

THE INCOME TAX APPELLATE TRIBUNAL

“I” Bench, Mumbai

Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 3039/Mum/2014 (Assessment Year 2007-08)

I.T.A. No. 3060/Mum/2014 (Assessment Year 2008-09)

DCIT, Circle-44 Room No. 656 6 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	M/s. Sopariwala Exports 21 st Floor, Nirmal Nariman Point Mumbai-400 021. PAN : AACFS6325E (Respondent)
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I.T.A. No. 3042/Mum/2014 (Assessment Year 2008-09)

I.T.A. No. 3043/Mum/2014 (Assessment Year 2009-10)

M/s. Sopariwala Exports Pvt. Ltd. 21 st Floor, Nirmal Nariman Point Mumbai-400 021. PAN : AACCS1620D (Appellant)	Vs.	ACIT, CC-44 Mumbai (Respondent)
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I.T.A. No. 3061/Mum/2014 (Assessment Year 2007-08)

I.T.A. No. 3062/Mum/2014 (Assessment Year 2008-09)

I.T.A. No. 3041/Mum/2014 (Assessment Year 2009-10)

I.T.A. No. 2080/Mum/2016 (Assessment Year 2010-11)

I.T.A. No. 198/Mum/2018 (Assessment Year 2011-12)

I.T.A. No. 13/Mum/2018 (Assessment Year 2012-13)

DCIT, Circle-44/ DCIT-CC-8(1) Room No. 656 Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	M/s. Sopariwala Exports Pvt. Ltd. 21 st Floor, Nirmal Nariman Point Mumbai-400 021. PAN : AACCS1620D (Respondent)
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Assessee by	Dr. K. Shivaram
Department by	Shri Vijaykumar Subramaniam
Date of Hearing	24.06.2021
Date of Pronouncement	21.09.2021

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by the Revenue and assesseees (belonging to the same group) arising out of orders of learned CIT(A) for respective assessment years.

2. Since the issues are common and connected and appeals were heard together, these are being consolidated and disposed of by this common order.

ITA No. 3060/Mum/2014 for A.Y. 2008-09 : M/s. Sopariwala Exports

3. This is a Revenue's appeal directed against the order of learned CIT(A) dated 24.2.2014. The grounds of appeal read as under :-

1. "On the facts and in the circumstances of the case and in law, the Id. CIT-(A), erred in allowing the commission paid to overseas agent M/s. Khadlaj Perfumes LLC, for the A.Y. 2008-09 without appreciating the fact that the assessee was unable to prove the need for commission @ 25% paid to M/s. Khadlaj Perfumes LLC, whereas commission incurred with other parties was @ 0.5% to 5.85%."

2. "On the facts and in the circumstances of the case and in law, the Id. CIT-(A), erred in deleting the addition made in respect of loan advanced to associated enterprises, M/s. Mellow Commodities SDN.BHD at arm's length price, without appreciating the fact that section 92 of the I.T. Act is clearly applicable to the transaction made with the associated entity."

3. "On the facts and in the circumstances of the case and in law, the Id. CIT-(A), erred in allowing the appeal of the assessee placing reliance on the decision of the jurisdiction Hon'ble ITAT, Mumbai Bench(Special Bench) in the case of M/s. All Cargo Global Logistics Ltd (137 ITD 287) , whereas the decision in All Cargo global logistics Ltd has been further contested in appeal and the decision of the Hon'ble Mumbai High Court is still pending."

4. The Appellant prays that the order of the CIT-(A), on the above grounds be set aside and that of the Assessing Officer be restored.

4. Brief facts of this case are as under :-

A search action u/s. 132 of the I.T.Act was carried out in the Sopariwala Group of cases on 29/04/08. The assessee firm is one of the entities in the said group. Consequent to the search action, notices u/s. 153A were issued for A.Y. 2003-04 to 2009-10 on 29/01/10. The appellant filed its return of income

on 04/03/10 declaring a total income of Rs. 7,52,43,080/- for AY 2004-05 . Notice u/s. 143(2) of the I.T. Act was issued on 09/03/10. The income was assessed at Rs. 12,90,18,850/- vide order dated 31/12/10 u/s. 143(3) r.w.s. 153A of the I.T. Act for AY 2004-05. The summary of returns of income filed in response to notice u/s 153A and the assessed income for AY 2004-05 to AY 2008-09 is tabulated below :-

A.Y.	Date of filing of return	Returned Income	Assessed income	Date of Assessment Order	Section under which order was passed
2004-05	03/03/2010	7,52,43,082	12,90,18,850	31/12/2010	143(3) r.w.s. 153A
2005-06	03/03/2010	9,53,40,111	16,16,49,500	31/12/2010	143(3) r.w.s. 153A
2006-07	03/03/2010	9,63,09,162	18,81,06,450	31/12/2010	143(3) r.w.s. 153A
2007-08	03/03/2010	1,51,30,521	5,64,63,783	31/12/2010	143(3) r.w.s. 153A
2008-09	03/03/2010	70,92,325	2,29,45,610	31/12/2010	143(3) r.w.s. 153A

5. On the impugned issue learned CIT(A) noted that the AO has disallowed the commission paid to overseas agent for all these assessment years. The case of the assessing officer as seen from the assessment order is the following. The analysis of the seized documents as per Annex. A-5 seized from the basement office at Nirmal, Nariman Point, Mumbai and the relevant material in connection with the same indicated that there was a fall in profitability of the appellant along with substantial rise in the cost of material and expenses. The cost of material increased by 12% to 14% and the expenses increased by 34% to 36% when the accounts of the assessee starting from A.Y. 2004-05 onwards were considered. The AO noted that the main reason for increase in expenses is the increase in payment of commission on export of *Afzal Pandharpuri* (Afzal Pandharpuri Tobacco) the main x-branded product of Sopariwala Group of Companies. He observed that during F.Y. 2002-03 no, commission was paid whatsoever to any overseas agent by the assessee. However from F.Y. 2003-04 to 2007-08, the assessee incurred overseas commission expenses to the tune of 29.27Cr. The commission was paid to a single party viz. M/s. Khadlaj

Perfumes LLC., Dubai only in respect of product *Afzal Pandharpuri*. The AO has summarized the situation as per his analysis for Sopariwala Exports, the assessee, as follows:

F.Y.	QTY. CTNS	SALES AMT. (in Lakhs)	COMM.PAID (in Lakhs)	REMARKS
2002-03	36249	1402	0	No Agent Appointed
2003-04	49416	1802	371	Agent appointed
2004-05	55361	2011	503	
2005-06	67810	2489	622	
2006-07	67738	3053	763	
2007-08	72586	2698	668	

6. Both during post search investigation as well as the assessment proceedings, the assessee was questioned regarding the high commission expenditure claimed in these years. The assessee submitted that they had appointed a single commission agent for the years in question viz. M/s. Khadlaj Perfumes LLC, Dubai, UAE, as the commission agent for *Afzal Pandharpuri* Tobacco in the Middle East market. The benefits from the appointment of commission agent were stated to be:-

- The product captured 100% market share in the Middle East.
- The duplicate products sold by business rivals were eliminated.
- Consequent to the appointment of the agent the sale price of the product was increased by 14% during F.Y. 2005-06 and 10% during F.Y. 2007-08. Despite the increase in sale price, the sales did not suffer a decline.
- Commission paid to the agent includes the cost of sales promotion, door to door marketing and other incidental expenses.
- It also protects the company's product from infringement of the company's brand.
- Brand Commission agent is also responsible for the collection.

7. The AO called upon the assessee to furnish various details in respect of commission agent, copies of the agent's audited financial statements, its tax returns, evidence for the services rendered by this agent. The AO also called for the production of the Principal Officer of the Commission Agent for verification. The assessee furnished the details of the commission agent and its address.

However, since the commission agent was a foreign entity located outside India, the assessee expressed its inability in furnishing copies of Financial Statements and Income tax details of the commission agent. The assessee also submitted that it was not in a position to produce the Principal Officer of M/s. Khadlaj Perfumes LLC, Dubai, for examination as desired by the AO. The commission agreement authenticated by UAE Consulate in India and Indian Consulate in UAE was furnished. The details of sales of *Afzal Pandharpuri* was furnished which is tabulated below:

A.Y.	No. of Cartons	KGs Sold	Amount (in lakhs)
98-99	18851	471275	466
99-00	28035	700875	847
00-01	22110	552750	776
01-02	31158	778950	1161
02-03	35716	892900	1362
03-04	36249	906225	1402
04-05	49416	1235400	1802
05-06	55361	1384025	2011
06-07	67810	1695250	2489
07-08	67738		3053

8. The AO concluded that no commission was paid till A.Y. 2003-04 to M/s. Khadlaj Perfumes LLC, Dubai. He noted that the assessee was getting the export benefit under the Provision of section 80HHC of the I.T. Act which was getting over in A.Y. 2004-05. He also noted it was in the A.Y. 2004-05 that the commission expenses started to be incurred in respect of M/s. Khadlaj Perfumes LLC, Dubai. He found fault with the assessee's inability to furnish the audited financial statements and the income tax details of the foreign commission agent and the non production of the Principal Officer, of the foreign commission agent. He noted that the assessee did not produce the correspondence and evidence of the service provided by the commission agent. He noted that though the sales increased from 22000 Cartons in A.Y. 2000-01 to 67800 Cartons in A.Y. 2006-07, there had been a similar increase from 18851 Cartons in A.Y. 98-99 to 36249 cartons in A.Y. 03-04, a period during which M/s. Khadlaj Perfumes LLC, Dubai was not appointed as overseas agent.

The AO therefore concluded that it could not be said that this foreign agent was necessary and responsible for increase in sales from AY 2004-05 to AY 2008-09. Primarily the AO was of the view that the export of the assessee was thriving without any problem in the earlier years and therefore, the increase in sales in subsequent period could not be ascribed to the agent and that there was no significant change after the appointment of M/s. Khadlaj Perfumes LLC, Dubai. The AO did not find the explanation of the assessee in respect of the services provided by M/s. Khadlaj Perfumes LLC, Dubai - as satisfactory and the services genuine since the evidence of such services in the form of correspondence, email, faxes etc; were not produced. He also mentioned, without naming, that 2 family members of the assessee group are permanent residents of Dubai for several years, the details of which were not submitted by the assessee. He treated the commission agreement as a self serving document. The AO referred to the statement recorded of Shri Arif Abdul Fazlani u/s. 131 of the I.T. Act on 28.12.10, just prior to finalization of the assessment order. The AO concluded that from the answers of Shri Arif A.Fazlani it was apparent that there was no evidence to prove the actual services rendered by M/s. Khadlaj Perfumes LLC, Dubai. The AO concluded that the target sales level specified in the contract was not achieved by the commission agent for at least two years out of the six years for which the assessment orders were passed. The AO finally concluded that transaction with M/s. Khadlaj Perfumes LLC, Dubai are not genuine since the genuineness of the transaction and the evidence of services rendered was not proved. The assessing officer therefore disallowed entire amount of commission paid to M/s. Khadlaj Perfumes LLC, Dubai in AY 2004-05 to AY 2008-09.

