assessing officer and submitted that disallowance made by the assessing officer should be restored.

40. We have considered rival submissions in the light of decisions relied upon and perused materials on record. Insofar as availability of deduction under section 80HHC of the Act on sales-tax set off is concerned, it is noticed, while deciding identical issue in assessee's own case in assessment year 2000-01 in the order referred to above, the Tribunal has decided the issue against the assessee holding as under:-

> *"11. Ground No.7 is in regard to sales-tax set off and refund amounting to Rs.1,76,85,412 is liable to be included in the total turnover for computing the deduction under section 80HHC of the Act and Ground No.8 is regarding processing charges of Rs.34,97,542 and bad debts recovered amounting to Rs, 89,4757- are required to be reduced to the extent of 90% under Clause (baa) of the explanation to Section 80HHC for the purposes of granting relief. This issue of eligibility of income from processing charges has been considered by the Hon'ble Supreme Court in the case of* ***AGO Associated Capsules Vs. CIT, 343 ITR 89 (SC).*** *The Tribunal also in assessee's own case for A.Y.1999-2000, in ITA No.4180/Mum/2003, following the judgment of the Hon'ble Apex Court in the case of* ***ACG Associated Capsules*** *(supra), held as under :-*
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> *"2.10.2 We have perused the records and considered the matter carefully. The dispute is regarding applicability of provision of Explanation (baa) to*

processing charges and sales tax refund and setoff. As regards the processing charges, the issues is covered by the judgement of Hon'ble Supreme Court in case of Ravindranathan Nair (295 ITR 228) in which it has been held that the processing charges form an independent item of income like commission rent etc. and, therefore, 90% of the same is required to be reduced from profit of business as per Explanation (baa). We therefore hold the processing charges will be covered by Explanation (baa). The issue of applicability of provision of Explanation (baa) to seals tax refund had been considered by the Hon'ble High Court of Bombay in case of Dresser Rand (322 ITR 449) in which it has been held that receipts like recovery of freight insurance, packing charges, sales tax refund and service income will not be part of business profit and has to be considered for reduction as per Explanation (baa). Subsequently, however Hon'ble High Court in case of Pfizer Ltd. (330 ITR 62) after referring to the judgement of in case of Dresser Rand (supra) held that insurance claim on stock in trade was not an independent item of income and therefore has to be considered as integral part of business profit. However, since the sales tax refund has been specifically considered by the Hon'ble High Court in case of Dresser Rand (supra) respectfully following the said decision, we hold that sales tax refund and set off will be considered for reduction as per Explanation (baa). Further, the alternate claim of the assessee that only the net receipt should be considered for reduction as per Explanation (baa) is covered by the judgement of Hon'ble Supreme Court in case of ACG Associated Capsules P. Ltd. v. CIT (343 ITR 89). We therefore direct the Assessing Officer only the net receipt after deducting expenditure incurred for earning of such income, will be considered for reduction as per Explanation (baa)."

11.1 *in view of the above, the issue with regard to allowing claim of deduction in respect of sales tax set off and refund, the assessee is not eligible in view of Explanation (baa) to Section 80HHC. Accordingly, we dismiss this ground of assessee's appeal and direct the AO to reduce the amount of sales tax refund from the eligible profit for computing claim of deduction u/s.80HHC."*

41. The same view was reiterated by the Tribunal while deciding assessee's appeal in assessment year 2001-02 (supra). That being the case, respectfully following the aforesaid decisions of the co-ordinate bench, we uphold the decision of learned Commissioner (Appeals) on the issue. Accordingly, ground 7(a) is dismissed.

42. Insofar as availability of deduction under section 80HHC in respect of processing charges, it is noticed, identical issue came up before the Tribunal in assessee's own case in assessment year 2000-01 (supra). While deciding the issue, the Tribunal has held as under:-

> *"11.2 With respect to claim of deduction u/s.80HHC in respect of processing charges, the issue has been dealt by the Tribunal in assessee's own case for the assessment year 1999-2000 as narrated above. Respectfully following the same, we direct the AO that only net receipts after deducting expenditure incurred for earning such income will be considered for reduction from eligible business profit as per Explanation (baa). Matter is restored back to the file of the AO for deciding as per direction given by the Tribunal in its order for assessment year 1999-2000 in assessee's own case, as discussed hereinabove."*

43. The same view was reiterated by the Tribunal while deciding assessee's appeal for assessment year 2001-02 (supra). Therefore, respectfully following the decision of the Tribunal in the preceding assessment years, we restore the issue back to the file of the assessing officer for reducing only the net receipt from the eligible business profit in terms of Explanation (baa) to section 80HHC of the Act.