9. The AO also made an alternative contention in his assessment order that in case the assessee is able to prove that the transactions of payment of commission is genuine the commission payment should be held to be excessive since such high rate commission was not paid for the other products sold by the assessee. He noted that the commission paid to all other parties for other

products ranges from 0.5% to 5.85% whereas commission paid to M/s. Khadlaj Perfumes LLC, Dubai is 25%. He was of the view that in such eventuality reasonable commission payment should be not in excess of 2% of these sales.

10. Upon assessee's appeal learned CIT(A) noted that the assessee has given following additional evidences :-

"The following additional evidence was requested to be admitted:

- i) Copies of invoice raised by M/s. Khadlaj Perfumes LLC, Dubai for commission along with proof of remittance by Indian Bank.
- ii) Copy of form no. A-2 being application cum withdrawal of foreign exchange for remittance of commission M/s. Khadlaj Perfumes LLC, Dubai.
- iii) Copy of certificate issued by M/s. Khadlaj Perfumes LLC, Dubai for sales executed during F.Y. 2003-04 to 2007-08."

11. Learned CIT(A) obtained remand report from the Assessing Officer as well as rejoinder from the assessee. Thereafter learned CIT(A) gave elaborate findings and deleted addition by holding as under :-

"Now, I come to the merits of disallowance of expenses made in respect of commission expenses. It is the case of the AO that the agreement was entered into with M/s. Khadlaj Perfumes LLC, Dubai only when the deduction u/s. 80HHC was coming to an end, thereby suggesting the motive for the appellant to siphon out money from the firm. It is however, seen that the section 80HHC deduction was being claimed in respect of the entire exports which included both the trading exports as well as manufacturing exports, whereas the commission paid to Khadlaj Perfumes LLC is only in respect of branded product *Afzal Pandharpuri*. In the initial assessment years in question the trading export was much larger than the manufacturing exports. It is further noted that the product *Afzal Pandharpuri* was only one of the products out of the manufacturing exports. The commission agreement is entered into only in respect of the branded product *Afzal Pandharpuri*. It is important to note that despite search carried out, no incriminating evidence was found to prove that the commission payment was bogus.

5.9.22. It is also seen that the business of export in the appellant firm Sopariwala Exports was subsequently diverted to the corporate entity Sopariwala Exports Pvt. Ltd. from FY 2006-07. Similar commission agreements with M/s. Khadlaj Perfumes LLC, Dubai on identical terms was entered in to by Sopariwala Exports Pvt. Ltd. wef 1st April 2006 in respect of *Afzal Pandharpuri*. Hence for ease of comparison, the details of sales and

exports can be better appreciated by combining the figures for both these entities. Same is tabulated below based on details culled out from the copy of audited accounts called from appellant in the appellate proceedings:

Sopariwala Exports (Figs Rs/Lakhs)

FY	Sales	Other income	Commission expenses exports	Net Profits	Loan to Subsidiary Mellow commodities SDN BHD at year end	Investment in subsidiary Mellow Commodities SDN at year end
2000-01	9693	221	78	1749		
2001-02	7689	41	90	1386		
2002-03	10058	153	136	1735		
2003-04	10363	510	555	1088	863.71	30.02
2004-05	10787	190	535	952	2166.09	66.99
2005-06	8929	218	631	857	2166.09	66.99
2006-07	4732	292	190	271	2166.09	66.99
2007-08	2625	584	2	92	0	2233.09
2008-09	2091	1561	0	1158	0	2233.09

Sopariwala Exports Pvt Ltd (Figs Rs/Lakhs)

FY	Sales	Other Income	Commission Expenses Exports	Net Profits
2005-06	0	0	0	0
2006-07	4841	72	575	943
2007-08	6015	133	668	1133
2008-09	10896	199	1013	1630

Combined Sopariwala Exports & Sopariwala Exports Pvt Ltd (Figs Rs/Lakhs)

FY	Sales	Other Income	Commission	Net Profits (PBT)	Total Exports	Exports - Afzal Pandharpuri	Commission for Afzal Pandharpuri
2000-01	9693	221	78	1749	9609	1158	002
2001-02	7689	41	90	1386	7500	1362	001
2002-03	10058	153	136	1735	10067	1722	024
2003-04	10363	510	555	1088	10279	1805	424
2004-05	10787	190	535	952	10770	2032	511
2005-06	8929	218	631	857	8895	2491	622
2006-07	9573	364	765	1214	8841	3064	763
2007-08	8640	717	670	1225	8665	2721	668
2008-09	12987	1760	1013	2788	12706	4528	1013

Combined Sopariwala Exports & Sopariwala Exports Pvt. Ltd.

FY	Sales in Cartons	Sales Target US Dollar (Lakhs)	Sales in Value in US Dollar (Lakhs)	Rate in \$/carton
2001-02	35716	0	28.57	79.99
2002-03	36249	0	29.00	80.00
2003-04	49416	40.00	39.53	79.99
2004-05	55361	46.00	44.29	80.00
2005-06	67810	52.90	56.12	82.76
2006-07	74323	60.84	63.84	85.89
2007-08	72656	69.96	66.96	92.16
2008-09	94864	80.45	98.75	104.09

5.9.23. A perusal of the above tables show that the AO is factually incorrect in claiming that there was no commission payment in F.Y. 2002-03. In F.Y. 2002-03 the total commission paid was Rs. 136 lacs and not Zero as mentioned in Page 2 of the assessment order. It is also seen that the product mix of exports has undergone a change over the years. Whereas *Afzal Pandharpuri* comprised only 12% of exports for F.Y. 2000-01, its share increased in total exports and it comprised 35.64% of exports in F.Y. 2008-09. It is also observed that the sale of *Afzal Pandharpuri* prior to the appointment of the commission agent was 36249 Cartons in FY 2002-03 which has gone up to 94864 Cartons in F.Y. 2008-09, an increase of about three times. The sales in US dollars have also exceeded the targets in the period F.Y. 2003-04 to 2008-09 when the commission agent was operating. Even though in one or two years the sales are slightly less than the target, the overall sales for the 6 years period totaling to 369.49 Lakhs dollars is more than the target of 350.15 Lakhs dollars. It is further noted that the rate per carton went up from USD 80 to USD 104 over this period. The increase in selling price in rupee terms per carton is even higher. In view of the factual position as can be seen from the above table, there is merit in the contention of the appellant that it focused on its branded export of *Afzal Pandharpuri* and the appointment of the agent for this purpose proved to be successful. There has been manifold increase in export of its branded product *Afzal Pandharpuri* both in terms of value and in quantity even after increasing the price of its products.

5.9.24. The AO has looked at overall net profit of the appellant. It will be naive to expect that the business environment will remain same across the years and that profitability will be maintained across the years. However, the AO has not examined the profitability of the product in respect of which the agent was appointed. The traded export sales has accounted for the falling profitability as is apparent from the accounts over a period. It is further noticed that the assessing officer has not considered the financial results for FY 07-08 and FY 08-09 which was available when he framed his assessment orders in December 2010. He stopped at FY 2006-07, while concluding that profitability has fallen after the agent was appointed. The net profit as % of sales for the combined entity was 21.46% in FY 2008-09 as against 17.25% for FY 2002-03, as can be seen from the table (supra) prepared from the audited financial statements.

5.9.25. The AO has found fault with the fact that a single sole selling agent was appointed. He has also found fault with the appellant's inability to produce this sole selling agent who is a foreign entity resident in another country. It is understandable that the appellant could not force the foreign commission agent to appear before the AO in India and to furnish the agent's tax returns. At the same time it is noted that there is no mention of any direct action taken by the assessing officer for verification of information in respect of the agent M/s. Khadlaj Perfumes, LLC, Dubai. AO could have sought for information in respect of this agent through proper channels from the authorities of UAE, a country with which Double Taxation Agreement has been entered into by India and the DTAA has a clause for exchange of information.

5.9.26. While the AO has held that the onus to prove genuineness of the export commission is on the appellant, the AO has ignored the evidences submitted by the appellant while framing the assessment order. Copy of documents submitted by the appellant indicating the fake product in the export market has been discounted by the AO. The copy of email, invoices of the commission agent, confirmation by the Commission agent, details of address and telephone numbers of the agent, submitted by the appellant, has been ignored by the AO.

5.9.27. From the details available on the records it is seen that the commission was being paid even in the case of *Afzal Pandharpuri* in the earlier years. For instance in F.Y. 2002-03, in respect of *Afzal Pandharpuri* commission @ of 14.14% was paid to AI-Falaq Trading, @ 13.91% to Khatri Trading Co. and to several other parties. Even in F.Y. 2003-04 commission was paid @ 22.91% to Naji Nasir and @ 18.18% to Abbas Ibrahim Essa Rajhi. Similarly, as regards the rates of commission paid on various products including trading and manufactured exports, it is seen that the commission paid ranged from 0.33% to 32.24% of sales. However, the AO has ignored the higher rates of commission payment in respect of various products, while making his alternate plea that commission to be allowed should be restricted to 2% of sales. It is seen that commission @ 32.24% had been paid to Motis Export Ltd in F.Y. 02-03.

5.9.28. It is seen that at no stage did the appellant admit that the commission expenses claimed was bogus during search action or thereafter. The commission payment along with rate has to be declared to RBI which also monitors the remittance going out of the country. It is apparent that the RBI has accepted the commission payment @ of 25% to Khadlaj Perfumes LLC as declared in the statements filed by the appellant over the years. It is therefore, apparent that the AO has merely on suspicion and with prejudged view held that the commission expenses are not allowable. He therefore ignored evidences which corroborate the contention of the appellant. Even in the alternate plea recorded by the assessing officer in the assessment order the conclusion that the commission payment to other commission agents ranges only from 0.5% to 5.88% is factually incorrect. A perusal of the

statement of commission rates in the chart incorporated in the assessment order itself shows that there is a commission payment of 8.73% to Al Keddah, which has been conveniently ignored by the AO. In any case, as I have already mentioned earlier, the commission payment at much higher figures have been made by the appellant in respect of different consignments and 5.9.29. In respect of appointment of the commission agent in UAE, the appellant in its submission stated that it is well established practice that for doing business in Middle East there is a necessity for having a local partner. In this regard in the submission dated 09/01/14 the appellant submitted that in the UAE, business is to be done with local representative which is mandatory. Extract of notification issued by Ministry of Economy, UAE for establishing business/commercial activity in the UAE by non UAE business organization was submitted. In particular, the clause relating to commercial agency agreement was highlighted which is reproduced below:

"4. Commercial agency agreement-Foreign companies may engage in a commercial agency arrangement which is defined as any arrangement whereby a foreign company is represented by a UAE agent to distribute, sell, offer or provide goods or services within the UAE for a commission or profit. The agent must either be a person holding UAE nationality or a company i.e. 100% owned by UAE nationals.

The agent must be registered with the Ministry of Economy. Unless otherwise agreed in writing between a foreign company and its commercial agent, an agent is entitled to receive a commission on the sale of products in his or her designated Emirate irrespective of whether such sales are made by or through the agent."

It was thus argued that since the appellant wanted to increase its business in this region and for protecting its business interest in UAE and other countries the commercial agency agreement was necessary. Thus it is out of business expediency and considering the status of the distributors and its capacity to achieve the requirements of the appellant, M/s. Khadlaj Perfumes, LLC, Dubai was appointed as the distributor of *Afzal Pandharpuri*", their brand product on the terms and conditions as per distribution agreement which was renewed from time to time. It is also submitted that on review the rate of commission was reduced to 17% later in FY 2008-09.

5.9.30. From the remand report submitted by the assessing officer after 8 months and from the rejoinder, it is seen that the assessing officer has repeated the observations made in the assessment order despite evidences submitted by appellant. He has again found fault with non production of tax returns and financial statements of commission agent and called for production of the agent. He has asked for further proof of action taken by agent in respect of spurious products. The appellant has rightly pointed out that records and documents cannot be maintained anticipating the requirements of the assessing officer at subsequent date.

5.9.31. The appellant has relied upon the following decisions.

- i) CIT vs Sales Magnesite Pvt Ltd. (1995) 214 ITR 1 (Bom)
- ii) Amarjothi Pictures vs CIT (1968) 69 ITR 755 (Mad)
- iii) CIT vs Rajarani Exports Pvt Ltd. (2013) 217 Taxman 84 (Calcutta)
- iv) Aluminum Corporation of India Ltd. (1972) 86 ITR 11 (SC)
- v) CIT vs Nestle India Ltd. (2011) 337 ITR 103 (Delhi)
- vi) JK Woollen Manufactures vs CIT (1969) 72 ITR 612

In respect of the argument that once the payment is exclusively for business, it is not open to the AO to go into the reasonableness of the payment, the case laws cited were J K Woolen, Aluminum Corporation of India Ltd. and Pheros & Co. Pvt. Ltd. Vs. CIT (1980)124 ITR 188 (Gau). For the proposition that where the payment is approved by RBI, the entire amount is allowable, the case law cited was in the case of Turner Morrison & Co. Ltd.Vs.CIT (1987) 167 ITR 844 (Cal.).

5.9.32. From the discussion above, it is noted that the Annex. A-5 referred to in the assessment order is a loose paper file comprising mainly of unaudited balance sheet and stock report as on 31.03.08 in respect of various group companies. There is no incriminating document brought on record by the AO in respect of disallowance of commission expenses. The commission was being paid even prior to AY 2004-05 and even in respect of *Afzal Pandharpuri*. Commission payment even at rate of 32% had been incurred in earlier years. Scrutiny assessments were made for AY 2004-05 and AY 2005-06, prior to search, and no disallowance of commission expenses were made. There is a generally accepted practice and requirement of appointing a local agent for business in Middle East. From the details of country wise exports called, it is observed that sales to UAE and Yemen fell at end of 2002-03 and beginning of FY 2003-04. The exports of *Afzal Pandharpuri* to UAE fell from Rs 7.45 crores in FY 2002-03 to Rs 6.36 crores in FY 2003-04. Similarly exports to Yemen fell from Rs 2.53 crores in FY 02-03 to Rs 1.61 crores in FY 2003-04. This corroborates the claim of the appellant that its sales was getting affected by availability of spurious and duplicate products necessitating appointment of a strong sales agent. The sales of branded product *Afzal Pandharpuri* went up manifold, both in terms of value and quantity, even after increasing the sales price, after the appointment of Khadlaj Perfumes LLC, Dubai. The details of the commission agent giving name and address was furnished. The AO did not seek verification of details regarding the foreign agent by using the DTAA provisions for exchange of information and unreasonably insisted on the appellant to furnish financial statements, tax returns of its foreign agent and insisted on the production of the foreign agent before the AO. The AO selectively looked at the financial data ignoring the increased profitability in later years which were available at the time assessment was completed, thereby concluding that the commission agent was appointed to siphon out money. The AO ignored evidence on record at the time of post search investigation showing commission payments as high as 32.4%, thereby erroneously concluding that rate of commission to Khadlaj Perfumes LLC was very high. The overall export over the period AY 2004-05 to AY 2009-10 shows that the sales targets were

achieved. The assessing officer ignored the evidence in support of services provided by the agent such as email, elimination of spurious products and action against infringement of copyrights, confirmation of the commission agent, evidence of sales executed with the help of the agent. These evidences support the case of genuineness of commission payment. The commission payments and the rates are disclosed in the application filed with RBI which has allowed the same. In case of commission exceeding 12%, the details have to be mentioned and remittance of commission requires RBI approval. It is reasonable to expect that the appellant cannot force the foreign commission agent to furnish its audited financial statements and tax returns and to force the principal officer of the foreign agent to appear before the assessing officer. That the issue of commission expenses was taken up through the assessing officer's letter dated 8-12-2010 and appellant's reply dated 22.12.2010, supports the grievance of the appellant that reasonable opportunity was not given to it in the assessment proceedings. The assessment order and the remand report indicates that the assessing officer's emphasis is on appellant maintaining meticulous documentary evidences for commission expenses. The appellant is not incorrect in claiming that business is not run with an eye on creating documentary evidence for everything. The disallowance cannot be made for AY 2004-05 and AY 2005-06, sans incriminating documents, as per the ratio of the decision of the Special Bench in case of Al Cargo (supra). In view of the above facts and discussion, the action of the AO in disallowing the entire commission expenses is not tenable on merits. As regards the alternative contention of the assessing officer, I have already discussed earlier that the assessing officer has selectively considered the rates of commission on other products and other agents by ignoring the higher rates of commission without spelling out any reason. This action of the assessing officer is biased. Further, I am unable to agree with the view of the AO that even if the commission services is held as genuine, part of the payment should still be disallowed as unreasonable. Once the services is held to be genuine, it is not for the AO to sit in judgment on the reasonableness of the payment. In any case there is no evidence that the payment has been siphoned off. The commission agent is an independent third party. I therefore do not uphold the alternative argument of the AO. Ground of appeal no. 8 is allowed for all the AY. 2004-05 to AY. 2008-09.

12. Against the above order the Revenue is in appeal before us.

13. We have heard both the parties and perused the records. Learned Departmental Representative supported the order of the Assessing Officer. He submitted that the only evidence for service rendered by the commission agent is the agreement entered into. That the assessee has not furnished any evidence to prove rendering of services by the foreign agent especially with regard to having eliminated duplicated products from overseas markets,

having undertaken marketing operations on behalf of the assessee. That the partner/director was examined under section 131 of the Act and he gave evasive replies to all questions stating that all transactions were done orally. He further submitted that whatever documents which have been submitted by the assessee do not prove the assessee's claim. That the bills of lading cannot be evidence in this regard. That evidence indicates that the payments were made but not that services were rendered.

14. Per contra learned Counsel of the assessee reiterated the submission before learned CIT(A). He submitted that learned CIT(A) has passed an elaborate order after appreciating all the evidence. He submitted that the said commission agent is a third party unrelated to the assessee. That the payment is pursuant to the agreement which is duly approved by consulate of both the countries. He further submitted that the rate of commission was duly informed to the RBI. That the said commission has been consistently paid. In this regard he placed reliance upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Excel Industries (358 ITR 295) and Radhasoami Satsang Vs. ACIT (193 ITR 321). He further submitted that the Revenue cannot argue upon the necessity of expenditure as one of the conditions under section 37(1) of the Act. That the expenditure has to be wholly, necessarily and exclusively for the purpose of the business. Hence, learned counsel pleaded that the Assessing Officer sitting in the judgement of necessity of expenditure is totally unsustainable. In this regard he placed reliance on the following decisions :-

- Sasson J. David & Co. Pvt. Ltd. Vs. CIT (118 ITR 261)
- Shahzad-a-Nand & Sons Vs. CIT (108 ITR 358)
- Voltamp Transformers Pvt. Ltd. Vs. CIT (129 ITR 105)

15. He further submitted that the contract between the parties is to be understood as is understood by the parties and Assessing Officer cannot give his own interpretation to the contract. In this regard he placed reliance upon

the decision of Hon'ble Calcutta High Court in the case of CIT Vs. Arun Dua (186 ITR 494).

16. Upon careful consideration, we note that the assessee in this case has paid commission to its overseas commission agent. Agreement has been duly submitted. Payment has been duly made to the overseas commission agents. The same is duly approved by the RBI. The Assessing Officer has questioned necessity of high rate of commission. In his opinion lower commission was to be paid. No case has been made out that the payment is bogus. In fact there was search and seizure operation at the premises of the assessee and no evidence was unearthed that the payments were bogus and non-genuine. Names and address of the overseas commission agents were very much there with the Assessing Officer. He insisted the assessee to produce principal officer of the overseas entity. The Assessing Officer has made no effort whatsoever to make any independent examination of his own. He sits in the shoes of the businessman and decided that lower rate of interest should have been charged. In our considered opinion this is legally totally unsustainable. Hon'ble Supreme Court decision referred by learned counsel hereinabove duly supports this proposition. Learned CIT(A) has elaborately examined the issue and after detailed analysis of the factual data has come to the conclusion that the assessee's performance has hugely increased pursuant to support from the commission agents. In this view of the matter in our considered opinion learned CIT(A) has passed a correct order. Addition made by the Assessing Officer is solely based upon surmises and conjecture without any cogent independent verification on record. Furthermore the decision of Hon'ble Calcutta High Court in the case of CIT Vs. Rajarani Exports Pvt. Ltd. (ITA no. 49/2013) is fully applicable here. The Hon'ble High Court has observed as under :-

"It is observed that the commission on export activity had been fully disclosed in all correspondences and activities in relation to export, the commission was paid through banking channel of RBI approval and it was paid pursuant to an agreement approved by Government of India and UN.