44. As regards availability of deduction under section 80HHC on recovery of bad debt, we may observe, while deciding identical issue in assessee's own case in assessment year 2000–01 (supra), the Tribunal has held as under:–

> ***"17.*** *Ground No.(v) is regarding excluding only processing charges and bad debts from the total turnover while computing the eligible deduction u/s.80HHC. This issue is covered by the decision of the Hon'bie Supreme Court in the case of CIT Vs. Ravindranathan Nair, 295 ITR 228(SC), wherein the Hon'bie Supreme Court has decided this issue in favour of the department*
>
> > *"21. At the outset, we may state that, in the present case, we are dealing with the law as it stood during assessment year 1993-94. At that time Section 80HHC(3) of the I. T. Act constituted a Code by itself. Subsequent amendments have imposed restrictions/qualifications by which the said provision has ceased to be a code by itself. In the above formula there existed four*

variables, namely, business profits, export turnover, total turnover and 90% of the sums referred to in clause (baa) to the said Explanation, in the computation of deduction under Section 80HHC ail four variables had to be taken into account. All four variables were required to be given weightage. The substitution of Section SOHHC(3) secures profits derived from the exports of eligible goods. Therefore, if all the four variables are kept in mind, it becomes dear that every receipt is not income and every income would not necessarily include element of export turnover. This aspect needs 10 be kept in mind while interpreting clause (baa) to the said Explanation, The said clause stated that 90% of incentive profits or receipts by way of brokerage, commission, interest, rent, charges or any other receipt of like nature included in Business Profits, had to be deducted from Business Profits computed in. terms of Sections 28 to 44D of the I. T. Act. In other words, receipts constituting independent income having no nexus with exports were required to be reduced from Business Profits under clause (baa). A bare reading of clause (baa)(1) indicates that receipts by way of brokerage, commission, interest, rent, charges etc. formed part of gross total income being Business Profits. But for the purposes of working out the formula and in order to avoid distortion of arriving 'export profits clause (baa) stood inserted to say that although incentive profits and "independent incomes" constituted part of gross total income, they had to be excluded from gross total income because such receipts had no nexus with the export turnover. Therefore, in the above formula, we have to read all the four variables. On reading all the variables it becomes clear that every receipt may not constitute sale proceeds from exports. That, every receipt is not income under the I. T. Act and every income may not toe attributable to exports. This was the reason for this Court to hold that indirect taxes like excise duty which are recovered by the taxpayers for and on behalf of the government, shall not be included in the total turnover In the above formula (See: Commissioner of Income Tax, Coimbatore v, M/s. Lakshmi Machine Works - 2007(6) Scale 168).

22. *In the present case, the processing charges were included in the gross total income from cashew business. That, even according to assessee the said charges constituted an important component of gross total income from cashew business. This is not disputed. Therefore, in terms of clause (baa), 90% of the "independent income" had to be deducted from gross total income to arrive at Business Profits to which the fraction had to be applied. Since, the processing charges constituted independent income similar to rent, commission, etc., which formed part of the gross total income, the same had to be reduced by 90% as*

contemplated in clause (baa) to arrive at Business Profits. Therefore, the said processing charges were includible in the total turnover in the formula under Section 80HHC(3) of the I.T. Act.

23. Before concluding we state that the nature of every receipt needs to be ascertained in order to find out whether the said receipt forms part of/or that it has an attribute of an export turnover. When an indirect, tax is collected by the taxpayer on behalf of the government the tax recovered is for the government. It may be an income in the conceptual sense or even under the I. T. Act but while working out the formula under Section 80HHC(3) of the I. T. Act and while applying the four variables one has to ascertain whether the receipt has an attribute of export turnover. An indirect tax like excise duty does not have that element of export turnover as understood in the above formula. As stated above, it is recovered by the taxpayer on behalf of the government Therefore, in the present cases, our judgment in Commissioner of Income Tax. Cotmhatore v. M/s. Lakshmi Machins Works - 2007(6) Scale 168, has no application.

24. Accordingly, the impugned judgments of the High Court and the Tribunal are set aside and the above civil appeals filed by the Department are accordingly allowed with no order as to costs.

17.1 This issue has been discussed by us at para 11.2 hereinabove, accordingly the AO to recompute the deduction u/s.80HHC after excluding the net income from processing charges. However, bad debts recovered is neither part of totai turnover nor export turnover for the purpose of Section 80HHC, therefore, same is required to be excluded from eligible profit for the purpose of clause (baa)."

Respectfully following the aforesaid observations of the co–ordinate Bench, we hold that bad debts recovered should be excluded from the eligible profit for computing deduction under section 80HHC of the Act.