The payment of commission was for business consideration and there was apparently no illegality in making payment of commission. Besides this, nothing has brought on record to show that the transactions relating to payment of commission are non-genuine or are excessive and unreasonable."

17. In this view of the matter, we do not find any infirmity in the order of learned CIT(A). Hence, we uphold the same.

Apropos ground No. 2

18. Brief facts are as under :

The concern Mellow Commodities SDN.BHD is a wholly owned subsidiary of appellant which is based in Malaysia. The assessee advanced interest free loan to its subsidiary. The concern Mellow Commodities SDN.BHD being overseas entity and being wholly owned subsidiary of the assessee, is an associated enterprise so far as the assessee is concerned. Sec. 92 of the I.T. Act is attracted. The AO vide order sheet noting dated 14/12/10 asked the assessee as to why the interest on the said loan to its associate enterprise should not be brought to tax invoking the principle of Arms Length Price (ALP). The assessee submitted that the loan was given out of commercial expediency and was out of its own funds and the transaction was with the approval of RBI. This loan was subsequently converted into share capital. The religion of the partners of the assessee-firm prohibit charging of interest. The AO quoting the ITAT Delhi decision in the case of Perot Systems TSI held that even if the amount is given as quasi-capital like share application money, then also such amount is required to be considered as loan. On the principles of Arms Length Pricing, the interest on these loans has to be determined u/s. 92 of the I.T.Act. The AO considered the Arms Length rate of interest to be 3% to 4% above LIBOR. The AO considered LIBOR rate of interest to be around 6% p.a. He therefore, concluded that 10% p.a. is ALP rate of interest for all these assessment years. He accordingly determined the adjustment in this case and accordingly made adjustment on the basis of ALP for each of the assessment years.

19. Upon assessee's appeal learned CIT(A) deleted the addition by holding as under :

"It is seen from the above that the amount advanced to the subsidiary in F.Y. 2003-04 was converted partly into equity of the subsidiary company and was therefore not in the form of loan (Rs 30.02 lakhs). Another part was converted in FY 2004-05. Thus the entire amount of Rs. 66,99,900/- (including that converted in FY 2003-04) was already converted into equity to that extent. The AO has considered loan of Rs 9,31,36,250/- during the FY 2003-04 as interest free and computed the adjustment on the same @10%. The action of the AO in treating at least this amount converted into equity in its subsidiary, as interest free loan is incorrect. As regards the subsequent advances, it is the appellant's contention that permission had been taken from RBI for investment in equity of its subsidiary. There was delay in receiving the permission from the authorities for enhancement of the authorized capital of the subsidiary company. Eventually the entire balance amount was also converted into equity by 14/12/07. The appellant has also not claimed any interest expenses in its books of accounts. In the decision cited by the appellant, the Hon'ble ITAT Ahmedabad Bench in the case of Micro Inks Ltd Vs. DCIT, which is subsequent to the decision in the case of M/s. Perot Systems TSI India Ltd. Vs. DCIT relied upon by the AO, the Hon'ble ITAT has considered that where amount was advanced towards equity and for certain reasons such as grant of permission, the equity shares were not allotted, it cannot be held that the amount advanced is not quasi equity. In the present case when the assessment order was passed on 31/12/2010, there was no doubt that advance will or will not be converted into equity. All the amount advanced by the appellant had been already converted in to equity in its subsidiary company. This aspect of the matter has not been appreciated by the AO.

5.10.4. In the appellate proceedings the appellant submitted copies of its submission before the AO. In the submission dated 24/12/10, copy of approval received from RBI for direct investment in its wholly owned subsidiary in Malaysia, copy of remittance made to its subsidiary and a note on provision of sec. 92 of the I.T. Act was filed. In the appellate proceedings in the submission filed on 22/02/13, the appellant submitted that the interest free amount given to its subsidiary company was with an intention to invest in the shares of its 100% subsidiary company. Since there was no provision to have subsidiary by a firm, the partners applied to avail the permission from RBI regarding the same. However, in view of the delay in formalities for the conversion of loan into equity shares the amount was reflected as loan to subsidiary in its books of accounts. It was submitted that in the assessment proceedings the appellant had furnished various details to the AO including copies of ledger accounts, copies of resolution passed of Mellow Commodities SDN.BHD for allotment of shares against amount received from share holders and copies of share certificate issued by Mellow Commodities SDN.BHD,

5.10.5. It was also submitted that no incriminating documents had been found during the search and as such addition u/s. 92 of I.T. Act could not be made in the order u/s. 153A by the AO. Copies of the assessment order u/s. 143(3) passed by Addl.CIT Rg.12(3) for A.Ys. 04-05 and 05-06, which is prior to the date of search, was filed.

5.10.6 It is noticed that in the assessment order there is no reference to any incriminating seized material found during the course of search on this issue. As discussed earlier in respect of disallowance of commission, the Hon'ble ITAT Spl. Bench in the case of Al Cargo Global Logistic Ltd. Vs. DCIT has held that in respect of completed assessments, no addition can be made which is not based on any incriminating material found in the course of search. To that extent such addition in the present case cannot be made up to A.Y. 2006-07.

5.10.7. Coming to the merits of the case it is seen that the AO has not examined the nature of transaction carefully. Firstly, there is ample evidence that the amount advanced by appellant to its subsidiary was for investing in its equity. The AO has not noticed that the first trash of the loan was already converted in to equity amounting to Rs. 66,99,900/- equivalent to USD 1,50,000 in the first year itself (calendar year 2004). Even the subsequent remittances to the extent of Rs. 21,66,09,171/- equivalent to USD 49,00,000 remitted between 14/01/04 to 31/01/05 was subsequently converted entirely into shares on 14/12/07. Thus on the date when assessment order was passed on 31-12-2010, there was no doubt that the entire amount had been converted into equity. In the case of Micro Inks Ltd., the Hon'ble ITAT Ahmedabad Bench in its order dated 06/08/13 has examined this issue. The Hon'ble Bench has considered the earlier. Tribunal decision referred to by the AO. The facts of the Micro Inks Ltd are similar to the facts of the appellant. In that case also the amount advanced was eventually converted in to equity capital and the advances were made from the EEFC account. The Hon'ble Tribunal noted that the loan was in the nature of quasi capital and that it was not open to the assessee to subscribe to the equity capital without the permission of the RBI. To that extent the ITAT distinguished the facts from the facts of case Perot Systems Ltd which has been relied upon by the AO. For the detailed reasons mentioned therein, the Tribunal came to the conclusion that no ALP adjustment was warranted in that case.

5.10.8. Coming to the case of the appellant, it is seen that the facts are similar to the case decided by ITAT Ahmedabad Bench. From the copies of audited accounts of the subsidiary filed in appellate proceedings, it is seen that the authorised capital of the subsidiary was 100000 MYR at beginning of calendar year 2003 which increased to 500000 MYR by the end of 2003. This again was increased to 1000000 MYR by end of calendar year 2004. In calendar year 2006, MYR 430300 was shown as share application money. In calendar year 2007, the total share capital went up to MYR 190,42,700 and the share application money was converted into equity. Further, the AO has made half hearted attempt at determining the comparable. He has taken the LIBOR rate to be uniform 6% for the entire period of FY 2003-04 to FY 2007-

08 on the dates when the amount was advanced without identifying the LIBOR rate for the specific dates on which the amount was advanced and for specific tenure. Further, there is no basis given for determining the markup @ of 4% over LIBOR. Lastly and most significantly, the AO has not examined the true nature of transaction that the amount was advanced only as subscription to equity capital. The fact that the entire amount advanced was converted into equity was before the AO even as he framed the assessment order. It is a fundamental proposition of Transfer Pricing that the true character of the transaction has to be considered before applying the ALP. The contractual terms, the economic circumstances, the nature of transaction, the business purpose and strategy - all have to be considered before a comparable is sought. In the present case, such an analysis would indicate that the amount was advanced as towards equity and not as commercial loan. There was some delay in converting the advances in to equity, but the same is explained as delay in getting the necessary approvals. If at all LIBOR is considered, appropriate adjustments have to be made to account for the difference in the transaction being evaluated, which in the present case is quasi equity. In my view, in the facts and circumstances of this case and the case law in the case of Micro Inks Ltd., the impugned transaction is not in the nature of loan, therefore, the same cannot be compared with LIBOR rate along with the markup. I am unable to uphold on merits the adjustment made as ALP. The adjustment made for AY 2004-05 and AY 2005-06 is liable to be deleted further also in view of the Special Bench decision in the case of Al Cargo (supra). The adjustment computed by the AO is therefore directed to be deleted. Accordingly, the ground of appeal no. 9 is allowed for all the AY. 2004-05 to AY. 2008-09.”

20. Against this order the Revenue is in appeal before us.

21. Learned Departmental Representative submitted that the assessee could have transferred the fund as equity from the beginning itself but has chosen to transfer the same as long term loans. That the authorised capital of the subsidiary at that time was very low. That the long term loan was not quasi equity. He submitted that the delay in the formalities as noted by learned CIT(A) in allowing the appeal is not sustainable. Learned Departmental Representative referred to the decision of ITAT Delhi bench in the case of Perot Systems TSI (India) Ltd. (37 SOT 358) and submitted that the decision of Micro Inks Ltd. Vs. ACIT (144 ITD 610) relied upon by learned CIT(A) is not applicable. That the Assessing Officer applied Libor plus 4% amounting to 10% for making TP adjustment. Learned Departmental Representative left to us the decision to apply appropriate rate for making TP adjustment.

22. Learned Counsel of the assessee relied upon the order of learned CIT(A) and submitted that the decision of ITAT Ahmedabad Bench is fully applicable on the facts of the present case as in that case Assessee gave advances to 'M', wholly owned subsidiary which was converted to equity capital on receiving RBI's permission. It was held that where advances were made, pending capital subscription, in a foreign subsidiary company, which played strategically significant commercial role in assessee's business, it was not a simplicitor financing transaction to be benchmarked with LIBOR plus rate, and therefore, comparable uncontrolled price for interest on such a transaction was nil.

23. Upon careful consideration we note that the assessee has given funds to its subsidiary initially which has been converted later on into equity capital. For the intervening period the Assessing Officer has charged 10% notional interest. The Revenue was relied upon the decision of ITAT Delhi Bench in the case of Perot System TSI India Ltd. (supra). We note that the facts of the case are different from the Parot System TSI India Ltd. (supra) referred by the Revenue. There was no issue of conversion of fund into equity in the case of Parot System TSI India Ltd. (supra). However in the present case the plea is that fund transferred was for conversion into equity and there was some procedural delay. This has been accepted by learned CIT(A) on the touchstone of the ITAT Ahmedabad decision in the case of Micro Inks Ltd. (supra). We find that the proposition that transfer of fund for equity capital does not attract transfer pricing adjustment is thus supported by ITAT decision as above. Accordingly, we uphold the order of learned CIT(A) in this regard.

Apropos ground No. 3

24. We note that this ground of appeal only arises qua ground No. 2, where learned CIT(A) has not only deleted the addition on merit but has held that upto A.Y. 2006-07 he has also deleted the addition on the ground that no incriminating material was found and these were completed assessment. We find that ground raised by the Revenue in this regard is that decision of the

Special bench of ITAT in M/s. All Cargo Global Logistics Ltd. [137 ITD 287(SB)] which is the basis of decision here which is challenged before Hon'ble High Court. As it is now clear that Hon'ble Bombay High Court has duly upheld the ITAT order in All Cargo Global Logistics Ltd. (supra), this ground of the Revenue does not survive. Moreover to the same affect Hon'ble Bombay High Court in the case of CIT Vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. [(2015) 374 ITR 645] has held that in the case of completed assessment no addition can be made under section 153A of the Act dehorse any incriminating material found. It is not disputed that upto A.Y. 2006-07 these were completed assessment and no incriminating material was found. To this extent this ground raised by the Revenue stands dismissed.

25. In the result, this appeal by the Revenue stands dismissed.

ITA No. 3039/Mum/2014- M/s. Sopariwala Exports

26. This is an appeal by the Revenue and grounds of appeal are identical to A.Y. 3060/Mum/2014 hereinabove. The learned CIT(A) has also passed a concern order. Our adjudication for the aforesaid applies mutatis mutandis to this year also. Hence the Revenue's appeal is dismissed.

ITA No. 3042/Mum/2014 for A.Y. 2008-09 M/s. Sopariwala Exports Pvt. Ltd.

27. This is an appeal by the assessee and Grounds of appeal read as under :

1. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of Learned Assessing Officer for disallowing the expenditure of Rs.1,55,000/- incurred by the appellant on purchase of Goats for distribution to staff on the occasion of Eid festival celebration being employees welfare expenditure, without appreciating that the said expenditure is incurred wholly and exclusively for business and hence the said expenditure is allowable u/s.37 of the Income Tax Act.

2. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of the Learned Assessing Officer for disallowing the expenditure of Rs.6,88,046/- incurred for providing food to employees during "Ramadan" month being staff welfare expenses, without appreciating that the said expenditure is incurred wholly

and exclusively for business and hence, the said expenditure is allowable u/s. 37 of the Income Tax Act.

3. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of the Learned Assessing Officer for disallowing the expenditure of Rs.3,00,000/- for obtaining special number for Motor Car without appreciating that the motor car was mainly used for foreign clients visiting the appellants registered office for business purpose and the manufacturing unit at Borsad, Gujarat and the appellant being in Export business, the foreign customers visiting the office/factory appreciate special number of cars since they are easily indentified and remembered and aids to the status of the appellant and hence, the expenditure was incurred wholly and exclusively for business and the same may be allowed u/s.37 of the Act.

3.1 Without prejudice to above, the expenditure of Rs. 3,00,000/- for obtaining Special number for motor car may be capitalized and depreciation may be allowed on the same.

Apropos staff welfare expenses (Ground No. 1&2) :

28. The AO disallowed Staff Welfare expenses under which expenses of Rs. 6,88,046/- was claimed on Ramzan celebrations. The AO also disallowed expenses claimed of Rs 1,55,000/- on account of purchase of goats for distributing it to its employees for Eid celebration.

29. Learned CIT(A) has upheld the addition by holding that there is nothing to indicate that this expenditure was incurred specifically on the employees of the assessee company. That there is no detail available as to the number of employees of the assessee company, the number of employees who are Muslims and the reasonableness of the said expenses. Further learned CIT(A) has found that there being enormous staff welfare expenses as compared to earlier year. That the expenses are clearly way out of proportion of overall expenses and are not reasonable. Hence, he held that this expenditure cannot be treated to be incurred for the business of the assessee.

30.. Against this order the assessee is in appeal before us.

31. We have heard both the parties and perused the records. We find that learned CIT(A) has passed reasonable order. In the absence of necessary details in this regard expenditure involved cannot be allowed as business expenditure. The decision of Borsad Tobacco Co. P. Ltd. Vs. ACIT (ITA No. 2941 & 2942) referred by learned Counsel of the assessee are not applicable on the facts of this case. Hence, we uphold the order of learned CIT(A).

Apropos Ground No. 3 :

32. In this issue the assessee has incurred Rs. 3,00,000/- for obtaining special number for car. The Assessing Officer was of the view that there is no benefit to business in any way and therefore he disallowed the expenses.

33. Before learned CIT(A) assessee pleaded that the assessee being in export business and foreign customers were visiting the office/factory and hence, this special number was useful. However, learned CIT(A) held that these cars are used by the directors and it is their personal fancy for obtaining special registration numbers. That this is certainly not a business expense. Hence, learned CIT(A) uphold the action of the Assessing Officer.

34. Against this order the assessee has filed the appeal before us.

35. It has been pleaded that in the alternative, depreciation should be allowed on the said expenditure.

36. Upon careful consideration, we find that the orders of the authorities below are appropriate that expenditure for obtaining "fancy number for the car" is not at all business expenditure. Hence, there is no question of allowing the same as revenue expenditure or capitalizing the same and allowing depreciation thereon. Hence, we uphold the order of learned CIT(A).

37. In the result, this appeal by the assessee stands dismissed.

ITA No. 3043/Mum/2014 for A.Y. 2009-10 M/s. Sopariwala Exports Pvt. Ltd.

38. This is an appeal by the assessee and Grounds of appeal read as under :

1. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of Learned Assessing Officer for addition of Rs.7,99,196/- being alleged excess physical stock computed by the learned search party despite the note on variation explaining the errors and omissions and without rejection of books of accounts and hence the addition may be deleted.

2. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of the Learned Assessing Officer for addition of Rs.22,31,126/- and computing GP margin @ 55% on Rs.40,56,593/- being alleged excess book stock computed by the learned search party despite furnishing a note on variation explaining the errors and omissions by the learned search party and without rejecting the Books of Accounts and hence the addition may be deleted.

3. The learned CIT(A) failed to appreciate that once addition is made on G.P. basis, making other additions of Stock will amount to double addition which is not in accordance with law.

4. On the facts and circumstances of the case and according to law, the Learned CIT (A) erred in confirming the order of the Learned Assessing Officer in respect of cash of Rs.2,00,000/- seized under the pretext that "no specific ground of appeal has been filed" though the said ground was mentioned in the statement of facts and hence, the order of CIT(A) is bad in law.

4.1 The Learned CIT (A) failed to appreciate that addition of Rs.2,00,000/- being excess cash seized is accounted in the books of account of the appellant and factually is not excess cash and hence the addition of Rs.2,00,000/- may be deleted.

Apropos issue of excess physical stock

39. Brief facts on this issue and the Assessing Officer's order indicate that excess physical stock was found during search and hence addition made by the Assessing Officer as under :-

As per the Stock inventories taken during the course of the Search & Surveys carried out at the assessee's business premises, discrepancies in Stock involving Excess Physical Stock in certain items & Excess Book stock in certain other items were found. As per this office letter dated 29.10.2010, the assessee was informed about the same as follows:

"During the search and survey action at your business places/ godowns etc. stock of various items was taken as per the inventories,

copies of which have been handed over to you. The analysis of such physical stock taken as compared with the Book Stock is given below:

<u>Stock at place</u>	<u>Excess Physical Stock</u>	<u>Excess Book Stock</u>
Borsad, Gujarat	23,80,641	77,53,385
Vasna, Gujarat	14,418	6,44,935
Khanpur, Gujarat	4,69,354	21,31,482
Lalpur, Gujarat	12,10,582	60,543
Vijapur, Gujarat	59,428	6,47,916
Gandhidham, Gujarat	--	94,01,832
Vishnoli, Gujarat	--	--
	41,34,423	2,06,40,093

Thus, there is excess Physical Stock of Rs. 41,34,423/- on the one hand and excess book stock on the other hand of Rs. 2,06,40,093/-. Please note that the above analysis of excess stock has been done in respect of each item of your stock and in some items excess physical stock has been found whereas in some other items, excess book stock was identified. The overall analysis has been tabulated above. Since the item wise analysis of the stock has given the above result, you are requested to kindly explain as to why the excess physical stock should not be added to your Total Income u/s. 69 of the IT Act and also, why the excess Book Stock should not be added to your Total Income considering the same to be your unaccounted sales?"

In response to the above, the assessee has furnished a reply vide its letter dated 24.12.2010, where-in after a detailed exercise of verifying the items of stock, a net of Excess Physical Stock of Rs. 7,99,196/- and a net Excess Book Stock of Rs. 40,56,593/- has been worked out. The reasons given in the submissions regarding the issues involved are prima-facie acceptable and so the additions on account of excess stock would accordingly be made. The addition would be reckoned on the figure of the excess Book Stock at the Gross Profit margin of the product. Thus, on account of Stock discrepancies, the addition resulting to the Total Income would be as follows:

i)	Excess Physical Stock	:	Rs. 7,99,196/-
ii)	Excess Book Stock	:	Rs.22,31,136/-
	of Rs. 40,56,593/- @ G.P. Margin of 55%		

40. Upon assessee's appeal learned CIT(A) confirmed the action of the Assessing Officer by observing as under :

"It is seen that the appellant has made general arguments without pinpointing any error that has taken place in physical stock taking. Even otherwise the AO has considered the discrepancy item wise between the physical stock and book stock as prepared by the appellant during the assessment proceedings. Thus, no grievance arises in this regard. This reconciliation was prepared by the appellant and furnished to the AO vide its letter dated 24/12/10. I also do not find any merit in the contention of the appellant that comparison of physical stock and book stock should not be done on item wise basis. The very essence of stock taking is to elaborately

identify the different items and to determine its quantity. In fact item wise analysis is more accurate way to notice the discrepancy. The AO has correctly added the excess physical stock as compared with the book stock to the total income of appellant. He has also correctly made addition in respect of gross profit on stock sold but not reflected in the books of accounts. This is the case where the book stock is more than physical stock. In view of the above it is held that there is no infirmity in the action of the AO.”