45. Thus, the only issue which survives now is regarding availability of deduction under section 80HHC of the Act in respect of receipts from DEPB entitlement. The core issue which needs to be looked into is, whether DEPB entitlement is hit by Explanation (baa) of section 80HHC, so as to, reduce 90% of such receipt from business profit for computing deduction under section 80HHC of the Act. As could be seen from the impugned assessment order, in course of

assessment proceedings, the assessee, vide letter dated 07-12-2004 has categorically stated that DEPB entitlement is in the nature of export incentive covered under section 28(iiib) of the Act. Further, the assessee had submitted, the DEPB entitlement has to be allowed in terms of proviso to section 80HHC (iii). The assessing officer rejected assessee's claim by holding that receipts from DEPB entitlement is not covered under sections 28(iiia), 28(iiib) & 28(iiic) of the Act. He also held that such receipts would fall under section 28(iv) of the Act. Accordingly, he has disallowed assessee's claim of deduction. Whereas, learned Commissioner (Appeals) has held that receipts from DEPB entitlement, only to the extent of received and utilized during the year, would not be covered under Explanation (baa) to section 80HHC of the Act.

46. Thus, as could be seen from the aforesaid decision of learned Commissioner (Appeals), he has not at all addressed the reasoning of the assessing officer that DEPB entitlement falls under section 28(iv) of the Act. Learned Commissioner (Appeals) has moved in a completely different direction by holding that DEPB entitlement received and utilized during the year would not be covered under Explanation (baa) of section 80HHC of the Act. We fail to understand, how and why DEPB entitlement only to the extent of received and utilized during the year would not be covered under Explanation (baa) of section 80HHC of the Act. In our view, the nature and character of DEPB entitlement would remain same, whether it is utilized or unutilized. Further, the reasoning of the assessing officer that DEPB entitlement is covered under section 28(iv) requires thorough examination. It is also noticed, while deciding identical issue in assessee's own case in assessment year 2000-01 (supra), the Tribunal has directed

the assessing officer to compute deduction on DEPB license by following the ratio laid down by the Hon'ble Supreme Court in case of Topman Exports vs CIT (supra). For better appreciation, the observations of the Tribunal in this regard are reproduced below:-

> *"**19.** Ground No.(vii) is regarding directing the AO to calculate deduction u/s.80HHC without reducing 90% of the DEPB license sold without appreciating the facts of the case. This issue has been decided in favour of the assessee by the decision of Hon'ble Supreme Court in the case of **Topman Exports Vs. CIT, 342 ITR 49 (SC),** wherein the Hon'ble Supreme Court has held as under :-*
>
> > *The aforesaid discussion would show that where an assessee has an export turnover exceeding Rs. 10 crores and has made profits on transfer of DEPB under clause (d) of section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of section 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business* under Explanation (baa) to section 80HHC of the Act and there is - , nothing in Explanation (baa) to section 80HHC to show that this .^j-benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs. 10 crores. In other words, where the export turnover of an assessee exceeds Rs, 10 crores, he does not get the benefit of addition of ninety per cent, of export incentive under clause (Hid) of section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit The High Court, therefore, was not right in coming to the conclusion that as the assessee did not have the export turnover exceeding Rs, 10 crores and as the assessee did not fulfill the conditions set out in the third proviso to section 80HHC(iii), the assessee was not entitled to a deduction under section 80HHC on the amount received on transfer of the DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of the DEPB under section 28(iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in Explanation (baa) to section 80HHC read with the words used in clauses (iiid) and (iiie) of section 28, the assessee was entitled to a deduction under section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.*

> *The impugned judgment and .orders of the Bombay High Court are accordingly set aside. The appeals are. allowed to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction under section BOHHC in the case of the appellants in accordance with this judgment There shall be no order as to costs."*
>
> ***19.1*** *We have considered rival contentions and perused the record. As the issue is covered by the decision of the Hon'ble Supreme Court in the case of* ***Topman Exports*** *(supra), respectfully following the same, we direct the AO to compute deduction on DEPB since license sold in terms of decision in the case of Topman Exports (supra)."*