41. Against the above order the assessee is in appeal before us.

42. We have heard both the parties and perused the records. We find that the addition in this regard is based upon the excess stock found during search and we do not find any infirmity in the order of the authorities below. Even the assessee is taking shifting stand partly accepting and partly denying the veracity of findings. This is not sustainable. Hence, we uphold the same.

Apropos issue of excess cash found :

43. In this case the Assessing Officer noted that during the course of the search proceedings, cash of Rs. 2,00,000/- was seized. That the cash balance as per books at that time was Rs. 47,420/- and the cash seized was the excess cash found at that time. That the assessee was asked to explain why the amount of the seized cash of Rs. 2,00,000/- should not be added to the Total Income? Vide letter dated 29.10.2010. That the reasons given in the reply furnished, maintaining that the cash seized is explained as per the books, are not acceptable. That therefore, the amount of the seized cash would be added to the Total Income u/s. 69A of the IT Act.

44. Upon assessee’s appeal learned CIT(A) noted that there is no specific ground in this regard and he treated the same as infructuous by observing as under :

“In the grounds of appeal filed for AY 2009-10 there is no ground in respect of addition made by the AO in respect of cash of Rs. 2,00,000/- that was seized. The was added by the AO u/s. 69A of the IT.Act. However, in the subsequent appellate proceedings the appellant has filed ground wise submissions in which a submission has been made in respect of cash seized. Since no specific ground of had been filed in respect of the addition of Rs.

2,00,000/- by the AO in the appeal filed on 31.01.2011 the submission filed on this issue is treated as infructuous.”

45. Against this order the assessee is in appeal before us.

46. We have heard both the parties and perused the records. We find that the assessee has contended that it was never a case the assessee has not pressed for this ground. Hence, in our considered opinion this issue has been left unadjudicated by learned CIT(A). Moreover the Assessing Officer has rejected the assessee's explanation without mentioning as to what was the explanation. Hence, in the interest of justice we remit this issue to the file of learned CIT(A). The learned CIT(A) is directed to consider this issue afresh and decide as per law.

46. In the result, this appeal by the assessee is partly allowed for statistical purposes.

ITA Nos. 2080/Mum/2016; 3041/Mum/2014; 3061/Mum/2014; 3062/Mum/2014; 198/Mum/ 2018 & 13/Mum/2018 : M/s. Sopariwala Exports Pvt. Ltd.

47. These are appeals by the Revenue against consolidated order of learned CIT(A) dated 24.2.2014 for A.Y. 2007-08 to 2009-10, dated 26.4.2013 for A.Y. 2010-11 and dated 16.4.2015 for A.Y. 2011-12 & 2012-13.

48. The issues are identical to ground No. 1 dealt with in ITA No. 3060/Mum/2014 above.

49. Brief facts for A.Y. 2007-08, 2008-09 & 2009-10 which have been adjudicated by the same learned CIT(A) who has adjudicated the appeal in ITA No. 3060/Mum/2014 above. Brief facts were as under :

The AO has disallowed the commission paid to overseas agent for all these assessment years. The case of the assessing officer as seen from the assessment order is the following. The analysis of the seized documents as per

Annex. A-5 seized from the basement office at Nirmal, Nariman Point, Mumbai and the relevant material in connection with the same indicated that there was a fall in profitability of the assessee alongwith substantial rise in the cost of material and expenses. The cost of material increased by 12% to 14% and the expenses increased by 34% to 36% when the accounts of the assessee starting from A.Y. 2004-05 onwards was considered. The Assessing Officer noted that the main reason for increase in expenses is the increase in payment of commission on export of *Afzal Pandharpuri* (*Afzal Pandharpuri Tobacco*) the main branded product of Sopariwala Group of Companies. He observed that during F.Y. 2002-03 no commission was paid whatsoever to any overseas by the assessee. However, from F.Y. 2003-04 to 2007-08, the assessee incurred overseas commission expenses to the tune of 29.27Cr. The commission was paid to a single party viz. M/s. Khadlaj Perfumes LLC., Dubai only in respect of product *Afzal Pandharpuri*. The AO has summarized the situation as per his analysis for Sopariwala Exports, the sister concern of the assessee as follows:

F.Y.	QTY. CTNS	SALES AMT. (in Lakhs)	COMM.PA ID (in Lakhs)	REMARKS
2002-03	36249	1402	0	No Agent Appointed
2003-04	49416	1802	371	Agent appointed
2004-05	55361	2011	503	
2005-06	67810	2489	622	
2006-07	67738	3053	763	
2007-08	72586	2698	668	

50. Both during post search investigation as well as the assessment proceedings, the assessee was questioned regarding the high commission expenditure claimed in these years. The assessee submitted that they had appointed a single commission agent for the years in question viz. M/s. Khadlaj Perfumes LLC, Dubai, UAE, as the commission agent for *Afzal Pandharpuri Tobacco* in the Middle East market. The benefits from the appointment of commission agent was stated to be :-

- The product captured 100% market share in the Middle East.

- The duplicate products sold by business rivals were eliminated.
- Consequent to the appointment of the agent the sale price of the product increased by 14% during F.Y. 2005-06 and 10% during F.Y, 2007-08. Despite the increase in sale price, the sales did not suffer a decline.
- Commission paid to the agent includes the cost of sales promotion, door to door marketing and other incidental expenses.
- It also protects the company's product from infringement of the company's brand.
- Commission agent is also responsible for the collection.

51. The AO called upon the assessee to furnish various details in respect of the commission agent, copies of the agent's audited financial statements, its tax returns, evidence for the services rendered by this agent. The AO also called for the production of the Principal Officer of the Commission Agent for verification. The assessee furnished the details of the commission agent and its address. However, since the commission agent was a foreign entity located outside India, the assessee expressed its inability in furnishing copies of Financial Statements and Income tax details of the commission agent. The assessee also submitted that it was not in a position to produce the Principal Officer of M/s. Khadlaj Perfumes LLC, Dubai, for examination as desired by the AO. The commission agreement authenticated by UAE Consulate in India and Indian Consulate in UAE was furnished. The details of sales of *Afzal Pandharpuri* was furnished which is tabulated below:

A.Y.	No. of Cartons	KGs Sold	Amount (in lakhs)
98-99	18851	471275	466
99-00	28035	700875	847
00-01	22110	552750	776
01-02	31158	778950	1161
02-03	35716	892900	1362
03-04	36249	906225	1402
04-05	49416	1235400	1802
05-06	55361	1384025	2011
06-07	67810	1695250	2489
07-08	67738		3053

52. The AO concluded that no commission was paid till A.Y. 2003-04 to M/s. Khandlaj Perfumes LLC, Dubai. He noted that the assessee was getting the export benefit under the Provision of section 80HHC of the IT. Act which was getting over in A.Y. 2004-05. He also noted it was in the A.Y. 2004-05 that the commission expenses started to be incurred in respect of M/s. Khadlaj Perfumes LLC, Dubai. He found fault with the assessee's inability to furnish the audited financial statements and the income tax details of the foreign commission agent and the non production of the Principal Officer of the foreign commission agent. He noted that the assessee did not produce the correspondence and evidence of the service provided by the commission agent. He noted that though the sales increased from 22000 Cartons in A.Y. 2000-01 to 67800 Cartons in A.Y. 2006-07, there had been a similar increase from 18851 Cartons in A.Y. 98-99 to 36249 cartons in A.Y. 03-04, a period during which M/s. Khadlaj Perfumes LLC, Dubai was not appointed as overseas agent. The AO therefore concluded that it could not be said that this foreign agent was necessary and responsible for increase in sales from AY 2004-05 to AY 2008-09. Primarily the AO was of the view that the export of the assessee was thriving without any problem in the earlier years and therefore, the increase in sales in subsequent period could not be ascribed to the agent and that there was no significant change after the appointment of M/s. Khadlaj Perfumes LLC, Dubai. The AO did not find the explanation of the assessee in respect of the services provided by M/s. Khadlaj Perfumes LLC, Dubai - as satisfactory and the services genuine since the evidence of such services in the form of correspondence, email, faxes etc; were not produced. He also mentioned, without naming, that 2 family members of the assessee group are permanent residents of Dubai for several years, the details of which were not submitted by the assessee. He treated the commission agreement as a self serving document. The AO referred to the statement recorded of Shri Arif Abdul Fazlani u/s. 131 of the I.T.Act on 28/12/10, just prior to finalization of the assessment order. The AO concluded that from the answers of Shri Arif

A.Fazlani it was apparent that there was no evidence to prove the actual services rendered by M/s. Khadlaj Perfumes LLC, Dubai. The AO concluded that the target sales level specified in the contract was not achieved by the commission agent for at least two years out of the six years for which the assessment orders were passed. The AO finally concluded that transaction with M/s. Khadlaj Perfumes LLC, Dubai are not genuine since the genuineness of the transaction and the evidence of services rendered was not proved. The assessing officer, disallowed entire amount of commission paid to M/s. Khadlaj Perfumes LLC, Dubai in AY 2004-05 to AY 2008-09.

53. The AO also made an alternative contention in his assessment order that case the assessee is able to prove that the transactions of payment of commission is genuine, the commission payment should be held to be excessive since such high rate commission was not paid for the other products sold by the assessee. He noted that the commission paid to all other parties for other products ranges from 0.5% to 5.85% whereas commission paid to M/s. Khadlaj Perfumes LLC, Dubai is 25%. He was of the view that in such eventuality reasonable commission payment should be not in excess of 2% of these sales.

54. Learned CIT(A) noted the following additional evidences were submitted :

“The following additional evidence was requested to be admitted :-

- i) Copy of Board Resolutions in respect of engaging the commission agent.
- ii) Copies of invoice raised by M/s. Khadlaj Perfumes LLC, Dubai for commission along with proof of remittance by Indian Bank.
- iii) Copy of form no. A-2 being application cum withdrawal of foreign exchange for remittance of commission M/s. Khadlaj Perfumes LLC, Dubai.
- iv) Debit voucher issued by Indian Bank Fort for remittance of commission,
- v) Copy of certificate issued by M/s. Khadlaj Perfumes LLC, Dubai for sales executed during F.Y. 2006-07 to 2008-09.
- vi) Third party/customers confirmation for purchasing of Afzal Pandharpuri from the appelland company through Khadlaj LLC.”