47. Pertinently, the same view was reiterated by the Tribunal while deciding revenue's appeal for assessment year 2001-02 (supra). On a careful perusal of the observations of the Tribunal reproduced above, it appears that the Tribunal has proceeded on the basis that the income claimed as deduction under section 80HHC of the Act arises out of sale of DEPB license. However, before us, it is the specific contention of the learned senior counsel for the assessee that DEPB entitlement has not arisen out of sale of DEPB license, but has accrued as income to the assessee. On a reading of the impugned assessment order as well as the order passed by the learned Commissioner (Appeals), prima facie, we are of the view that various facts relating to the issue either have not been properly placed before the departmental authorities or have not been properly appreciated by them. At the cost of re-iteration, we may observe that in the submissions made before the assessing officer, the assessee itself has stated that DEPB entitlement is akin to cash assistance; hence, covered under section 28(iiib). In that event, certainly it would be covered under Explanation (baa) to section 80HHC. However, assessee's alternative claim that it can still avail deduction under proviso to section 80HHC(3) requires consideration and which, according to us, has not been properly dealt with. In view of the discussion hereinabove, we are of

the considered opinion that the issue has to be restored back to the assessing officer for fresh consideration after examining all facts and materials on record and submissions of the assessee, as well as, in the light of ratio laid down in the judicial precedents, including, the decision of Hon'ble Supreme Court in case of Topman's Exports vs CIT (supra). The restoration of this issue to the assessing officer is also essential, keeping in view the observations of the Tribunal in assessment years 2000-01 and 2001-02 and the compliance made by the assessing officer to the directions of the Tribunal in those assessment years. Accordingly, we set aside the issue to the assessing officer for deciding afresh after due opportunity of being heard to the assessee. Ground 7(c) is allowed for statistical purposes.

48. In ground 8, the assessee has challenged the disallowance of bad debts written off amounting to Rs.28,41,568/-.

49. Briefly the facts are, in course of assessment proceedings, the assessing officer, noticing that the assessee has claimed deduction on account of bad debts written off, called for the necessary details. After perusing the details and examining record, the assessing officer found that similar claim made by the assessee in the preceding assessment year was disallowed. Following the same, he disallowed the claim of the assessee in the impugned assessment year as well. Assessee contested the disallowance before learned Commissioner (Appeals). In the appellate proceedings, the assessee submitted that the amount written off were invoice items of balances, which remained outstanding for long and could not be recovered. Further, it was submitted , the assessee had amounts due from various hospitals on account of sales effected in the year 1998. However, due to

amalgamation, the amounts could not be recovered in absence of proper documentation. Thus, it was submitted, the bad debts written off has to be allowed as deduction either under section 36(1)(vii) or as business loss under section 28 of the Act. Learned Commissioner (Appeals), relying upon his order passed for assessment year 2000-01 granted partial relief to the assessee, while, upholding disallowance for the balance amount.

50. The learned senior counsel for the assessee submitted, the only reason for disallowance of assessee's claim is, the assessee has not proved that the debt is not recoverable. He submitted, as per the amended provisions of section 36(1)(vii), there is no requirement for the assessee to prove that the debt has become bad and not recoverable. He submitted, once the debt is written off in the books of account, it has to be allowed. In support, learned senior counsel relied upon the following decisions:-

i. *TRF Ltd vs CIT (2010) 323 ITR 397 (SC)*
ii. ACIT vs Glaxo Smithkline Pharmaceuticals Ltd
ITA No.6444/Mum/2007, dt 28-01-2011

51. The learned departmental representative relied upon the observations of the assessing officer.

52. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. As per the amended provision of section 36(1)(vii) of the Act, any bad debt written off in the books of account as irrecoverable is an allowable deduction. The effect of the aforesaid statutory provision has been lucidly explained by the Hon'ble Apex Court in case of TRF Ltd vs CIT (supra). Therefore, once the conditions of section 36(1)(vii) are fulfilled, assessee's claim has to be allowed. Keeping in view the uncontroverted factual

position that the conditions of section 36(1)(vii) are satisfied, we allow assessee's claim. This ground is allowed.

53. In the result, appeal is partly allowed.

ITA No.3187/Mum/2006 (Revenue's Appeal–Quantum)

54. In ground 1, the revenue has challenged the deletion of enhancement/addition made by the assessing officer to the annual letting value (ALV) of the flat at Hoechst House.

55. As could be seen from the facts on record, the assessee has let out a flat situated at 5th floor of Hoechst House. Though, the assessee had offered rental income from this property; however, the assessing officer was of the view that the income offered by the assessee does not represent the correct ALV. Accordingly, adopting the rate of Rs.150 per sq.ft., he determined the ALV of the property and accordingly, enhanced the income shown from the said property. Assessee contested the aforesaid addition before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) held that the enhancement/addition made to the ALV of the property is without any basis. Therefore, he deleted the addition.

56. Both, learned senior counsel appearing for the assessee as well as learned departmental representative have agreed before us that the issue is squarely covered by a number of decisions of the Tribunal in assessee's own case from assessment years 1994-95 to 2001-02. The learned senior counsel submitted, in most of the preceding assessment years, the revenue has accepted the decisions

of the Tribunal. The learned departmental representative has not controverted the aforesaid submission of learned senior counsel for the assessee.

57. Having considered rival submissions, we find that this is a recurring dispute between the assessee and the revenue right from assessment year 1994-95. In all the preceding assessment years, the addition/enhancement made to the ALV has been deleted and as stated before us, the revenue has accepted the decision of the Tribunal. In the latest order passed for assessment year 2001-02, the Tribunal, in ITA No.8978 & 8746/Mum/2004 dated 23.07.2014 has decided the issue in favour of the assessee, holding as under:-

> *"6.2 We have heard rival contentions, perused the record and orders of the Tribunal and found that the very same issue has already been decided by the Tribunal in assessee's own case in terms discussed above. After considering the decision of Hon'ble Supreme Court, the Tribunal has concluded that gross annual ratable value of the property for the purposes of computation of house property income is to be determined at the annual value determined by Municipal Corporation. As the facts and circumstances during the year under consideration are same, hence, respectfully following the decision of the Tribunal, we direct the AO to determine ALV at the value determined by Municipal Corporation for the year under consideration. Hence, this ground of the assessee is allowed for statistical purposes, whereas the ground raised by the Revenue is dismissed."*

58. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

59. In ground 2, department has challenged partial relief granted by learned Commissioner (Appeals) in respect of adjustment made to ALP of export commission paid. This ground is corresponding to ground 1 of assessee's appeal in ITA No.3092/Mum/2006, decided by us in the earlier part of the order. In view of our decision therein, this ground has become infructuous, hence, dismissed.

60. In ground 3, department has challenged the deletion of disallowance made by the assessing officer on account of software expenditure. While deciding corresponding ground raised by the assessee, being ground 5 in ITA No.3092/Mum/2016, in the earlier part of the order, we have allowed assesse's claim. In view of the aforesaid, this ground of the revenue has become infructuous, hence, dismissed.

61. Ground 4 relates to deletion of part of the disallowance made under section 14A of the Act. This ground is corresponding to ground 4 of assessee's appeal in ITA No.3092/Mum/2016 decided in the earlier part of the order. In view of our decision therein, this ground of the revenue has become infructuous, hence, dismissed.

62. Ground 5 being a general ground, does not require adjudication.

63. In ground 6, the department has challenged the decision of learned Commissioner (Appeals) in directing the assessing officer to exclude excise duty, set off of sales tax refund and receipts from sale of scrap as part of total turnover and net profit. As agreed before us by learned counsels appearing for the parties, the issues raised in this ground have been decided by the Tribunal in the preceding assessment year. As could be seen from the order passed by the Tribunal in assessee's own case in assessment year 2000-01 vide ITA No.3703/Mum/2004 and others dated 16-04-2014, the Tribunal has held that excise duty has no element of profit; hence, cannot be included in total turnover for computing deduction under section 80HHC. For better appreciation, the relevant observations of the Tribunal are extracted hereunder for convenience:-

> *"***16.** Ground No.(iv) in Revenue's appeal is regarding directing the AO to exclude the excise duty from the total turnover while computing the eligible

> deduction u/s.80HHC. This issue has been decided by the Hon'ble Supreme Court in the case of CIT **Vs. Laxmi Machine Works, 290 ITR 667(SC),** wherein it was held that excise duty has no element of profit, therefore, not includible in total turnover for computing deduction u/s.80HHC. Respectfully, following the decision of the Hon'ble Supreme Court, we do not find any infirmity in the order of CIT(A) directing for exclusion of excise duty from the total turnover for computing deduction u/s.80HHC."

64. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) on the issue.

65. As regards set off of sales-tax refund, while deciding corresponding issue raised in ground 7(a) of assessee's appeal in ITA No.3092/Mum/2016, we have followed the decision of the Tribunal in assessee's own case for assessment year 2000-01, wherein, it is held that sales tax set off and refund are not eligible for deduction in view of Explanation (baa) to section 80HHC. Therefore, 90% of such receipt has to be excluded from the business profits as well as turnover for computing deduction under section 80HHC of the Act. Our decision therein will apply to this ground as well.

66. As regards receipts from sale of scrap, we uphold the decision of Learned Commissioner (Appeals).

67. In ground 7, the revenue has challenged the decision of learned Commissioner (Appeals) in deleting the disallowance on account of provision for impairment of assets written back while computing deduction under section 80HHC.

68. We have considered rival submissions and perused materials on record. We find, the write back of provisions for impairment has already been reduced in the computation of total income by the assessee. Therefore, we do not find any infirmity in the decision of learned Commissioner (Appeals).

69. In ground 8, the department has challenged the direction of learned Commissioner (Appeals) regarding re-computation of indirect cost attributable to export of trading goods for deduction under section 80HHC.

70. Learned Senior Counsel for the assessee submitted, the issue has been decided in favour of the revenue in the preceding assessment year. The learned departmental representative agreed with the aforesaid submission of the assessee.

71. As we find from material on record, identical issue came up for consideration before the Tribunal in assessee's own case for assessment years 1998-99 to 2001-02. In the latest order passed for the assessment year 2001-02 in ITA Nos. 8978 & 8746/Mu/2004 dated 23-07-2014, the Tribunal following its earlier orders has held as under:-

> *"**22.3** We have considered rival contentions and found from the record that exactly similar issue has been dealt by the Tribunal in assessee's own case for the assessment year 1998-99 in ITA No.4179/Mum/2003, vide order dated 12-12-2012, wherein the Tribunal has upheld the action of AO for computing profit of trading export after having detailed discussion, which reads as under:-*
>
> *"10 We have considered the rival submissions as well as the relevant material on record. Though, the issue before us is limited only to the extent of a finding of the CIT(A) pertaining to the expenditure incurred at Hyderabad branch office to be taken as part of indirect cost for working out the deduction u/s 80HHC (3}(b), However, the said finding of the CIT(A) /s based on the view taken by the Commissioner of Income Tax(Appeals) that u/s sub.sec. 3(b) of sec. 80HHC, indirect cost attributable to export includes the items of expenditure only if it has some connection, link, attributes to - ' export. This proposition propounded by the CIT(A) is apparently against the provisions of section 80HHC(3)(b). If the provisions of sec 80HHC(3)(b) are read in conjunction with clause (e) of Explanation to the said sub. section, it is clear that the indirect cost . for the purpose of allocation under sub.sec (3) shall be taken*

as *the total indirect cost incurred for the total turnover (local + export) and the same has to be allocated in the ratio of export turnover of trading goods to the total turnover*

10.1 For ready reference, we quote sec 80HHC(3)(b) and clause (e) of Explanation as under:

[(3) For the purposes of sub-section (1) —

(a).....

(b) where the export out of India is of trading goods, the profits ' derived from such export shall be the export tumover45 in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export;

(c)..... ,

Explanation.—For the purposes of this sub-section,—

(a).....

(b) .....

(d)

(e)"indirect costs" means costs, not being direct costs, allocated in ratio of the export turnover in respect of trading goods to the total turnover;

(f)..... ;

10.2 It is clear from the combined reading of sub. Sec. 3(b) and clause (e) of explanation to sec. 80HHC(3) that the profit derived from export of trading goods shall be the export turnover of trading goods minus direct cost and indirect cost attributable to such exports. The indirect cost has been defined under clause (e) of Explanation which means the indirect cost which is not direct cost and allocated in the ratio of export of trading goods to the total turnover.

10.3 The total turnover further defined under clause (ba) of Explanation to sub sec. AC. Therefore, the total turnover includes the local sales as well as the export safes regarding manufacturing goods and trading goods except certain items which shall be included as per clause (ba). When the indirect cost has to be allocated in the ratio of export turnover of trading goods to the total turnover, then the indirect cost subjected to be allocated in the said ratio includes all items of indirect cost incurred for the total turnover.

10.4 It is manifest from the plan reading of the relevant provisions that the indirect cost for the purpose of sec. 80HHC (3)(b) r.w.s clause (e) of Explanation does not restrict the items of expenditure incurred in relation to export of trading goods only; but the entire indirect cost incurred for the total turnover has to be allocated in the ratio of export turnover of trading goods to the total turnover which itself makes it clear that only such portion of the total indirect cost in the ratio of export turnover of the trading goods to the total turnover

shall be allocated for the purpose of computing the profits derived from such export u/s 80HHC(3)(b).

10.5 Though the revenue has not filed any appeal against the findings of the CIT(A); however, the revenue, being the respondent can raise an plea against sustainability of the order of the CIT(A); but the effect of such plea would be only to the extent of defence against the appeal and if the respondent/revenue succeeds in the said ground/plea, then the appeal of the appellant/assessee would fail.

10.6 The scope of raising a plea against the sustainability of the impugned order as *the respondent defended against the appeal filed by other party has been provided under Rule 27 of ITAT Rules; therefore, though the impugned order of the C!T(A) would stand and will have full effect in so far as it is against the revenue; but if the plea raised by the revenue is accepted as regards the validity of the impugned order but then the revenue succeeds only to the extent that the appeal of the assesses would fait.*

10.7 The scope of Rule 27 of ITAT Rules has been discussed by the Hon'b!e jurisdictions! High Court in the case of Bamasi (B.R.) v. Commissioner of Income-tax reported in 83 *ITR* 223 as *under,*

"But even if the assesses *had not made such* a *statement, the above judgment shows that the* assesses *would be entitled to raise a new ground, provided it is a ground of law and does not necessitate any other evidence to be recorded, the nature of which would not only be a defence to the appeal itself, but may also affect the validity of the entire assessment proceedings. If the ground succeeds, the only result would be that the appeal would fail. The acceptance of the ground would show that the entire assessment proceedings were invalid, but yet the Tribunal which hears that appeal would have no power to disturb or to set aside the order in favour of the appellant against which the appeal has been filed. The ground would serve only* as a weapon of *defence against the appeal, if the respondent has not himself taken any proceedings to challenge the order in appeal, the Tribunal cannot set aside the order appealed against. That order would stand and would have full effect in so far as it is against the respondent. The Tribunal refused to allow the* assesses *to take up this ground under an incorrect impression of taw that if the point was allowed to be urged and succeeded, the Tribunal would have not only to dismiss the appeal, but also to set aside the entire assessment. The point would have served as a weapon of defence against the appeal, but it could not be made into a weapon of attack against the order in so far as it was against the* assesses."

10.8 The CIT(A) has given the findings on the issue in paras 28 *to 30 as under:-*

"28. After careful consideration of the submission, it has to be said that the section of the Assessing Officer does not appear to be correct. What cannot be ignored is that subsection (3}(b)deduction inter-alia of indirect cost attributable to such exports. The phrase attributable to such export cannot be missed out. Therefore, an item of expenditure can be taken as cost for the purpose only if it has some connection, link, attributes to the export, if the expenditure is totally disconnected with the export activity, it cannot be taken as part of the indirect costs, Therefore, the Assessing Officer has definitely gone beyond what is provided in the Act to workout the indirect cost attributable to export of trading goods.

29. In order to determine correctly the indirect cost, the appellant's representative was asked to furnish the details of trading export activities. In this regard the details reveal that the trading goods exports comprise partly of goods imported and partly purchased locally either from Mumbai or elsewhere. It was submitted that the material department of the company procured items of trading exports. All actions and formalities for exports are carried out by Export Department. Expenses of both these departments are booked as Head Office Expenses. The appellant's representative furnished the details of Head Office Expenses. It was claimed that some of the expenses incurred therein are for domestic activities and only expenditure amounting to Rs.29,04,71,863/- is such that is to be taken as somehow attributable to exports to be taken as part direct expenses. A perusal of the details show that as far as *the Head Office Expenses is concerned, the working thereof is correct and hence needed to be accepted.*

30 However, the appellant company exported trading goods during the year that were procured from Hyderabad and Mumbai. At both the places the appellant company has branch offices apart from the head office being located in Mumbai. Though it was claimed that the job of procurement of trading goods exported are carried out from head office that is having separate procurement and export divisions, while the involvement of branch office at Mumbai can be ruled out with a specific office for the purpose located therein, in respect of the branch office at Hyderabad, the other place for procurement, the same cannot be accepted. Hence the expenditure incurred at Hyderabad branch office to the extent not directly related to domestic sales is also

required to be taken as part of the indirect cost for working out deduction under section 80 HHC (3)(b) of the Act, The Assessing Officer shall rework out the indirect cost under the section accordingly."

x x x x x x

10.10 As we have already discussed that for the purpose of sec. *80HHC(3}(b) r.w.clause (e) of Explanation, the indirect cost to be allocated in the ratio of export turnover of trading goods to the total turnover has to be taken as the total figure of the indirect cost incurred for the total turnover and not the indirect cost directly related to the export turnover as held by the C!T(A).*

X X X X X X X X

10.12 It is clear from the working of the Assessing Officer that for determining the indirect cost, the AO has reduced from the total cost of business, cost of goods as *well as the other items. Therefore, we do not find any error as far as the formula adopted by the Assessing Officer for computation of indirect cost allocated to the export of trading goods."*

22.4 As the facts and circumstances during the year under consideration are same, respectfully following the decision of the Tribunal in assessee's own case, the ground in the Revenue's appeal is allowed and the cross objection filed by the assessee is dismissed."

72. Respectfully following the aforesaid decision, we allow the ground raised by the revenue.

73. In grounds 9 to 12, the revenue has challenged partial relief granted by learned Commissioner (Appeals) with regard to deduction claimed on DEPB entitlement.

74. The issue raised in these grounds are corresponding to identical issue raised by the assessee in ground 7(c) of ITA No.3092/Mum/2016. Since, we have restored the issue to the assessing officer while deciding the said ground in assessee's appeal, there is no need for separate adjudication of the issue in this appeal. Accordingly, these grounds have become infructuous, hence, dismissed.

75. In ground 13, revenue has challenged the partial relief granted by learned Commissioner (Appeals) in respect of disallowance of VRS expenditure. While deciding corresponding ground, being ground 2 raised by the assessee in ITA No.3092/Mum/2016 in the earlier part of the order, we have fully allowed assessee's claim of deduction. Thus, this ground having become infructuous, is dismissed.

76. In ground 14 revenue has challenged part relief granted by learned Commissioner (Appeals) in respect of bad debts written off. While deciding corresponding ground in ground 8 of assessee's appeal in ITA No.3092/Mum/2016 in the earlier part of the order, we have allowed assessee's claim of deduction. That being the case, this ground having become infructuous, is dismissed.

77. In ground 15, the revenue has challenged partial relief granted by learned Commissioner (Appeals) with regard to addition made under section 145A. While deciding corresponding ground, being ground 6 in assessee's appeal in ITA No.3092/Mum/2016 in the earlier part of the order, we have deleted the entire disallowance. That being the case, this ground having become infructuous, is dismissed.

78. In the result, appeal is partly allowed.

ITA No.2072/Mum/2010

79. In this appeal, the revenue has challenged the deletion of penalty imposed under section 271(1)(c) of the Act.

80. Briefly the facts are, while completing the assessment for the impugned assessment year, the assessing officer made various additions and disallowances.

Out of such additions/disallowances, the assessing officer initiated proceedings for imposition of penalty under section 271(1)(c) of the Act alleging concealment of income on the following additions:-

A.	Software Expenditure	-	Rs. 12,27,147/-
B.	Depreciation on obsolete assets	-	Rs.55,54,998/-
C.	VRS expenses	-	Rs.8,24,60,028/-
D.	Bad debts	-	Rs. 26,41,568/-
E.	Transfer Pricing Adjustment	-	Rs. 6,67,71,476/-
	Total	-	Rs.15,87,58,217/-

81. In response to show cause notice issued under section 274 r.w.s. 271(1)(c) of the Act, though, the assessee furnished its explanation stating that neither there is furnishing of inaccurate particulars of income nor concealment of income, however, the assessing officer rejecting the explanation of the assessee imposed penalty of Rs.5,66,06,683/-. Against the order so passed, assessee preferred appeal before learned Commissioner (Appeals). Considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals), being of the view that the assessee has neither furnished inaccurate particulars of income nor concealed its income, deleted the penalty imposed.

82. We have considered rival submissions and perused materials on record. On a reading of the impugned assessment order, it is very much clear that the additions/disallowances, based on which penalty under 271(1)(c) was made were claimed as deduction by the assessee under various provisions of the Act. One more addition was on account of Transfer Pricing adjustment relating to payment

of commission. As rightly observed by learned Commissioner (Appeals), such disallowances cannot automatically lead to the conclusion that the assessee has either furnished inaccurate particulars of income or has concealed its income. We also agree with learned Commissioner (Appeals) that the issues relating to disallowances/additions, based on which penalty has been imposed are debatable issues on which more than one opinion is possible. Further, the transfer pricing adjustment was made on purely estimate basis. Thus, as rightly held by learned Commissioner (Appeals), such additions/disallowances, based on difference of opinion, cannot lead to the inference that assessee has either furnished inaccurate particulars of income or concealed its income so as to levy penalty under section 271(1)(c) of the Act. Further, it is a fact on record that while deciding the appeal arising out of the quantum proceeding, learned Commissioner (Appeals) has granted relief to the assessee in respect of the aforesaid additions/disallowances which further goes to prove that these are debatable issues. In any case of the matter, while deciding the quantum appeals of the assessee and the revenue in the earlier part of the order, we have deleted all the disallowances/additions based on which penalty under section 271(1)(c) of the Act was imposed. That being the case, the penalty order passed under section 271(1)(c) of the Act cannot survive. Accordingly, we uphold the decision of learned Commissioner (Appeals) on the issue by dismissing the grounds raised by the revenue.

83. In the result, appeal is dismissed.

84. To sum up, assessee's appeal in ITA 3092/Mum/2006 is partly allowed; revenue's appeal in ITA No.3187/Mum/2006 is partly allowed and revenue's appeal in ITA No.2072/Mum/2010 is dismissed.

Order pronounced in the open court on 11/08/2021.

Sd/- sd/-

PRAMOD KUMAR	**SAKTIJIT DEY**
VICE PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Dt : 11/08/2021

Pavanan

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1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

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Asstt. Registrar, ITAT, Mumbai