55. Learned CIT(A) passed an order on same line as in the case of 3060/Mum/2014 above. The same may be gainfully referred as under :-

5.9.21. Now, I come to the merits of disallowance of expenses made in respect of commission expenses. It is the case of the AO that the agreement was entered into with M/s. Khadlaj Perfumes LLC, Dubai only when the deduction u/s. 80HHC was coming to an end, thereby suggesting the motive for the appellant to siphon out money from the firm. Firstly, in the case of this appellant, no 80 HHC deductions were claimed, and the assessment years under question are AY 2007-08 to AY 2009-10. It was claimed in case of Sopariwala Exports, a sister concern. It is however, seen that the 80HHC deduction was being claimed in respect of the entire exports which included both the trading exports as well as manufacturing exports, whereas the commission paid to Khadlaj Perfumes LLC is only in respect of branded product *Afzal Pandharpuri*. In the initial assessment years in question the trading export was much larger than the manufacturing exports. It is further noted that the product *Afzal Pandharpuri* was only one of the products out of the manufacturing exports. The commission agreement is entered into only in respect of the branded product *Afzal Pandharpuri*. It is important to note that despite search carried out, no incriminating evidence was found to prove that the commission payment was bogus.

5.9.22. It is also seen that the business of export in the appellant firm Sopariwala Exports was subsequently diverted to the corporate entity Sopariwala Exports Pvt. Ltd. from FY. 2006-07. Similar commission agreements with M/s. Khadlaj Perfumes LLC, Dubai on identical terms was entered in to by Sopariwala Exports Pvt. Ltd. w.e.f 1st April 2006 in respect of *Afzal Pandharpuri*. Hence for ease of comparison, the details of sales and exports can be better appreciated by combining the figures for both these entities. Same is tabulated below based on details culled out from the copy of audited accounts called from appellant in the appellate proceedings:

Sopariwala Exports (Figs Rs/Lakhs)

FY	Sales	Other income	Commission expenses exports	Net profits	Loan to subsidiary Mellow commodities SDN BHD at year end	Investment in subsidiary Mellow commodities SDN at year end
2000-01	9693	221	78	1749		
2001-02	7689	41	90	1386		
2002-03	10058	153	136	1735		
2003-04	10363	510	555	1088	863.71	30.02
2004-05	10787	190	535	952	2166.09	66.99
2005-06	8929	218	631	857	2166.09	66.99
2006-07	4732	292	190	271	2166.09	66.99
2007-08	2625	584	2	92	0	2233.09
2008-09	2091	1561	0	1158	0	2233.09

Sopariwala Exports Pvt Ltd (Figs Rs/Lakhs)

FY	Sales	Other Income	Commission Expenses Exports	Net Profits
2005-06	0	0	0	0
2006-07	4841	72	575	943
2007-08	6015	133	668	1133
2008-09	10896	199	1013	1630

Combined Sopariwala Exports & Sopariwala Exports Pvt Ltd (Figs Rs/Lakhs)

FY	Sales	Other Income	Commission	Net Profits (PBT)	Total Exports	Exports Afzal Pandharpuri	Commission for Afzal Pandharpuri
2000-01	9693	221	78	1749	9609	1158	002
2001-02	7689	41	90	1386	7500	1362	001
2002-03	10058	153	136	1735	10067	1722	024
2003-04	10363	510	555	1088	10279	1805	424
2004-05	10787	190	535	952	10770	2032	511
2005-06	8929	218	631	857	8895	2491	622
2006-07	9573	364	765	1214	8841	3064	763
2007-08	8640	717	670	1225	8665	2721	668
2008-09	12987	1760	1013	2788	12706	4528	1013

Combined Sopariwala Exports & Sopariwala Exports Pvt Ltd

FY	Sales in Cartons	Sales Target US Dollar (Lakhs)	Sales in Value in US Dollar (Lakhs)	Rate in \$/carton
2001-02	35716	0	28.57	79.99
2002-03	36249	0	29.00	80.00
2003-04	49416	40.00	39.53	79.99
2004-05	55361	46.00	44.29	80.00
2005-06	67810	52.90	56.12	82.76
2006-07	74323	60.84	63.84	85.89
2007-08	72656	69.96	66.96	92.16
2008-09	94864	80.45	98.75	104.09

5.9.23. A perusal of the above tables show that the AO is factually incorrect in claiming that there was no commission payment in F.Y. 2002-03. In F.Y. 2002-03 the total commission paid was Rs. 136 lacs and not Zero as mentioned in Page 2 of the assessment order. It is also seen that the product mix of exports has undergone a change over the years. Whereas *Afzal Pandharpuri* constituted only 12% of exports for F.Y. 2000-01, its share increased in total exports and it constituted 35.64% of exports in F.Y. 2008-09. It is also observed that the sale of *Afzal Pandharpuri* prior to the appointment of the commission agent was 36249 Cartons in FY 2002-03

which has gone up to 94864 Cartons in F.Y. 2008-09, an increase of about three times. The sales in US dollars has also exceeded the targets in the period F.Y. 2003-04 to 2008-09 when the commission agent was operating. Even though in one or two years the sales are slightly less than the target, the overall sales for the 6 years period totaling to 369.49 lakhs dollars is more than the target of 350.15 Lakhs dollars. It is further noted that the rate per carton went up from USD 80 to USD 104 over this period. The increase in selling price in rupee terms per carton is even higher. In view of the factual position as can be seen from the above table, there is merit in the contention of the appellant that it focused on its branded export of *Afzal Pandharpuri* and the appointment of the agent for this purpose proved to be successful. There has been manifold increase in export of its branded product *Afzal Pandharpuri* both in terms of value and in quantity even after increasing the price of its products.

5.9.24. The AO has looked at overall net profit of the appellant over the years. It will be naive to expect that the business environment will remain same across the years and that profitability will be maintained across the years. However, the AO has not examined the profitability of the product in respect of which the agent was appointed. The traded export sales has accounted for the falling profitability as is apparent from the accounts over a period. It is further noticed that the assessing officer has not considered the financial results for FY 07-08 and FY 08-09 which was available when he framed his assessment orders in December 2010. He stopped at FY 2006-07, while concluding that profitability has fallen after the agent was appointed. The net profit as % of sales for the combined entity was 21.46% in FY 2008-09 as against 17.25% for FY 2002-03, as can be seen from the table (supra) prepared from the audited financial statements.

5.9.25. The AO has found fault with the fact that a single sole selling agent was appointed. He has also found fault with the appellant's inability to produce this sole selling agent who is a foreign entity resident in another country. It is understandable that the appellant could not force the foreign commission agent to appear before the AO in India and to furnish the agent's tax returns. At the same time it is noted that there is no mention of any direct action taken by the assessing officer for verification of information in respect of the agent M/s. Khadlaj Perfumes, LLC, Dubai. AO could have sought for information in respect of this agent through proper channels from the authorities of UAE, a country with which Double Taxation Agreement has been entered into by India and the DTAA has a clause for exchange of information.

5.9.26 While the AO has held that the onus to prove genuineness of the export commission is on the appellant, the AO has ignored the evidences submitted by the appellant while framing the assessment order. Copy of documents submitted by the appellant indicating the fake product in the export market has been discounted by the AO. The copy of email, invoices of the commission agent, confirmation by the commission agent, details of address and telephone numbers of the agent, confirmation of buyers

regarding role of the agent, submitted by the appellant, has been ignored by the AO.

5.9.27. From the details available on the records it is seen that the commission was being paid even in the case of *Afzal Pandharpuri* in the earlier years. For instance in F.Y. 2002-03, in respect of *Afzal Pandharpuri* commission @ of 14.14% was paid to Al-Falaq Trading, @ 13.91% to Khatri Trading Co. and to several other parties. Even in F.Y. 2003-04 commission was paid @ 22.91% to Naji Nasir and @ 18.18% to Abbas Ibrahim Essa Rajhi. Similarly, as regards the rates of commission paid on various products including trading and manufactured exports, it is seen that the commission paid ranged from 0.33% to 32.24% of sales. However, the AO has ignored the higher rates of commission payment in respect of various products, while making his alternate plea that commission to be allowed should be restricted to 2% of sales. It is seen that commission @ 32.24% had been paid to Motis Export Ltd in F.Y. 02-03.

5.9.28. It is seen that at no stage did the appellant admit that the commission expenses claimed was bogus. The commission payment along with rate has to be declared to RBI which also monitors the remittance going out of the country. It is apparent that the RBI has accepted the commission payment @ of 25% to Khadlaj Perfumes LLC as declared in the statements filed by the appellant over the years. It is therefore, apparent that the AO has merely on suspicion and with prejudged view held that the commission expenses are not allowable. He therefore ignored evidences which corroborate the contention of the appellant. Even in the alternate plea recorded assessing officer in the assessment order, the conclusion that the commission payment to other commission agents ranges only from 0.5% to 5.88% is factually incorrect. A perusal of the statement of commission rates in the chart incorporated in the assessment order itself shows that there is a commission payment of 8.73% to Al Kedah, which has been conveniently ignored by the AO. In any case, as I have already mentioned earlier, the commission payment at much higher figures have been made by the appellant in respect of different consignments and products.

5.9.29. In respect of appointment of the commission agent in UAE, the appellant in its submission stated that it is well established practice that for doing business in Middle East there is a necessity for having a local partner. In this regard in the submission dated 09/01/14 the appellant submitted that in the UAE, business is to be done with local representative which is mandatory. Extract of notification issued by Ministry of Economy, UAE for establishing business/commercial activity in the UAE by non UAE business organization was submitted. In particular, the clause relating to commercial agency agreement was highlighted which is reproduced below:

"4. Commercial agency agreement-Foreign companies may engage in a commercial agency arrangement which is defined as any arrangement whereby a foreign company is represented by a UAE agent to distribute, sell, offer or provide goods or services within the UAE for a

commission or profit. The agent must either be a person holding UAE nationality or a company i.e. 100% owned by UAE nationals.

The agent must be registered with the Ministry of Economy. Unless otherwise agreed in writing between a foreign company and its commercial agent, an agent is entitled to receive a commission on the sale of products in his or her designated Emirate irrespective of whether such sales are made by or through the agent."

It was thus argued that since the appellant wanted to increase its business in this region and for protecting its business interest in UAE and other countries the commercial agreement was necessary. Thus it is out of business expediency and considering the status of the distributors and its capacity to achieve the requirements of the appellant it, M/s. Khadlaj Perfumes, LLC, Dubai was appointed as the distributor of Afzal Pandharpuri", their brand product on the terms and conditions as per distribution agreement which was renewed from time to time. It is also submitted that on review the rate of commission was reduced to 17% later in FY 2008-09.

5.9.30. From the remand report submitted by the assessing officer and from the rejoinder of the appellant, it is seen that the assessing officer has repeated the observations made in the assessment order despite evidences submitted by appellant. He has again found fault with non production of tax returns and financial statements of commission agent and called for production of the agent. He has asked for further proof of action taken by agent in respect of spurious products. The appellant has rightly pointed out that records and documents cannot be maintained anticipating the requirements of the assessing officer at subsequent date.

5.9.31. The appellant has relied upon the following decisions.

- i) CIT vs Sales Magnesite Pvt Ltd. (1995) 214 ITR 1 (Bom)
- ii) Amarjothi Pictures vs CIT (1968) 69 ITR 755 (Mad)
- iii) CIT vs Rajarani Exports Pvt Ltd. (2013) 217 Taxman 84 (Calcutta)
- iv) Aluminum Corporation of India Ltd. (1972) 86 ITR 11 (SC).
- v) CIT vs Nestle India Ltd. (2011) 337 ITR 103 (Delhi)
- vi) J K Woollen Manufactures vs CIT (1969) 72 ITR 612

In respect of the argument that once the payment is exclusively for business, it is not open to the AO to go into the reasonableness of the payment, the case laws cited were J K Woollen, Aluminum Corporation of India Ltd. and Pheros & Co. Pvt. Ltd. Vs. CIT (1980)124 ITR 188 (Gau). For the proposition that where the payment is approved by RBI, the entire amount is allowable, the case law cited was in the case of Turner Morrison & Co.Ltd. Vs. CIT (1987) 167 ITR 844 (Cal.).

5.9.32 From the discussion above, it is noted that the Annex. A-5 referred to in the assessment order is a loose paper file comprising mainly of unaudited balance d stock report as on 31.03.08 in respect of various group

companies. There is no incriminating document brought on record by the AO in respect of disallowance of commission expenses. The commission was being paid even prior to AY 2004-05 and even in respect of *Afzal Pandharpuri*. Commission payment even at rate of 32% had been incurred in earlier years. Scrutiny assessments were made for AY 2004-05 and AY 2005-06, prior to search, in case of Sopariwala Exports, and no disallowance of commission expenses were made. There is a generally accepted practice and requirement of appointing a local agent for business in Middle East. From the details of country wise exports called, it is observed that sales to UAE and Yemen fell at end of 2002-03 and beginning of FY 2003-04. The exports of *Afzal Pandharpuri* to UAE fell from Rs 7.45 crores in FY 2002-03 to Rs 6.36 crores in FY 2003-04. Similarly exports to Yemen fell from Rs 2.53 crores in FY 2002-03 to Rs 1.61 crores in FY 2003-04. This corroborates the claim of the appellant that its sales was getting affected by availability of spurious and duplicate products necessitating appointment of a strong sales agent. The sales of branded product *Afzal Pandharpuri* went up manifold, both in terms of value and quantity, even after increasing the sales price, after the appointment of Khadlaj Perfumes LLC, Dubai. The details of the commission agent giving name and address was furnished. The AO did not seek verification of details regarding the foreign agent by using the DTAA provisions for exchange of information and unreasonably insisted on the appellant to furnish financial statements, tax returns of its foreign agent and insisted on the production of the foreign agent before the AO. The AO selectively looked at the financial data ignoring the increased profitability in later years which were available at the time assessment was completed, thereby concluding that the commission agent was appointed to siphon out money. The AO ignored evidence on record at the time of post search investigation showing commission payments as high as 32.4%, thereby erroneously concluding that rate of commission to Khadlaj Perfumes LLC was very high. The overall export over the period AY. 2004-05 to AY. 09-10 shows that the sales targets were achieved. The assessing officer ignored the evidence in of services provided by the agent such as email, elimination of spurious products and action against infringement of copyrights, confirmation of the commission agent evidence of sales executed with the help of the agent. These evidences support the case of genuineness of commission payment. The commission payments and the rates are disclosed in the application filed with RBI which has allowed the same. In case of commission exceeding 12%, the details have to be mentioned and remittance of commission requires RBI approval. It is reasonable to expect that the appellant cannot force the foreign commission agent to furnish its audited financial statements and tax returns and to force the principal officer of the foreign agent to appear before the assessing officer. That the issue of commission expenses was taken up through the assessing officer's letter dated 8-12-2010 and appellant's reply dated 22-12-2010, supports the grievance of the appellant that reasonable opportunity was not given to it in the assessment proceedings. The assessment order and the remand report indicate that the assessing officer's emphasis is on appellant maintaining meticulous documentary evidences for commission expenses. The appellant is not incorrect in claiming that business is not run with an eye on creating

documentary evidence for everything. The disallowance cannot be made for AY 2004-05 and AY 2005-06, sans incriminating documents, as per the ratio of the decision of the Special Bench in case of Al Cargo (supra). In view of the above facts and discussion, the action of the AO in disallowing the entire commission expenses is not tenable on merits. As regards the alternative contention of the assessing officer, I have already discussed earlier that the assessing officer has selectively considered the rates of commission on other products and other agents by ignoring the higher rates of commission without spelling out any reason. This action of the assessing officer is biased. Further, I am unable to agree with the view of the AO that even if the commission services is held as genuine, part of the payment should still be disallowed as unreasonable. Once the service is held to be genuine, it is not for the AO to sit in judgment of the reasonableness of the payment. In any case there is no evidence that the payment has been siphoned off. The commission agent is an independent third party. I therefore do not uphold the alternative argument of the AO. Ground of appeal no. 8 for A.Y. 2007-08 and AY2008-09 and Ground no. 9 for AY. 2009-10 is allowed.”

56. In A.Y. 2010-11, on same facts learned CIT(A) has followed earlier learned CIT(A)'s order by observing as under :

“The issue involved is an issue of fact, and not of law. I have carefully considered the stand of the Assessing Officer and the submission of the A/R is whether the expenditure incurred by way of commission paid to M/s Khadlaj Perfumes LLC, UAE of Rs.9,81,01,411/- was incurred wholly and exclusively for business. The Assessing Officer has held that the expenditure was not incurred wholly or exclusively for business. But he has not discussed the matter in detail in the assessment order. He has mentioned that the appellant failed to establish the genuineness of the expenditure but he has not specifically pointed out any failure/omission on the part of the appellant. Instead he has 'imported' the findings of the Assessing Officer for A.Y.2009-10. I find that the findings of the Assessing Officer for A.Y.2009-10 was limited to the transactions relevant to A.Y. 2009-10. There is no finding in the assessment order for A.Y.2009-10 in respect of transactions relevant to A.Y.2010-11. The Assessing Officer has clearly erred in "transplanting" findings from the assessment order of A.Y.2009-10 in the assessment order of A.Y.2010-11. Therefore, in my view, the Assessing Officer was not justified in making the disallowance of Rs. 9,81,01,411/-. In any case, the CIT(A)-37, Mumbai in his order dated 24/02/2014 in Appeal No.CIT(A)-37/IT-514 to 516/ACCC-44/12-13 has deleted the corresponding addition for A.Y.2009-10.”

57. For A.Y. 2011-12 also learned CIT(A) followed earlier year order and has concluded as under :

“6.3.9. In this regard, reference is made upon the Judgment of the Honorable Calcutta High Court in case of CIT v Rajarani Exports Pvt Ltd, ITA No.49/2013, G.A. No.480/2013 and G.A. No.483/2013 in which the Hon'ble High Court observed as under :

"It is observed that the commission on export activity had been fully disclosed in all correspondences and activities in relation to export, the commission was paid through banking channel of RBI approval and it was paid pursuant to an agreement approved by Government of India and UN. The payment of commission was for business consideration and there was apparently no illegality in making payment of commission. Besides this, nothing has brought on record to show that the transactions relating to payment of commission are non-genuine or are excessive and unreasonable."

6.3.10. In view of above facts and circumstances of the case, facts and clarification noted above, decision of my predecessor as well as the earlier CIT(Appeals) on this issue in earlier assessment years, as referred above and above all the Judgment of Hon'ble Calcutta High Court in the case of Rajarani Exports P. Ltd. (Supra) it will be difficult to sustain the disallowance of Rs.9,11,53,873/- made by the A.O and accordingly the same is deleted."

58. For A.Y. 2012-13, the same learned CIT(A) has followed his earlier year order.

59. Against the above orders the Revenue is in appeal before us.

60. Facts in these cases and that the order of the Assessing Officer and learned CIT(A) and submissions by the parties are identical to the one dealt with by us in ITA No. 3060/Mum/2014 hereinabove. Our above adjudication applies mutatis mutandis for this appeal also. Accordingly, we uphold the order of learned CIT(A) on this issue.

61. One more issue raised by the Revenue in A.Y. 2011-12 in ITA No. 198/Mum/2018 is learned CIT(A) erred in deleting the addition of Rs. 47,904/- by treating the unexplained purchases as genuine without appreciating the fact that the assessee has not proved the genuineness of the said transactions.

62. On this issue Assessing Officer noted that he has noticed that the assessee has indulged in obtaining bogus accommodation entry from N.B. Enterprises to the tune of Rs. 46,965/-. The Assessing Officer did not specify as to what was the nature and from where the accommodation entry information came from. He sought assessee's response. The assessee informed

that the transaction was in connection of purchase of I-pad. That the assessee company duly received invoice and payment was made through cheque. The transaction was genuine. That the assessee-company has actually received I-pad. That the company has duly prepared goods inward report GIR. Hence, it is noted that the transaction is not bogus. Without any reason the Assessing Officer rejected the expenditure and added the sum of Rs. 46,965/- to the total income of the assessee and over and above added 2% for obtaining accommodation bills.

63. Upon assessee's appeal learned CIT(A) deleted the addition. He inter alia held that all supporting of purchase bills were duly submitted by the assessee. No independent inquiry has been done by the Assessing Officer. Moreover he found that the purchase was not routed through profit and loss account and the assessee has not claimed it as expenditure on revenue's account. Hence, learned CIT(A) directed that the addition be deleted.

64. Against that order the Revenue has filed the appeal before us.

65. We have heard both the parties and perused the records. We find that the addition has been made by the Assessing Officer without any cogent material. The assessee has supplied all purchase/evidence. This has been rejected by the Assessing Officer without any reasoning whatsoever. Moreover learned CIT(A) has also given finding that the said purchase was not routed through profit and loss account as expenditure. For all these reasons we do not find any infirmity in the order of learned CIT(A). Hence, we uphold the same.

66. Hence, all these appeals by the Revenue stand dismissed.

Pronounced in the open court on 21/09/2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 21/09/2021

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS