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

BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA.NO.1606/MUM/2007(A.Y: 2003-04)

ITA.NO.1128/MUM/2009 (A.Y. 2003-04)

M/s. Sanofi India Ltd {Formerly known as Aventis Pharma Limited} 54/A, Sir MathuradasVasanji Road Andheri (E), Mumbai – 400093 **PAN: AAACH2736F**	*v.*	DCIT – Range – 8(1) Room No. 210, Aayakar Bhavan Maharshi Karve Road Mumbai - 400020
(Appellant)		**(Respondent)**

ITA.NO. 5939/MUM/2010 (A.Y. 2004-05)

M/s. Sanofi India Ltd {Formerly known as Aventis Pharma Limited} C.T.S. No. 117-B, L & T Business Park Saki Vihar Road, Powai Mumbai - 400072 **PAN: AAACH2736F**	*v.*	Addl. CIT – Range – 8(1) Aayakar Bhavan Maharshi Karve Road Mumbai - 400020
(Appellant)		**(Respondent)**

ITA NO.1302/MUM/2007(A.Y: 2003-04)

ACIT – Circle – 3(1)(1) Room No. 607, 6th Floor Aayakar Bhavan Maharshi Karve Road Mumbai - 400020	*v.*	**M/s. Sanofi India Ltd** {Formerly known as Aventis Pharma Limited} 54/A, Sir MathuradasVasanji Road Andheri (E), Mumbai – 400093 **PAN: AAACH2736F**
(Appellant)		**(Respondent)**

ITA.No. 6548/MUM/2010 (A.Y. 2004-05)

DCIT – 8(1) Room No. 210, 2nd Floor Aayakar Bhavan Maharshi Karve Road Mumbai - 400020	*V.*	**M/s. Sanofi India Ltd** {Formerly known as Aventis Pharma Limited} 54/A, Sir MathuradasVasanji Road Andheri (E), Mumbai – 400093 **PAN: AAACH2736F**
(Appellant)		**(Respondent)**

ITA.NO. 6745/MUM/2013 (A.Y. 2004-05)

DCIT –8(3) Room No. 217, 2nd Floor Aayakar Bhavan Maharshi Karve Road Mumbai - 400020	*V.*	**M/s. Sanofi India Ltd** {Formerly known as Aventis Pharma Limited} 54/A, Sir MathuradasVasanji Road Andheri (E), Mumbai – 400093 **PAN: AAACH2736F**
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri J.D. Mistri Shri Sanjiv M. Shah & Shri Pratik Poddar**
Department Represented by	**:**	**Shri Pankaj Mehta**
Date of conclusion of Hearing	**:**	**24.08.2023**
Date of Pronouncement	**:**	**31.10.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. Appeals for the A.Y.2003-04 are filed by assessee and revenue against order of Learned Commissioner of Income Tax (Appeals)-VIII, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 30.11.2006 for the A.Y.2003-04. The appeal in ITA.No. 1128/M/2009 is filed by assessee against order passed by Ld.CIT(A) dated 02.12.2008 passed u/s.271(1)(c) of the Act.

2. Appeals for the A.Y.2004-05 are filed by assessee and revenue against order of Learned Commissioner of Income Tax (Appeals)-15, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 14.06.2010 for the A.Y.2004-05. The appeal in ITA.No. 6475/M/2013 is filed by revenue against order passed by Ld.CIT(A)-16 dated 12.08.2013 passed u/s.271(1)(c) of the Act.

3. At the time of hearing, both the counsels fairly agreed that the issues raised in these appeals are covered and adjudicated by the Coordinate Bench of the Tribunal in assessee's own case for the previous Assessment Years. Copies of the orders are placed on record.

4. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeals relating to Assessment Year 2003-04 as a lead assessment year for adjudication.

A.Y. 2003-04

ITA.NO. 1606/MUM/2007 (A.Y. 2003-04) (ASSESSEE APPEAL)

5. Assessee has raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (hereinafter referred to as the learned CIT(A)) has erred in confirming the disallowance of estimated depreciation on obsolete assets to the extent of Rs.50,19,393/-. He ought not to have done*
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> *2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance on bad debts/advances to the extent of Rs.38,46,549/-. He ought not to have done so.*
>
> *3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the adjustment of Modvat relating to closing stock of this assessment to the extent of Rs.4,49,10,165/- He ought not to have done so.*
>
> *4. Without prejudice to Ground No.3, on the facts and in the circumstances of the case and in law, the learned CIT(A) ought to have allowed deduction of Modvat of Rs.6,37,43,762/- relating to opening stock of this assessment without adding Modvat relating to closing stock.*

5. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of brokerage of Rs 7,00,000/- He ought not to have done so.

6. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of repairs expenditure of Rs. 1,27,66,471/- as capital expenditure and has also erred in allowing only depreciation of Rs. 12,76,648/- with reference to the same. He ought not to have done so.

7. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of the expenditure of Rs. 13,91,89,365 under section 40A(2)(a)(b) of the Income-tax Act, 1961 (hereinafter referred to as "the Act").

8. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of Rs 87,61,130 representing part of the payment made for encashment of leave. He ought not to have done so.

9. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming that the interest of Rs.81,83,620 allowed under section 244(1A) of the Act had to be included in computing the income of this assessment when the said amount was already withdrawn as per orders passed u/s 143(3) of the Act. He ought not to have done so.

10. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the enhancement of long-term capital gain to the extent of Rs.3,24,40,774/- He ought not to have done so.

11. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the curtailment of deduction section 80HHC to the following extent:

(a) 90% of the following receipts were covered under Explanation (baa) to Section 80HHC.

Sales-tax set off/ refund of Rs.42,49,253;

Sale of scrap - Rs. 19,48,232;

Bad debts recovered - Rs. 112,625:

(b) Part deduction in respect of DEPB Entitlement of Rs.1,68,15,592.

He ought not to have done so.

12. (a) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming adjustment of Rs.7,71,47,232 under section 92C(4) of the Act. He ought not to have done so.

(b) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not considering the appellant's ground that the assessing officer had depended completely on the order passed by the learned Transfer Pricing Officer. In doing so the assessment office had not independently evaluated whether addition of Rs.7,71,47,232 was due in the given facts. He ought to have considered it and decided.

Your appellants crave leave to add, to amend any one or all the foregoing grounds of appeal and also beg leave to take additional ground, if need be."

6. Further, assessee has raised following additional grounds in its appeal: -

"Ground No. 14. On the facts and circumstances of the case and in law, the transfer pricing order dated 30th September, 2005, passed under section 92CA (3) is beyond jurisdiction and thus null and void."

7. Ld. Counsel for the assessee submitted that the above additional grounds of appeal is not pressed at this stage, accordingly, the above additional ground is dismissed as not pressed.

8. With regard to, Ground No. 1 which is in respect of disallowance of estimated depreciation on obsolete assets to the extent of ₹.50,19,393/-, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought to our notice order of the Coordinate Bench in assessee's own case in ITA.No. 3092/Mum/2006 dated 11.08.2021 (Para No. 15 and 16). Copy of the order is placed on record.

9. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

10. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3092/Mum/2006 dated 11.08.2021 held as under: -

> *"15. We have considered rival submissions and perused materials on record. It evident, assessee's claim of depreciation on the opening WDV of block of assets has been disallowed simply for the reason that similar claim made by the assessee in preceding assessment years has been disallowed. As brought to our notice by learned senior counsel for the assessee, while*

deciding identical issue in assessee's own case in assessment years 1998-99 to 2001-02, the Tribunal has allowed assessee's claim of depreciation. In the latest order passed for the assessment year 2001-02 in ITA No.8978/Mum/2004 & 8746/Mum/2004 dated 28-07-2014, the Tribunal, following its earlier order, has allowed assessee's claim holding as under:-

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

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

11. Further, the Coordinate Bench in assessee's own case for the A.Y.2001-02 in ITA.No. 8978/Mum/2004 held as under: -

> *"8. Ground No.3 is regarding disallowance of estimated depreciation on obsolete assets of Rs. 68,16,036/-. It was contended by the learned AR that this issue has been decided by the Hon'ble Bombay High Court in the case of CIT VS. GR Shipping Ltd., ITA No.598/2009 in favour of the assessee and*

relying upon the aforesaid decision of the Hon'ble jurisdictional High Court, the Tribunal has decided the issue in assessee's own case for the assessment year 2000-01 vide order dated 16-4-2014.

8.1 We have considered rival contentions and found from the record that exactly similar issue has been decided by the Tribunal in assessee's own case for the assessment year 1998-99 and 1999- 2000, wherein the Tribunal after considering the decision in the case of G.R.Shipping Company and Inductotherm India Ltd, 73 ITD 529. held that depreciation was allowable on obsolete assets to the assessee. However, against this decision of the Tribunal, the department has not filed any further appeal before the Hon'ble High court. Thereafter relying the same, the Tribunal in assessee's own for the assessment year 2000-01 has decided the issue in favour of the assessee.

8.2 As the facts and circumstances during the year under consideration are same, respectfully following the decision of the Tribunal in assessee's own case, we do not find any merit in the action of the AO for declining assessee's claim of depreciation on obsolete assets."

12. Respectfully following the above decisions and following the principle of consistency, the view taken by the Coordinate Bench in previous Assessment Years are respectfully followed, ground raised by the assessee is accordingly allowed.

13. With regard to Ground No. 2 which is in respect of disallowance of Bad debts to the extent of ₹.38,46,549/- written off in the books (on the ground that written off debts not proved to be Bad). Ld. AR of the assessee brought to our notice that the issue in appeal has been

considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 3092/Mum/2006 dated 11.08.2021 (Para No. 52 and 53). Copy of the order is placed on record.

14. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

15. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3092/Mum/2006 dated 11.08.2021 held as under: -

> *"52. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. As per the amended provision of section 36(1)(vii) of the Act, any bad debt written off in the books of account as irrecoverable is an allowable deduction. The effect of the aforesaid statutory provision has been lucidly explained by the Hon'ble Apex Court in case of TRF Ltd VS CIT (supra). Therefore, once the conditions of section 36(1)(vii) are fulfilled, assessee's claim has to be allowed. Keeping in view the uncontroverted factual position that the conditions of section 36(1)(vii) are satisfied, we allow assessee's claim. This ground is allowed.*
>
> *53. In the result, appeal is partly allowed."*

16. Respectfully following the above decision and following the principle of consistency, the view taken by the Coordinate Bench in previous Assessment Year is respectfully followed, ground raised by the assessee is accordingly allowed.

17. With regard to, Ground No. 3 which is in respect of adjustment u/s.145A of Modvat to the extent of reduction by ₹.1,88,33,597/- (Op Stock value increased by ₹.637,43,762 & CI stock value increased by ₹.449,10,165/-, net ₹.188,33,597, reduced from Profit). Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 3092/Mum/2006 dated 11.08.2021 (Para No. 34). Copy of the order is placed on record.

18. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

19. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the

assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3092/Mum/2006 dated 11.08.2021 held as under: -

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

20. Further, the Coordinate Bench in assessee's own case for the A.Y.1999-2000 in ITA.No. 4180/Mum/2003 held as under: -

> *"2.9.1 We have heard both the parties, perused records and considered the matter carefully. The dispute is regarding adjustment on account of Modvat Credit u/s 145A of the Income-tax Act. Under the said provision, valuation of purchase and sale of goods and inventory has to be made on the basis of method of accounting regularly followed and further adjustment is required to be made to include the amount of any tax, duty, cess to bring the goods to the place of its location condition on the date of the valuation. Therefore, under the provision u/s 145A adjustment on account of tax, duty etc has to be made at all stages that is, opening stock, purchases and sales and closing stock. It has been held by the Hon'ble High Court of Delhi in case of Mahavir Aluminium Ltd. (295 ITR 77) that adjustment u/s 145A has to be made both to the opening stock and closing stock. This issue therefore in our view requires fresh examination. We, therefore, set aside the order of CIT(A), and restore the matter to AO for passing a fresh order after allowing opportunity of hearing to assessee."*

21. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in previous Assessment

Years is respectfully followed. It is brought to our notice that the department has accepted the similar decisions in the AY 2006-07 and 2007-08 were accepted by the revenue by not preferring appeals and subsequently no adjustments were proposed by Assessing Officer in the subsequent years, accordingly, this ground is decided in favour of the assessee. Hence this ground of appeal is allowed.

22. As we have allowed Ground No. 3, ground No. 4 becomes academic. Accordingly the same is not adjudicated at this stage.

23. With regard to, Ground No. 5 which is in respect of disallowance of brokerage of ₹. 7,00,000/-. Brief facts relating to the above ground as summarized by the Ld.CIT(A) and the decision held by the Ld.CIT(A) is reproduced below: -

ASSESSING OFFICER'S CASE:

The Assessing Officer in the assessment order examined the payment of brokerage amounting to Rs 7,00,000/- and held the same to be disallowable when he found that the expenditure related to rented premises The A.O. rejected the plea that the asset was being used for business prior to its letting out and that the assessee had put the business property for profitable use. It has been stated by the A.O. that the expenditure pertain to rented premises and was not a business expenditure.

APPELLANT'S CASE:

In appeal, it has been argued that the expenditure was incurred to obtain a tenant to whom the premises was subsequently let

and that it was the business premises which had been given on rent where it was found that the premises had become surplus on account of shifting of the office to other premises.

DECISION:

The issue has been examined and the plea of the appellant is rejected. The facts of the case are that the appellant found that it was left with a premise which was surplus on account of the shifting of the office. It therefore, decided to rent out such premises. The fact that the rental has to be accounted to under the Income from House property is accepted by the appellant. It is not understood how then the brokerage be considered to be a business expenditure. It was indeed not the business of the appellant to let out its premises whether Surplus or not for earning rental incomes and therefore, it is difficult to appreciate the claim of the appellant regarding the brokerage paid by it for finding out a tenant for such a premise which was to be given on rent. The stand of the A.O. is upheld and so is the disallowance. This ground is decided against the appellant."

24. Considered the rival submissions and material placed on record, we observe that at the time of hearing Ld AR submitted that the issue under consideration is covered in the case of Krishna N. Bhojwani *v.* ACIT in ITA.No. 1463/MUM/2012. On careful consideration of the above case, it was held that:

"12. We have heard both the parties on the issue and carefully perused the material placed before us including the orders relied upon by the assessee. The undisputed facts of the case that the licensee did not vacate the flats as per the terms of leave and license agreement and as a result the assessee received Rs.10,40,000/- as damages pertaining to that period when the licensee occupied the premises without any valid authority as per the licensee deed dated 31.5.2006 and the said

damages related to the period after 31.5.2006. We find merit in the argument of AR that the said receipt is a capital receipt and not liable to tax as the issue is directly covered in favour of the assessee by the following decisions of the jurisdictional high court and coordinate benches as relied and referred to by the ld AR."

25. From the above, it is clear that the decision of the coordinate bench is on mesne profit earned by the assessee, whereas the issue involved in this appeal is that the assessee has incurred brokerage charges to let out the excess space available with the assessee. The issue involved in this case is different and it is clear that the expenses are only relating to the let out of the property and not relating to the business carried on by the assessee. Since the expenses are purely relating to the earning of income under the head Income from House property, it is an expenditure deductable under that head and not under the head Income from Business or profession. Hence, we are inclined to agree with the findings of the Ld CIT(A) and at the same time, it is fact on record that gross income of the assessee is taxable, which includes income from business, income from house property, capital gains and income from other sources. The expenses claimed by the assessee are rejected under the head income from business and it is allowed under the head income from the house properties, the net result would be the same. That is, the AO

will disallow the expenditure under the head income from Business and have to allow the same under the head income from House property. The net result would be Nil. There is no change in the tax rate for both the heads of income. Therefore, the claim of the assessee is allowed in this regard considering the above discussions.

26. With regard to Ground No. 6, Ld. AR of the assessee submitted that this ground is not pressed, accordingly the same is dismissed as not pressed.

27. With regard to, Ground No. 7 which is in respect of disallowance of expenditure of ₹.13,91,89,365/- under section 40A (2)(a)/(b) of the Act.

28. Brief facts relating to the above ground are, Assessee [Aventis Pharma Ltd. now known as Sanofi India Ltd.] was manufacturing and selling Rabipur vaccine under technical agreement with Behringwerke GMBH, a German company. After worldwide takeover of Behringwerke GMBH by Chiron Corp Inc, USA (Chiron, USA) in 1997, Rabipur vaccine was manufactured in India by joint venture company namely, M/s Chiron Behring Vaccines Private Limited (Chiron India) formed by Assessee and Chiron USA holding 49% and 51% respectively. Assessee entered into

agreement [page 59 of paper book volume 1] with joint venture company, M/s Chiron India, whereby inter alia Assessee would market, sell and distribute Rabipur vaccine in territories of India, Nepal and Sri Lanka and Chiron of USA or its affiliate would do same in territories other than covered by Assessee. One of the main terms of aforesaid marketing agreement was that Assessee would purchase Rabipur vaccine at a price which is not less than 60% of selling price of Assessee [page 64 of paper book volume 1]. In the premise, Assessee, earned gross margin of 40% of sale price of Rabipur vaccine. Aforesaid arrangement is not disturbed by revenue since inception and until Assessment Year 2002-03. Abovementioned marketing agreement with Chiron India expired in February 2009 and latter entered into fresh agreement dated 16.02.2009 with M/s Novartis Healthcare Limited [Novartis]. Manufacturing capacity of Chiron India was primarily utilized to the extent of 80-85% for domestic consumption, that is, to source purchase of Rabipur vaccine by Assessee and balance surplus production 15-20% went in exports to German associate, Chiron Behring GMBH. Assessee also undertakes trading in other pharmaceutical products in domestic market and it was submitted that it earned gross margin of 24 to 25%. It was also submitted before AO that Assessee earns average gross margin of 24 to

25% on other products traded with third parties in domestic market and is a direct internal comparable so as to justify 40% gross margin earned by Assessee on sale of Rabipur vaccine.

29. It was also submitted before AO that both Assessee and Chiron India clocked profits ₹.103,17,49,319/- [page 3 of paper book volume 1] and Rs.25,55,06,000/- [page 97 of paper book volume 1] respectively for Assessment Year 2003-04 and assessed to tax at same rate of corporate tax. In assessment year under appeal, Assessee purchased Rabipur Vaccine at ₹.127 per vial from Chiron India aggregating ₹.50,50,58,553/- Simultaneously, Chiron India was exporting same vaccine to its associate German company namely, M/s Chiron Behring, GMBH ₹.92 per vial (US$ 2 per vial). The AO adopted aforesaid export price to benchmark the above purchase price with Chiron India and invoked Section 40A(2) inter alia on premise that Assessee paid much higher price at Rs. 127 per vial to its sister concern, i.e., Chiron India as against export price Rs.92/- per vial and held as under:-

> *a) Assessee's contention that export and domestic market are different is not acceptable because in international market there is strict adherence to quality more particularly, for pharmaceutical products;*

b) usual trade practice is higher than domestic one,

c) persons buying in bulk and cash get heavy discount,

d) purchase of Rabipur vaccine by Assessee from Chiron India is on payment of cash and not credit; and

e) arrangement is to pass on profit to sister concern and intention to reduce tax burden of Assessee.

30. In the premises, Assessing Officer added difference of ₹.35 [₹.127 (-) ₹.92] per vial under Section 40A(2) amounting ₹. 13,91,89,365/-.

31. Aggrieved with the above order of the Assessing Officer, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) confirmed the addition made by the Assessing Officer with the following observations: -

"The Assessing Officer in the assessment order has examined the transactions between the appellant and Chiron Behring Vaccines P. Ltd and concluded that the assessee had made excessive payments to M/s Chiron Behring Vaccines P. Ltd. by way of paying excess purchase price of the vaccines. The A.O. has pointed out that the price paid per vial to M/s Chiron Behring Vaccines P. Ltd was at the rate of Rs 127 per vial whereas the price at which CBPL had sold its product to other parties was @ 92 per vial.

The A.O. has in the assessment order has stated as under :-

"The arguments of assessee are not tenable in view of the fact that the assessee company is holding 49% of shares of M/s Chiron Behring. Therefore, the contention of the assessee that the vendor was free to any one else is not correct. The other argument of the assessee that export market and the domestic market are different, and

therefore, there is difference in the price is also not correct in light of the facts of the case. In the international market there has to be strict adherence to the quality of the products. When it comes to medicine and pharma products in Europeon countries the quality control is very very stringent. IN the usual trade practice, the export price is higher than the domestic price of the same goods. Moreover, it is an accepted principal of trade that a person buying goods in bulk get a heavy discount. It can be seen that in this particular case, exports constitute just about 15% of the turnover of Chiron Behring whereas the domestic turnover is very high. is also noteworthy that the assessee company purchases the vaccine from M/s Chiron Behring on payment of cash and not against credit. IN the trade parlance, if any goods if purchased in cash in bulk there is heavy discount to the customer.

From the above it can be seen that the assessee company should have purchased goods at the price lower than Rs 92/- Le. the price at which the goods were sold to M/s Chiron Behring Gmbh Germany by M/s Chiron Behring India P. Ltd. However the arrangement of things were done in such a manner so as to pass on the profits to the sister concern by the assessee company. All this was done with the specific intention to reduce the tax burden of the assessee company for the reasons best known to the assessee himself. The assessee has made an argument that the revenue is not at a loss because if any amount of excess profit is transferred to M/s Chiron Behring India P. Ltd. they are also taxed in india at the same rate. In the Act, every assessee is a different assesse and the charge of tax is on the profits of the particular assessee it is immaterial whether the profit of other company is higher lower. A perusal of section 40A(2)(a) of the Act would disclose that where the assessee incurs any expenditure in respect of which payment has been made to any person refereed to in clause (b) of this subsection, and the A.O. is of opinion that such expenditure is excessive or unreasonable

having regard to the fair market value of the goods services or facilities for which the payment is made or the, so much of the expenditure as is to considered by him to be excessive or unreasonable shall not be allowed as a deduction. Clause 9b) of the above said section mentions about the nature of the persons.

A perusal of the record would disclose that the assessee company has paid much higher price at Rs 127 per vial to its sister concern M/s Chiron Behing India P. Ltd. for certain vaccine, which was sold @Rs 92/-to other persons by CBIPL." and made an addition of Rs 13,91,89,365/- to the income of the appellant.

Ld CIT(A) has held as under:

The issue raised by the appellant has been carefully appreciated. But, however, it is not understood how there can be such a substantial and wide variance between the sale price charged by M/s CBVPL from the appellant and on other clients. The variation is of 27.55 % which is indeed a wide variation even after considering the various arguments of the appellant pertaining to the exports price vis-a-vis domestic price or the fact that the appellant has indeed made good and reasonable profits and that the prices are being determined as per the agreement. It cannot be denied that CBVPL did. have a cost index on which it loaded its profit either for the export market or for the domestic market. There is no evidence to suggest that the price charged by CBVPL from its export clients was comparable to the world wide prices of the "vaccine imported by other entities. It is also not understood why CBVPL will mark up the profit margin by not less than 27.55 % while dealing with its associate sister concern, and why should the appellant in turn curtail its profitability by paying a higher margin of 27.55% to its own associate sister concern knowing very well that the mark-up was so high. The fact that margins based on percentages have been fixed vide an agreement cannot determine the reasonableness of the prices when it is abundantly clear that the prices which was being charged by CBVPL to its export clients was less than 27.55% than what it was being charged from the appellant. It is not a question of

both the entities being profitable and paying tax but the question is of the determination the reasonableness of the transactions. There cannot be any justification for a difference of 27.55% between the prices charged by CBVPL to the appellant and to its other export entities.

In view of the above discussion, I am of the view that the A.O. was correct in facts and in law to have made the aforesaid disallowance. The same is upheld. This ground is decided against the appellant."

32. Aggrieved with the order of the Ld. CIT(A) for the current assessment year, assessee is in appeal before us. At the time of hearing, Ld AR submitted that Ld. CIT(A) confirmed aforesaid addition for following reasons: -

a) variance of 27.55% between domestic and export price is wide;

b) there is no evidence to suggest that export price charged by Chiron India is comparable to world wide prices of vaccines /imported by other entities;

c) fact that margin of Assessee is fixed in percentages as per marketing agreement cannot determine reasonableness of prices; and

d) it is not question of both entities being profitable, but determination of the reasonability of price.

33. Further, he submitted that in Assessment Year 2004-05, the then Ld.CIT(A) decided the issue in favour of the assessee even though his predecessors have taken contrary decisions in Assessment years 2003-04

and 2005-06. In Assessment Year 2004-05, Ld.CIT(A) deleted addition under Section 40A(2) by observing as under:-

> *"a) material fact is that Assessee has not purchased Rabipur vaccine from any independent third party at lower rates;*
>
> *b) there is nothing in Assessee's books to demonstrate that it has paid more than market price:*
>
> *c) it is none of the business of Assessee nor latter is answerable that Chiron India sells Rabipur vaccine to its associate concern at lower price:*
>
> *d) Chiron India sells a very small part of its production to its associated enterprise stationed abroad;*
>
> *e) export price cannot be taken as market rate [benchmark] since it is a controlled transaction being executed with associated enterprise, a related party as held in VAN OORD DREDGING v. DDIT (2007) 105 ITD 97 (MUM);*
>
> *f) thus whole exercise undertaken by AO is inherently flawed;*
>
> *9) TPO in the case of Chiron India has made adjustments based on purchase price of Assessee i.e. Rs.127/- per vial which is mutually contradictory resulting in candle burning from both sides;*
>
> *h) export and domestic markets are different and their prices can never be compared inasmuch as demand and supply situation, purchasing parity. pricing structure, tax structure and penetration strategy of companies in both markets are divergent and prices depend upon aforementioned variables;*
>
> *i) comparison of prices between two distinct markets violates above fundamental economic principle;*
>
> *j) further for determination of market price of a product it is necessary to identify buyers and sellers, determine extent of market and its boundaries both geographical and range of similar or equivalent products as may be available;*

k) there is nothing on record to suggest that Rabipur vaccine was sold by any independent third party in India during that period at a lower rate than Rs.127/-:

l) export and domestic sale prices cannot be compared because exports is not a core and focus area of business of Chiron India and hence undertaken by Chiron India purely on marginal costing theory to achievefull utilization of capacity and thus reduce overhead costs of company which is admitted by Chiron India in its transfer pricing assessment,

m) export price fixed by Chiron India made good commercial sense to take advantage of its surplus manufacturing capacity which is similar to airline company or hotels who charge different prices to different customers so as to achieve equilibrium by earning best profits in a given situation;

n) therefore, CIT(A) is of view that price charged by Chiron India for it exports is not the fair market value of Rabipur vaccine;

o) Chiron India broke its relations with Assessee and tied up with its rival competitor Novartis, a non-related party under Section 40A(2)(b), vide marketing and distribution agreement dated 16.02.2009 whereby Novartis is paying 64% as against 60% of selling price paid by Assessee towards purchase of Rabipur vaccine thereby providing a direct comparison of price and proving and validating that margin of 40% earned by Assessee reflects fair market of Rabipur vaccine since the margin ranges from 36% to 40%;

p) thus taking an overall view of the matter, CIT(A) differs in his appellate order for AY 2004-05 from stand taken by his predecessors as concurring with their views will be unfair and unjust to Assessee; and

q) in the result, CIT(A) holds in AY 2004-05 that no disallowance is required to be made under section 40A(2) in respect of purchases of Rabipur vaccine by Assessee from Chiron India.

34. Further, Ld.AR of the assessee submitted that cumulative conditions precedent of Section 40A(2) namely, expenditure of purchase of Rabipur vaccine must be excessive or unreasonable having regard to fair market value of Rabipur vaccine, legitimate needs of business of Assessee and benefit derived by or accruing to Assessee there from are not at all from any angle and whatsoever manner satisfied in Assessee's case. It is urged that Assessing Officer failed to discharge primary onus that afore mentioned parameters are fulfilled in Assessee's case and relied on the case of CIT *v.* Johnson and Johnson (2018) 11 ITR OL 48 (BOM). Assessing Officer, without any shred or iota of material much less cogent, straightway, purely founded on his ipse dixit, compared export sale price Rs.92/- per vial realized by Chiron India from its associate with purchase price Rs. 127/- per vial of Assessee and wrongly deemed same to be the fair market value ignoring and overlooking distinguishing factors which govern a export sale and local sale made by Chiron India. AO has not pointed out a single comparable instance in domestic market of India to reach a conclusion that price of Rs.127 per vial paid by Assessee to Chiron India is excessive or unreasonable. It is submitted that export sale of Chiron India constitutes only 15-20%, whereas domestic sale consists of 80-85% of total manufacturing capacity of

Assessee and competitive export business is purely super-structured on theory of marginal costing vis-à-vis availability of idle/spare capacity after all fixed costs are absorbed by domestic production and in addition, both cater to two entirely different, separate and distinct markets, economies and geographical regions. Moreover, price realized from associated enterprise namely, German company on export sales of vials at Rs.92/- can never be fair market value envisaged in Section 40A(2) which proposition is fortified by decision in Van Oord Dredging *v.* DDIT (2007) 105 ITD 97 (ITAT) (MUM), paragraph 32 thereof.

35. Ld.AR of the assessee further submitted that addition under Section 40A(2) is unsustainable in law for the following reasons:-

> *a) In Circular no 6-P dated 06.07.1968 in paragraph 74 thereof (page 117 of paper book volume 1], it is stated that AO is expected to exercise his judgment in a fair and reasonable manner with reference to criteria prescribed under Section 40A(2) and he must bear in mind that provision is meant to check evasion of tax through excessive and unreasonable payments to associate concerns etc. and should not be applied in a manner which will cause hardship in bonafide cases. AO must consider entire position dispassionately, judiciously and objectively from point ofview of prudent businessman and not capriciously, routinely, arbitrarily, subjectively and in a prejudiced manner with a view to collect more revenue [CIT v. EDWARD KEVENTER (PVT) LTD 86 ITR 370 (CAL) affirmed in 115 ITR 149 (SC). Relying upon aforesaid circular, Bombay High Court in CIT V. INDO SAUDI SERVICES (TRAVELS) PVT LTD 310 ITR 306, held that if revenue fails to demonstrate how tax is*

evaded by alleged payment of higher expenditure more particularly, if recipient of such payment is also taxed at the same/higher rate as the Assessee, Section 40A(2) cannot be called into aid. Aforementioned ruling is subsequently followed in CIT v. GOA MINERALS PVT. LTD. 396 ITR 452 (BOM). Therefore, if whole transaction is tax neutral in the sense that both Assessee and payee fall in the same tax bracket then there is no question of attempt to evade tax as laid down in ITO v. HDFC TRUSTEE MANAGEMENT LTD 10 ITR (TRIB)-OL (ITAT) (MUM) following ratio of pronouncement of Supreme Court in CIT v. GLAXOSMITHKLINE ASIA PVT LTD 195 TAXMAN 35 (SC). In present case, both Assessee and payee, Chiron India, are assessed to tax by same AO, Range 8(1), Mumbai, subjected to identical rate of corporate tax and paid substantial tax in assessment year under appeal [Chiron India made huge profits as reflected at pages 97, 136 of paper book volume 1 and thus there is neither any revenue leakage or evasion of tax and in the result, AO failed to establish factually that there is any attempt to evade tax except making a bald and unsupported statement to that effect in assessment order. In the result, ratio of aforestated judgments apply on all fours to Appellant- Assessee and hence addition be deleted on this ground alone;

b) Assessee earns average gross margin of 24 to 25% on other products traded with third parties in domestic market and is a direct internal comparable so as to justify 40% gross margin earned by Assessee on sale of Rabipur vaccine and thus must be taken into account while determining fair market value of Rabipur vaccine;

c) gross margin of 40% earned by Assessee on sale of Rabipur vaccine is also comparable with average gross profit margins of 18% earned by other pharmaceutical companies during financial year 2002-03 [page 39 of paper book volume 1];

d) on expiry of distribution agreement with Chiron India in February 2009, Chiron India appointed M/s Novartis Healthcare Limited [Novartis] as sole distributor of Rabipur vaccine and gross margin earned by Novartis is 36% which is lower than 40% clocked by Assessee vindicating that price of Rs. 127 per vial paid by Assessee is not excessive or unreasonable and in

this context heavy reliance is placed on points no (0) of paragraph 7 supra:

e) no disallowance under Section 40A(2) has been made by AO since assessment year 1999-00 and this arrangement has been accepted up to and including Assessment Year 2002-03 and adhering to well settled consistency principle, no addition can be made;

f) from commercial viewpoint, arrangement under consideration between Assessee and Chiron India is very successful for Assessee substantiated by fact that sales of Rabipur vaccine jumped from 39 crores in 1998 to 78 crores in 2002 and further to Rs. 100 crores in 2005 and Assessee has about 75% of market share resulting in substantial increase in profits;

g) in transfer pricing assessment of Chiron India, purchase price Rs. 127/- per vial paid by Assessee to Chiron India for domestic purchase of Rabipur vaccine has been substituted for Rs.92 per vial realized by Chiron India on export made to Chiron Behring, GMBH by Transfer Pricing Officer thereby resulting in contradictory and self-defeating stand of revenue; and

h) we heavily rely on CIT(A) order for Assessment Year 2004-05 deciding this issue in favour of Assessee wherein all aforesaid arguments are endorsed [page 141 of paper book volume 1] and points summarized from CIT(A)'s order in paragraph 10 supra.

36. On the other hand, Ld. DR relied on the order of the Ld. CIT(A) and objected to the submissions made by the Ld.AR of the assessee. He submitted that the difference between the selling price to the assessee and the export price to other concerns from Chiron India is considerable. This difference cannot be ignored and the assessee shifts its profit to other sister concern.

37. Considered the rival submissions and material placed on record, we observe that Assessing Officer has disallowed the portion of cost of purchase of vial, purchased from Chiron India, which is a subsidiary company of the assessee. Based on the information available on record, we observe that the subsidiary is a Joint venture between the assessee and Chiron USA with the holding ratio of 49:51 between them. As per the agreement for forming the above said JV in the form of subsidiary company ie., Chiron India, as per the terms of engagement, it is agreed to manufacture the Rabipur vaccine for the exclusive Indian/South Asia Market, Chiron India will produce the vaccine and sell the same to the assessee at the 60% of the selling price of the Assessee. Accordingly, the obligation of the assessee to market the same in the South Asia, which has demand of about 80 to 85% of the capacity of the Chiron India. The rest of the capacity are available to Chiron USA to market in the rest of World. From the record we observe that the assessee has purchased the vaccine at 60% of the selling price in India ie., at ₹.127/- as against the selling price of ₹.96/- to Chiron USA by the Chiron India. The Ld CIT(A)/AO has considered the above difference as excessive u/s 40A(2) of the Act.

38. In subsequent AY 2004-05, the respective CIT(A) has decided the issue in favour of the assessee by distinguishing point of view of the AO. After careful consideration of the fact on record, we are of the view that the Rabipur vaccine is unique and manufactured and marketed in the South Asia by the assessee with the agreement with the Chiron Group. The majority of the vaccines are sold in the India and adjacent countries. There is no equivalent vaccine manufactured by any other pharmaceutical companies. Therefore, Chiron Group of companies holding monopoly in this line of business, it shows that there is no comparable available for this vaccine. Therefore, it has to be analyzed independently and on commercial basis.

39. As per the JV agreement, the Chiron India will produce and market the same by the assessee company with full monopoly on the market, therefore there is no comparable. Then it has to be bench marked on the commercial terms only. As per the commercial understanding, Chiron India produces and sells 80 to 85% of the vaccines to assessee and rest of the capacity are utilized to manufacture and sells to Chiron USA having marketing right to the rest of the world. Therefore, the success of the venture depends upon the marketing of the vaccines in the South Asia,

where the assessee has the marketing rights. Further we observe that the assessee buys the vaccine at the 60% of the selling price of vaccine marketed by it. Since, the assessee has to buy the vaccine only from Chiron India, which supplies the same having monopoly over the product, it is left to the Chiron group of companies to decide on the pricing of the vaccines. They sell the vaccines to assessee at the cost of 60% of the selling price, which ultimately recovers its cost of manufacturing, which is also based on the JV agreement. The Chiron group markets the same at the lesser cost does not make, anyway, affects the marketability or achieving the profitability of the assessee in the whole marketing strategy of the Chiron Group. It is wrong on the part of the revenue authorities in invoking the provisions of section 40A(2) of the Act in this case. Even otherwise, the existence of the assessee depends on the JV agreement and majority of the vaccines are marketed only by the assessee and the business of the assessee depends on the supply of vaccines from Chiron India, it is like co existence and mutual dependence.

40. In the similar situation and facts, the Hon'ble Bombay High Court in the case of CIT *v.* Goa Mineral Pvt. Ltd., [2017] 396 ITR 452 (Bom.) (Goa Bench) held as under: -

"5. We have duly considered the rival contentions and we have also gone through the records. Section 40A(2)(a) of the Income Tax Act reads thus :

> *"(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub- section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction"*

6. On going through the said provisions, it clearly provides that in case the first part of the Section is satisfied, the question of refusing such charges when such amounts are not excessive would not at all arise. In the present case, the authorities below have concurrently found that the charges claimed by the respondent were not excessive as they were based on the charges fixed by the Barge Owners Association. As the findings of fact have been arrived at based on the documentary evidence on record whose authenticity has not been disputed by the appellant, we find that such findings cannot be said to be perverse. The learned counsel appearing for the appellant was unable to point out that the finding rendered by the authorities below is on the basis of misreading of the evidence or that any relevant document has been over-looked while arriving at such findings of fact. As already pointed out herein above, the findings of fact are based on the documentary evidence and consequently, this Court in the present appeals under Section 260 of the Income Tax Act cannot reappreciate the evidence to come to any contrary findings. As the appellant have failed to produce any evidence or material to show that the amount of charges were excessive, we are of the opinion that there is no infirmity committed by the Tribunal while coming to the conclusion that the amount charged are not excessive and as such do not come within the four corners of Section 40A(2)(a) of the Income Tax Act.

7. In fact, this Court in the judgment in the case of V. S. Dempo & Co. (P) Ltd., (supra) has observed at paras 6, 9 and 10 thus :

> *"6. In our view, in a business of export consistency of supply as well as quality of supply is important. In order to assure a consistent supply of material of the same quality the purchaser of a commodity may pay to a seller bound under a contract a little higher than the current rate. Furthermore, in case of yearly contracts by agreeing to bye goods at a specified rate the exporter is insulated from vagaries of any seasonal rise in the market rate. Therefore, unless the rate agreed is so very much excessive or unreasonable as to doubt the objective behind the agreement, it cannot be said that the rate, a little higher than the seasonal market rate is unjustified or amounts to diversion of profit. In this connection, the fact that the assessee as well as its subsidiary which is the seller are in the same tax bracket and pay same rate of tax is a fact which assumes importance. Admittedly, it is not a case of tax evasion inasmuch as if the rate would have been less, the assessee's profit would have been more, but the profits of the seller would have been less and both being taxable at the same rate, there would be no difference in the aggregate tax payable by the assessee and its subsidiary.*
>
> *9. Clause (a) of sub-section (2) of Section 40A of the Act provides that where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of the sub-section and the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as it so considered by him to be excessive or unreasonable, shall not be allowed as a deduction. The object of Section 40A(2) is to prevent diversion of income. An assessee who has large income and is liable to pay tax at the highest rate prescribed under the Act*

often seeks to transfer a part of his income to a related person who is not liable to pay tax at all or liable to pay tax at a rate lower than the rate at which the assessee pays the tax. In order to curb such tendency of diversion of income and thereby reducing the tax liability by illegitimate means, Section 40-A was added to the Act by an amendment made by the Finance Act, 1968. Clause (b) of Section 40A(2) gives the list of related persons. It is only where the payment is made by the assessee to the related persons mentioned in clause (b) of Section 40A(2) of the Act that the Assessing Officer gets jurisdiction to disallow the expenditure or a part of the expenditure which he considers excessive or unreasonable. Clause (b) of Section 40A(2) reads as under :

> *"40A(2)(b) The persons referred to in clause (a) are the following, namely:—*
>
> *(i) where the assessee is an individual any relative of the assessee;*
>
> *(ii) where the assessee is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;*
>
> *(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;*
>
> *(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;*
>
> *(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial*

interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(vi) any person who carries on a business or profession,—

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner, or member, has a substantial interest in the business or profession of that person.

Explanation.—For the purposes of this sub-section, a person shall be deemed to have a substantial interest in a business or profession, if,—

(a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profit) carrying not less than twenty per cent of the voting power; and (b) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession."

10. Learned Counsel for the appellant submitted that the present case falls under sub-clause (ii) or sub-clause (iv) of clause (b) of Section 40A(2). Subclause (ii) provides that where the assessee is a company, firm, association of persons or Hindu undivided family, any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member would be a related

person. In the present case, the assessee is a company and the seller is its subsidiary company. The seller i.e. the subsidiary company does not fall in any of the capacities mentioned under sub-clause (ii) of clause (b). Only a director of the company, partner of the firm, or member of the association or family or any relative of such director, partner or member is a related person, under subclause (ii) of clause (b) of sub-section (2). Another company, even if it is a subsidiary of the assessee , is not a related person within the meaning of sub-clause (ii) of clause (b) of Section 40A(2). Sub-clause (iv) of clause (b) of Section 40A(2) provides that in case of a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member is a related person. Again a subsidiary company does not fall in any of the class of persons mentioned in sub-clause (iv) of clause (b) of Section 40A(2). In law, a holding company is a member of subsidiary company and holds more than 50% equity share capital of the subsidiary company (except in cases where it controls the composition of the board of directors without holding majority of the shares). While the holding company is a member of its subsidiary company, the subsidiary company is not a member of the holding company. As, the subsidiary company was not a member of the assessee sub-clause (iv) of clause (b) of Section 40A(2) of the Act is also not attracted in the present case."

8. Taking note of the said observations, we find that in the present case, the learned Tribunal has found in the impugned order dated 18.02.2009 for the Assessment Years 2003-2004 that there is no evidence brought on record to show that the payment itself was excessive and it had enriched the individual Directors. It is also noted that the records reveal that there is no undue advantage by the Directors by the arrangement and

there is no loss to the Revenue as the subject amount has already been taxed in the hands of the HUF. It is further noted that the case of the HUFs has not been reopened and there is no reopening of the assessment of the individual Directors. It is also pointed out that the records reveal that the barges were taken on payment of time charter charges of income earned from the transportation of iron ore on the basis of per tonne rate as prescribed by the Goa Barge Owners Association. Considering the said factual position, the learned Tribunal observed that in the absence of any comparative case that the payments were excessive and unreasonable, the orders of the Revenue Authorities are liable to be set aside. The learned Tribunal also took note of the Circular dated 06.07.1968, particularly para 74 thereof and noted that there is nothing on record to show that either of the parties enriched by getting a fixed sum of money as charter hire charges and the tax due by the Assessee has been reduced by this arrangement. The learned Tribunal also found that as far as the other appeal being I.T.A. No. 48/PANJ/2006, the issues involved are identical and consequently, the appeal filed by the respondents came to be allowed.

9. In the present case, we find that the factual findings are that there is no excessive payment or that the arrangement has in any way enriched the respondents which cannot be faulted as they are based on the appreciation of evidence by the learned Tribunal and no perversity has been shown to such findings by the appellant.

10. In such circumstances and for the aforesaid reasons, we find that the substantial question of law framed is answered against the Revenue/appellant. Both the appeals stand accordingly rejected."

41. Respectfully following the above said decision of Hon'ble High Court and discussions in the above paras, we are inclined to allow the ground raised by the assessee.

42. With regard to, Ground No. 8 which is in respect of disallowance of ₹.87,61,130/- representing 24/25 of the payment made for encashment of leave. Brief facts relating to the above ground are, Prior to introduction of clause (f) to Section 43B, provision of leave encashment based on actuarial valuation was claimed and allowed as deduction to Assessee. In compliance of foregoing amendment, Assessee with effect from Assessment Year 2002-03, began to claim expense of leave encashment on payment basis which has been countenanced by Assessing Officer. In year under appeal, Assessing Officer observed that payment of leave encashment ₹.91,11,130/- cannot be allowed fully because it will amount to double deduction of same expenditure inasmuch as same is already allowed in earlier years on provision basis. AO observed in his order as under: -

> *"When a employee get leave encashment at the time of leaving the company, amount paid to him, is the accrued amount of leave salary through out the period of his service. Therefore, by claiming leave encashment on actual payment basis, the assessee is claiming a part of the leave encashment which was also claimed in the past based on the actuarial valuation report. It is worthwhile to note that the auditor in his tax audit report has raised similar issues.*
>
> *Explanation 3A to section 43B of the Act reads as under:*
>
> *"For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (e) of this section is allowed in computing the income referred to in section*

28 of the previous year in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

In view of the facts of the case the comments of the assessee himself it is established that the double deduction is being claimed by the assessee company. The only thing left is to determine the amount of double deduction, In this regard vide show cause letter dated 8.12.2005 the assessee was asked to explain as to what was the amount of leave encashment claimed in the past on the basis of actuarial valuation report in respect of the employees to whom leave encashment was paid during the year.

In response the assessee has explained its inability to arrive at the amount of leave encashment claimed in earlier years on account of retiring employees based on the actuarial valuation report."

43. The A.O. thereafter taking the normal tenure of the employee at 25 years concluded that 124 of the actual payment had been claimed in the past on the basis of actuarial valuation report.

44. Aggrieved with the above order, assessee preferred appeal before the Ld. CIT(A) and Ld. CIT(A) sustained the action of the Assessing Officer and held as under: -

In appeal, it has been argued that:

"It was pointed out that in the earlier years when the deduction was being allowed, the same was on the footing that the provision made by the appellant for the payment of leave

encashment in the future was made on the scientific basis and it represented the liability incurred till that date. Such provision was made on actuarial basis, which was not made per employee, identifying the actual amount required to be paid on account of leave earned during the particular year payable of a future date.

Thus it was submitted that the payment during the current year could not be identified being out of a provision of the particular year. Hence full deduction should be allowed even after considering the provision of Sec 43B of the Act".

DECISION:

I have carefully examined the issue and I find that there cannot be any dispute on the fact that when leave encashment is claimed on actual payment basis it also includes leave encashment claimed in the past based on the actuarial valuation report. In the absence of any other method of computing the sum which can be allowed, the method followed by the A.O. is approved. The disallowance of Rs. 87,61,113/- is therefore upheld. This ground is therefore decided against the appellant."

45. Aggrieved, with the order of the Ld. CIT(A), assessee is in appeal before us. At the time of hearing, Ld.AR of the assessee submitted that provision for leave encashment Rs.34,97,959/- is already suomotu disallowed in computation of income by Assessee. Moreover, payment Rs.91,11,130/- incurrent assessment year which is claimed as a deduction has no one to one co-relation, correspondence and juxtaposition with amounts already allowed on provision basis in earlier years since provision in previous years founded on actuarial valuation is done on a global basis and not against entitlement of any particular and

specific employee. In the result, no portion of actual payment effected during assessment year under appeal forms part of earlier years' provisions nor are such payments are identifiable, traceable and linked to such provisions as sought to be done by AO. Exercise undertaken by AO is in the realm of suspicion, conjecture, surmises and hypothesis which is not sufficient to sustain addition. Assessee prays that entire paid sum Rs.91,11,130/- be allowed as a deduction under Section 43B.

46. On the other hand, Ld. DR relied on the order of the lower authorities.

47. Considered the rival submissions and material placed on record, we observe from the submissions made and material available on record. We notice that the assessee has started adopting the amended provisions of section 43B and started claiming actual payments of leave encashment. However, until previous AY, it has claimed deduction based on Actuarial valuation by claiming on the basis of provisions created. Since the assessee has started adopting the expenses on actual payment basis, it is the duty of the assessee to declare the provisions created until previous assessment years and the same has to reversed in the current assessment year and start claiming on the basis of actual payments.

48. We observe that the AO has rejected the submissions of the assessee and disallowed the actual claim made by the assessee without any discussion on the reversal of provisions by the assessee. Before us Ld.AR of the assessee submitted that the assessee has reversed the provisions made. It is fact on record that the assessee has claimed the expenses on leave encashment on the basis of actuarial valuation until previous year and no specific details were submitted before us to adjudicate the issue on merit, since it is factual matter, in our considered view, it needs to be verified by the tax authorities on the aspect of status of opening provisions outstanding in the books of the assessee, which was based on the actuarial valuation, which needs to be reversed first before allowing any expenditure on actual basis. Therefore, we are inclined to remit this issue back to the file of Assessing Officer to determine the provisions outstanding in the books of the assessee and disallow the same during this year and allow the actual claim of the assessee on the basis of actual payment. Accordingly, we allow the ground raised by the assessee for statistical purpose.

49. With regard to, Ground No. 9 which is in respect of interest of ₹.81,83,620 allowed under section 244(1A) for AY 2001-02 & 2002-03

included in computing the income of the assessment when the said amounts were already withdrawn as per orders passed u/s 143(3) of the Act. Brief facts relating to the above ground are, the Assessing Officer in the assessment order made an addition of Rs. 81,83,620/-under the head Income from Other sources'. The A.O. noted that the assessee had not subjected the interest of Rs. 49,02,558/- and Rs 32,81,032/- to tax on the plea that such interest was withdrawn on completion of regular assessment u/s 143(3) of the IT Act. The assessee submitted before AO as under:

> *"Our clients are surprised that your Honour has proposed to bring to tax both these amounts as income from other source in this assessment by ignoring the fact that both the amounts (of interest) have been already withdrawn by your Honour in the respective assessment order passed u/s 143(3) of the Act. The amounts were not credited to the P&L A/c of this assessment since our clients had already received notices u/s 143(2) for these years by the time the accounts were finalized and keeping in view the income determined in assessment made for earlier assessment years, interest allowed to our clients in terms of intimation issued u/s 143(1)(a) for any assessment in the past has always been fully withdrawn in the assessment order passed u/s 143(3) of the Act. In the circumstances, our clients submitted that they should be allowed to offer to tax interest allowed to them under the provisions of the Act only when the finality has reached for such an allowance, and on the basis of having allowed in the intimation."*

50. However, the A.O. rejected the above plea by stating that the assessee is to follow the mercantile system of accounting and the receipts to be bound to account for those which have accrued. The A.O. also rejected the plea that interest gets nullified on the passing of the assessment order u/s 143(3) by stating that such a prospective liability can only be contingent in nature and there after the taxability of receipt by way of interest on income tax refund is not contingent upon the future levy of interest. It has also been stated that under the I.T.Act, the assessee always gets interest after the assessee having been finalized.

51. Aggrieved with the above order, assessee preferred an appeal before Ld.CIT(A) and after considering the assessee's submissions, he dismissed the ground and held as under:

> *The issue has been examined and the plea of the appellant is rejected. The scheme of issue of refund alongwith interest is embedded in the I.T.Act. It is also embedded in the I.T.Act that as a consequence to the order u/s 143(3) of the I.T.Act, such amounts have to be adjusted against the demands if any. Further, it is also embedded in the Act that the appellant is entitled to interest on the resultant refund if any, which would also include part of the interest which the appellant was entitled to.*
>
> *In view of the above facts and the express provisions of the I.T.Act, the A.O. was justified both on facts and in law to treat the sum of Rs 81,83,620/-as income of the appellant. This ground is therefore decided against the appellant.*

52. At the time of hearing, Ld. AR of the assessee submitted that this issue is decided in favour of the revenue and brought to our notice decision of the Special Bench in the case of Avada Trading Co. Pvt. Ltd., *v.* ACIT (2006) 100 ITD 131 (Spl. Mumbai).

53. On the other hand, Ld.DR agreed with the submissions of the assessee.

54. Considered the rival submissions and material placed on record, we observed that in the case of Avada Trading Co. Pvt. Ltd., v. ACIT (supra), the Special Bench of the Mumbai Tribunal held as under:

> *"14. It has been apprehended by assessee's counsel that assessee would be without remedy if the interest is reduced by virtue of assessment under Section 143(3). This apprehension, in our opinion, is unfounded. If interest is reduced by virtue of Sub-section (3) of Section 244A on account of assessment under Section 143(3), the interest granted in earlier year gets substituted and it is the reduced amount of interest that would form part of income of that year. Thus, it would amount to mistake rectifiable under Section 154 of the Act. In our opinion, if the basis, on which income was assessed is varied or ceases to exist, then such assessment would become erroneous and can be rectified. This can be explained with an example. For instance, land in a village belonging to various persons is acquired by Government for some development works and the compensation is awarded by the Collector with interest, if any. But one of the land holders challenges the acquisition proceedings in the High Court and later on succeeds as the acquisition is declared illegal. By virtue of such High Court order,*

such compensation has to be returned and Government will have to restore the land to the villagers. Therefore, if capital gain has been assessed in the hands of some of the persons where lands were acquired, such assessment would become patently erroneous, as the basis itself has ceased to exist. Such assessment would, therefore, amount to mistake, which, in our opinion, can be rectified. Similarly, any income assessed may become non-taxable by virtue of retrospective amendment and consequently, erroneous assessment can be rectified. Therefore, in our humble opinion, if the interest granted under Section 244A(1) is varied under Sub-section (3) of such section, then the interest originally granted would be substituted by the reduced/increased amount as the case may be. Thus, income on account of interest if assessed can be rectified under Section 154.

15. In view of the above discussion, we are of the view that interest on refund under Section 244A(1) would be assessable in the year in which it is granted and not in the year in which proceedings under Section 143(1)(a) attain finality."

55. Respectfully following the above said decision, this issue is decided in favour of the revenue. Accordingly, this ground is dismissed.

56. With regard to, Ground No. 10 which is in respect of enhancement of long term capital gain on account of FMV as on 01.04.1981 to ₹.3,24,40,774/-. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the department and against the assessee. He brought to our notice order of the Coordinate Bench in

assessee's own case in ITA.No. 8978/Mum/2004 dated 23.07.2014 (Para No. 9). Copy of the order is placed on record.

57. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

58. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the department for the A.Y. 2001-02. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 8978/Mum/2004 dated 23.07.2014 held as under: -

> *"9. Ground no. 4 is in regard to fair market value as on 01.04.1981 for computation of LT capital gain on sale of 1st phase of land at Muind to Nirmal Lyfestyles Pvt. Ltd. It was fairly conceded by the Ld. AR that this issue is covered by the decision of the Tribunal in assessee's own case for A.Y. 1998-99 and 1999-2000 and 2000-01 against the assessee. Therefore, respectfully following the order of the Tribunal in assessee's own case, we dismiss this ground of assessee and decide in favour the Department.*

59. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in previous Assessment Year is respectfully followed, ground raised by the assessee is accordingly dismissed.

60. With regard to Ground No. 11 which is in respect of curtailment of deduction u/s. 80HHC and part deduction of DEPB entitlement of ₹.1,68,15,592/-.

61. Ld.AR of the assessee brought to our notice that Sales tax set off/refund Rs.42,49,253/- and bad debts recovered Rs. 1,12,625/- are not to be reduced under Explanation (baa) from profits of business because they do not constitute receipts covered by said explanation. Issues of sales set- off/refund and bad debts recovered are held against Assessee by Tribunal in Assessee's own case for A.Y. 2002-03 (on the basis that the same was held by ITAT in earlier years). In respect of sales tax set- off/refund it is submitted that such benefit actually and really constitutes reduction in cost of purchases and bad debts recovered arises directly from business and consequently, both items form part of operational income not liable to be reduced from profits of business and reliance, in this connection, is placed on decision of jurisdictional High Court in CIT V. Pfizer India [330 ITR 62]. Further, he submitted that 90% of Sale of scrap Rs. 19,48,232/- is to be reduced under Explanation (baa) from profits of business which controversy is adjudicated in favour

of department by Tribunal in Assessee's own case for Assessment Year 2002-03 and earlier years.

62. Ld.AR of the assessee submitted that Duty Entitlement Pass Book [DEPB] does not fall within any of clauses covered by Section 28(iiia) to 28(iiie) and consequently, ought not to be reduced from "profits of business" as defined in Explanation (baa) because it is specifically covered by Section 28(iv) which position is accepted by Assessing Officer in order giving effect for Assessment Year 2002-03 pursuance to Tribunal order for that assessment year. Therefore, following same view, DEPB Rs. 1,68,15,592/- should not reduced from profits of business under Explanation (baa) and deduction under Section 80HHC computed accordingly. Copy of order giving effect dated 07.11.2022 for AY 2002-03 was handed over across the bar during course of hearing on 24.08.23.

63. Furthermore, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the department on sales tax refund and bad debts and on DEPB issue in favour of the assessee. He brought to our notice order of the Coordinate Bench in assessee's own

case in ITA.No. 3092/Mum/2006 dated 11.08.2021 (Para No. 41, 45, 46 & 47). Copy of the order is placed on record.

64. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

65. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3092/Mum/2006 dated 11.08.2021 held as under: -

> *"41. The same view was reiterated by the Tribunal while deciding assessee's appeal in assessment year 2001-02 (supra). That being the case, respectfully following the aforesaid decisions of the co-ordinate bench, we uphold the decision of learned Commissioner (Appeals) on the issue. Accordingly, ground 7(a) is dismissed.*
>
> *45. Thus, the only issue which survives now is regarding availability of deduction under section 80HHC of the Act in respect of receipts from DEPB entitlement. The core issue which needs to be looked into is, whether DEPB entitlement is hit by Explanation (baa) of section 80HHC, so as to, reduce 90% of such receipt from business profit for computing deduction under section 80HHC of the Act. As could be seen from the impugned assessment order, in course ofassessment proceedings, the assessee, vide letter dated 07-12-2004 has categorically stated that DEPB entitlement is in the nature of export incentive covered under section 28(iiib) of the Act. Further, the assessee*

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

46. Thus, as could be seen from the aforesaid decision of learned Commissioner (Appeals), he has not at all addressed the reasoning of the assessing officer that DEPB entitlement falls under section 28(iv) of the Act. Learned Commissioner (Appeals) has moved in a completely different direction by holding that DEPB entitlement received and utilized during the year would not be covered under Explanation (baa) of section 80HHC of the Act. We fail to understand, how and why DEPB entitlement only to the extent of received and utilized during the year would not be covered under Explanation (baa) of section 80HHC of the Act. In our view, the nature and character of DEPB entitlement would remain same, whether it is utilized or unutilized. Further, the reasoning of the assessing officer that DEPB entitlement is covered under section 28(iv) requires thorough examination. It is also noticed, while deciding identical issue in assessee's own case in assessment year 2000-01 (supra), the Tribunal has directedthe assessing officer to compute deduction on DEPB license by following the ratio laid down by the Hon'ble Supreme Court in case of Topman Exports vs CIT (supra). For better appreciation, the observations of the Tribunal in this regard are reproduced below:-

> *"19. Ground No.(vii) is regarding directing the AO to calculate deduction u/s.80HHC without reducing 90% of the DEPB license sold without appreciating the facts of the case. This issue has been decided in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Topman Exports Vs. CIT, 342 ITR 49 (SC), wherein the Hon'ble Supreme Court has held as under :-*

The aforesaid discussion would show that where an assessee has an export turnover exceeding Rs. 10 crores and has made profits on transfer of DEPB under clause (d) of section 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-section (3) of section 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business under Explanation (baa) to section 80HHC of the Act and there is - , nothing in Explanation (baa) to section 80HHC to show that this .^j-benefit of exclusion of a smaller figure from "profits of the business" will not be available to an assessee having an export turnover exceeding Rs. 10 crores. In other words, where the export turnover of an assessee exceeds Rs, 10 crores, he does not get the benefit of addition of ninety per cent, of export incentive under clause (Hid) of section 28 to his export profits, but he gets a higher figure of profits of the business, which ultimately results in computation of a bigger export profit The High Court, therefore, was not right in coming to the conclusion that as the assessee did not have the export turnover exceeding Rs, 10 crores and as the assessee did not fulfill the conditions set out in the third proviso to section 80HHC(iii), the assessee was not entitled to a deduction under section 80HHC on the amount received on transfer of the DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of the DEPB under section 28(iiid) would not include the face value of the DEPB. It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute and if as per the words used in Explanation (baa) to section 80HHC read with the words used in clauses (iiid) and (iiie) of section 28, the assessee was entitled to a deduction under section 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.*

The impugned judgment and .orders of the Bombay High Court are accordingly set aside. The appeals are. allowed

to the extent indicated in this judgment. The Assessing Officer is directed to compute the deduction under section BOHHC in the case of the appellants in accordance with this judgment There shall be no order as to costs."

19.1 We have considered rival contentions and perused the record. As the issue is covered by the decision of the Hon'ble Supreme Court in the case of Topman Exports (supra), respectfully following the same, we direct the AO to compute deduction on DEPB since license sold in terms of decision in the case of Topman Exports (supra).”

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

Hon'ble Supreme Court in case of Topman's Exports vs CIT (supra). The restoration of this issue to the assessing officer is also essential, keeping in view the observations of the Tribunal in assessment years 2000-01 and 2001-02 and the compliance made by the assessing officer to the directions of the Tribunal in those assessment years. Accordingly, we set aside the issue to the assessing officer for deciding afresh after due opportunity of being heard to the assessee. Ground 7(c) is allowed for statistical purposes."

66. Respectfully following the above decision and following the principle of consistency, the view taken by the Coordinate Bench in previous Assessment Year is respectfully followed, Assessing Officer is directed to allow the DEPB claim and sustain the additions made on sales tax refund and bad debts as per the ratio as directed by the Tribunal in assessee's own case for the A.Y. 2002-03. Therefore, the claim of the assessee is partly allowed.

67. With regard to, Ground No. 12 which is in respect of adjustment of ₹.7,71,47,232/- under section 92C(4) of the Act. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 3092/Mum/2006

dated 11.08.2021 (Para No. 2 to 8). Copy of the order is placed on record.

68. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

69. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3092/Mum/2006 dated 11.08.2021 held as under: -

> *"2. In ground 1, assessee has challenged addition made on account of adjustment to the arm's length price (ALP, hereafter) of export commission paid to the overseas associated enterprises (AE).*
>
> *3. Briefly the facts are, the assessee is a subsidiary of Aventis Pharma Holding GmbH, which, in turn, is a wholly owned subsidiary of Hoechst AGTE. As stated by the Transfer Pricing Officer (TPO, in short), assessee is primarily engaged in manufacture and marketing of formulations across the therapeutic segment of anti infective, arthritis, cardiology, central nervous system, metabolism, oncology and respiratory. During the year under consideration, the assessee had entered into various international transactions with its AEs, such as, imports of actives/formulations from AE, export of formulations/bulk drugs to AE, payment of commission to Aventis Germany, reimbursement of expenses, purchase of shares, purchase of patent rights and trademarks from AE in*

Germany and France, reimbursement of expenses from AE. As it appears, the assessee aggregated the transactions relating to import and exports of active formulations, bulk drugs, payment of commission, etc. and benchmarked them in the transfer pricing study report applying transactional net margin method (TNMM). Since, the operating margin shown by the assessee at 13.83% was more than the mean operating margin of the comparable companies worked out at 7.69%, the transactions were claimed to be at arm's length. Apparently, the TPO accepted the benchmarking of the assessee in respect of all international transactions, except, payment of export commission to AE. Insofar as this transaction is concerned, the TPO has treated it as a completely independent and separate transaction and proceeded to verify whether the export commission paid at 12.5% of the sales is at arm's length or not. In response to query raised, the assessee furnished a detailed submission along with supporting evidence justifying its claim that commission paid at 12.5% on sales is at arm's length. The TPO, however, did not accept the submissions of the assessee. After rejecting the benchmarking of the assessee, insofar as it relates to payment of export commission, the TPO observed that the assessee has not furnished any evidence to demonstrate that the AE, in any way, has helped in promoting the sales of the assessee. Thus, he was of the view that in such circumstances no commission payment is warranted. However, considering the quantum of export sales of the assessee and the services rendered by the AE, the TPO ultimately concluded that arm's length export commission of 3% on sales can be allowed. Accordingly, out of the total export commission paid of Rs.11,12,85,794/-, the TPO allowed an amount of Rs.2,97,08,590/-. The differential amount of Rs.8,15,77,203/- was proposed for adjustment to the ALP. The adjustment proposed by the TPO was added to the income of the assessee in the assessment order. The assessee contested the aforesaid addition before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) determined the arm's length rate of commission at 5% on estimate basis. Thus, learned Commissioner (Appeals) granted partial relief to the assessee.

4. Shri J. D. Mistry, learned senior counsel appearing for the assessee submitted, while the assessee has benchmarked the payment of export commission by applying one of the prescribed methods, both, the TPO and learned Commissioner (Appeals) have determined the ALP purely on adhoc/estimate basis. He submitted, while doing so, both the TPO and learned Commissioner (Appeals) have failed to appreciate various documentary evidences filed by the assessee to demonstrate rendition of service by the AE for facilitating the export sales. Drawing our attention to various documentary evidences placed in the paper book, he submitted, the progressive growth in export sales clearly indicates rendition of service by the AE. He submitted, the assessee has specifically entered into an agreement with the AE for availing services for its export sales. He submitted, in pursuance to such agreement, the AE has rendered services to the assessee. He submitted, the payment of export commission at 12.5% on sales was also approved by the Reserve Bank of India (RBI) and is within the outer limit fixed by RBI in circular No.17 dated 19th May, 1999. Therefore, the payment of export commission should be considered to be at arm's length. He submitted, since payment of commission is closely linked to the transactions of exports and imports, they have to be aggregated for the purpose of benchmarking. Whereas, the TPO has selectively segregated payment of commission as an independent transaction for benchmarking while accepting the other transactions. He submitted, when the TPO has accepted TNMM as the most appropriate method in respect of other closely linked transactions, he should not have segregated the payment of commission. The learned senior counsel submitted, the assessee has been paying export commission from assessment year 1992-93 onwards at the very same percentage and no adjustment has ever been made to the price of commission payment. He submitted, in the year 1999-2000, the TPO made similar adjustment; however, learned Commissioner (Appeals) allowed the entire commission paid at 12.5% finding it to be at arm's length. He submitted, in assessment year 2005-06, the TPO himself accepted the export commission paid at 12.5% to be at arm's length. Thus, he submitted, rule of consistency has to be followed.

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

6. We have considered rival submissions in the light of decisions relied upon and perused materials on record. Undisputedly, assessee, during the year, had entered into various international transactions with its overseas AE. Insofar as import and export of formulations and bulk drugs and payment of export commission to the AE in Germany are concerned, the assessee treated them as closely linked and after aggregating them benchmarked under TNMM. It is evident, the assessee had entered into an agreement with its overseas AE in Germany termed as 'export guarantee agreement' for exploring foreign market and facilitating its export sales. In terms with the agreement, the assessee has agreed to pay commission at 12.5% to the AE towards service rendered by the AE. Undisputedly, in the benchmarking done under TNMM, the transactions relating to import and export of formulations and bulk drugs as well as payment of export commission was found to be at arm's length. Before the TPO, the assessee has also furnished supporting evidence to demonstrate that assessee's foreign exchange outflow at 12.5% is much lesser than similar foreign exchange outflow of comparables at 34.05%.

7. Thus, it is patent and obvious, not only the assessee has benchmarked the subject transaction by adopting one of the methods prescribed under the statute, but, in course of proceedings before the TPO assessee has also furnished various other evidences to support its benchmarking and to further demonstrate that export commission paid at 12.5% is at arm's length. Whereas, the TPO has determined ALP of commission at 3% purely on adhoc/estimate basis without following any of the prescribed methods. Though, the TPO has observed that the assessee failed to furnish any direct documentary evidence to demonstrate that services were rendered by the AE to warrant payment of commission; however, he has immediately contradicted himself by stating that the AE has rendered nominal services. Thus, it is very much clear, the TPO while

rejecting export commission paid at 12.5% and proposing adjustment, has not followed the statutory mandate. Rather, the decision of the TPO in determining the ALP of export commission at 3% is without any basis and purely on conjectures and surmises. The TPO has not shown any valid reason why assessee's claim that the transactions relating to import and export of formulations and bulk drugs as well as payment of export commission being closely linked, should not be aggregated together for benchmarking purpose.

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

70. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in previous Assessment Year is respectfully followed and ground raised by the assessee is accordingly allowed.

71. In the result, appeal filed by the assessee is partly allowed as indicated above.

ITA.No. 1302/MUM/2007 (Revenue Appeal)

72. Revenue has raised following grounds in its cross appeal: -

> *"1. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to exclude the excise duty of Rs. 47,32,23,552/- from total turnover for computation of deduction u/s 80HHC of the IT Act without appreciating the facts of the case."*
>
> *2. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to exclude an amount of Rs 79,34,650/- being tool manufacturing and other service charges from total turnover for computation of deduction u/s. 80HHC of the I.T. Act."*
>
> *3. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the disallowance made on account of sales tax set off of Rs. 42,49,253/- and receipts on sale of scrape of Rs. 19,48,232/- in determining the adjusted profits of the business without appreciating the facts of the case."*

4. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in taking indirect cost attributable to trading exports at Rs 4,39,568/- instead of Rs 16,39,892/- The CIT(A) erred in directing the Assessing Officer to recomputed the deduction in trading export profit, without appreciating the facts of the case."

5. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in not upholding the Assessing Officer's action in not considering amount of DEPB entitlement of Rs. 1,68,15,192/- as being eligible for the purpose of computing deduction under the proviso to section 80HHC(3) and or as part of profits of business itself

6. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in not upholding the Assessing Officer not to deduct the deduction u/s 801B amounting to Rs. 8,21,42,894/- while determining profit eligible for deduction u/s. 80HHC(3) of the Act, without appreciating the facts of the case."

7. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in not upholding the Assessing Officer's action in taxing the receipts of Rs. 14,26,834/- from Chiron Behring Vaccines Pvt. Ltd (CBVPL) under the head 'Income from house property without appreciating that the assessee has accepted before the CIT(A) that there is letting out of staff quarters to employee of CBVPL."

8. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to allow necessary relief by reducing the discount from the total turnover for computation of deduction u/s. 80HHC of the Act, without giving any reason why the gross rate sale before discount should not be regarded as total turnover."

9. "On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting disallowance in determining adjusted profits of the business on account of sale of scrapped asset (Rs. 2,15,608/-), profit on sale of long term investment (Rs. 51/-), dividend on trade investment (Rs. 1,22,50,000/-), refund of contribution from Hub Educational & Welfare fund (Rs. 19,51,237/-), sale proceeds of Mira Road flat considered as

short term capital gain (Rs. 3,00,000/-) and especially in deleting the disallowance after stating that the appellant has agreed to the fact that the issue is covered against the appellant in the CIT(A)'s order dt. 13/03/2006 for A.Y. 2002-03."

10. "The appellant prays that the order of the CIT(A) on the above ground to be set aside and that of the ITO/AC/DCIT be restored. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

73. With regard to, Ground No. 1 which is in respect of excise duty of ₹.47,32,23,552/- is not to be excluded from the total Turnover of the Business. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 3187/Mum/2006 dated 11.08.2021 (Para No. 63 to 66). Copy of the order is placed on record.

74. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

75. Considered the submissions and material placed on record, we observe from the record the identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate

Bench of the Tribunal in ITA.No. 3187/Mum/2006 dated 11.08.2021 held as under: -

> *"63. In ground 6, the department has challenged the decision of learned Commissioner (Appeals) in directing the assessing officer to exclude excise duty, set off of sales tax refund and receipts from sale of scrap as part of total turnover and net profit. As agreed before us by learned counsels appearing for the parties, the issues raised in this ground have been decided by the Tribunal in the preceding assessment year. As could be seen from the order passed by the Tribunal in assessee's own case in assessment year 2000-01 vide ITA No.3703/Mum/2004 and others dated 16-04-2014, the Tribunal has held that excise duty has no element of profit; hence, cannot be included in total turnover for computing deduction under section 80HHC. For better appreciation, the relevant observations of the Tribunal are extracted hereunder for convenience:-*
>
> > *"16. Ground No.(iv) in Revenue's appeal is regarding directing the AO to exclude the excise duty from the total turnover while computing the eligible deduction u/s.80HHC. This issue has been decided by the Hon'ble Supreme Court in the case of CIT Vs. Laxmi Machine Works, 290 ITR 667(SC), wherein it was held that excise duty has no element of profit, therefore, not includible in total turnover for computing deduction u/s.80HHC. Respectfully, following the decision of the Hon'ble Supreme Court, we do not find any infirmity in the order of CIT(A) directing for exclusion of excise duty from the total turnover for computing deduction u/s.80HHC."*
>
> *64. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) on the issue.*

76. Further, the Coordinate Bench in assessee's own case for the A.Y.2001-02 in ITA.No. 8746/Mum/2004 held as under: -

> *"19. Ground No.(iv) in Revenue's appeal is regarding directing the AO to exclude the excise duty from the total turnover while computing the eligible deduction u/s.80HHC. This issue has been decided by the Hon'ble Supreme Court in the case of CIT Vs. Laxmi Machine Works, 290 ITR 667(SC), wherein it was held that excise duty has no element of profit, therefore, not includible in total turnover for computing deduction u/s.80HHC. Respectfully, following the decision of the Hon'ble Supreme Court, we do not find any infirmity in the order of CIT(A) directing for exclusion of excise duty from the total turnover for computing deduction u/s 80HHC."*

77. Respectfully following the above decision and following the principle of consistency, the view taken by the Coordinate Bench in previous Assessment Year is respectfully followed, ground raised by the revenue is accordingly dismissed.

78. With regard to, Ground No. 2 which is in respect of Ld.CIT(A) erred in excluding Toll Manufacturing charges and services charges (Processing Charges) of ₹.79,34,650/- from the total turnover of the business. Brief facts relating to the above ground are, Assessee had considered Rs.34,34,950 representing income from processing charges as part of the turnover and the balance amount of Rs.44.99,700 representing service charges as Business income, 90% of which was excluded in computing 80HHC deduction in view of Expanation (baa). The AO has considered the entire amount as part of turnover and also excluded 90% of the

Rs.44,99,700 from computation of business profit. The assessee submitted that the above amount should be excluded considering the fact that the above said amount was already included in the total turnover, this amounts to double addition in the total turnover.

79. Aggrieved, the assessee preferred an appeal before Ld CIT(A) and made the submissions to excluded the same. After considering the submissions, Ld CIT(A) directed the AO to exclude the same by observing as under:

> *"The issue has been examined. It is apparent from the facts of the case that the sum of Rs.44,99,700/- representing service charges cannot be classified as operational income and can therefore not become a part of the total turnover. The appellant has correctly applied explanation (baa) to section 80HHC wherein 90% was excluded. Under the circumstances, it is held that the A.O. erred in treating the sum of Rs. 79,34,650/- as part of the turnover and the A.O. is therefore directed to exclude the amount in computing the turnover.*
>
> *Coming to the amount of Rs.34,34,950/- representing processing charges the A.O shall allow necessary relief to the appellant after verifying the claim that this amount had ready been included in the total turnover.*

80. Ld. DR relied on the order of the Assessing Officer and prayed to set-aside the order of the Ld. CIT(A).

81. Ld.AR of the assessee submitted that total amount ₹.79,34,650/- comprises Tool manufacturing charges ₹.34,34,950/- and service charges (processing charges) ₹.44,99,700/- both of which are reduced from profits from business applying Explanation (baa) to Section 80HHC and consequently, both ought not to be reckoned for calculating total turnover for purpose of Section 80HHC. Ld.CIT(A), therefore, held that both are to be reduced from total turnover for purpose of Section 80HHC in line with that they are not considered as "profits of business". It is prayed that order of Ld.CIT(A) be affirmed on this count and this ground of revenue be dismissed.

82. Considered the rival submissions and material placed on record, we observe that the other income declared by the assessee in its claim under section 80HHC, which includes tool manufacturing and other service charges, these income are additional income generated in the business and may not be part of total turnover or export turnover but it is an additional income earned by the assessee. These are not part of turnover but can be considered as additional income eligible to be claimed under clause (baa) of explanation to section 80HHC of the Act. Therefore, the

findings of the Ld CIT(A) are proper and as per law. Hence, we are inclined to dismiss the ground raised by the revenue.

83. With regard to, Ground No. 3 which is in respect of Ld.CIT(A) erred in deleting Sales Tax set off of ₹.42,49,253/- and sale of scrap of ₹.19,48,232/- for determining adjusted profits of the business. Brief facts relating to the above ground are, the assessee has claimed the above income under explanation (baa) to section 80HHC of the Act and the AO has rejected the same. We observe that this issue was decided against the assessee by Ld CIT(A) as well as by the coordinate bench in the earlier AYs. This ground raised by the revenue is misconceived. At the time of hearing, both the counsels agreed that the issues were decided by the Ld CIT(A) dismissing the plea of the assessee and this ground is misconceived. Hence this ground of appeal raised by the revenue is dismissed.

84. With regard to, Ground No. 4 which is in respect of Ld.CIT(A) erred in taking Indirect cost attributable to trading export at ₹.4,39,568/- instead of ₹.16,39,892/-. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the department and

against the assessee. He brought to our notice order of the Coordinate Bench in assessee's own case in ITA.No. 3187/Mum/2006 dated 11.08.2021 (Para No. 69 to 72). Copy of the order is placed on record.

85. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

86. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the revenue for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3187/Mum/2006 dated 11.08.2021 held as under: -

> *"69. In ground 8, the department has challenged the direction of learned Commissioner (Appeals) regarding re-computation of indirect cost attributable to export of trading goods for deduction under section 80HHC.*
>
> *70. Learned Senior Counsel for the assessee submitted, the issue has been decided in favour of the revenue in the preceding assessment year. The learned departmental representative agreed with the aforesaid submission of the assessee.*
>
> *71. As we find from material on record, identical issue came up for consideration before the Tribunal in assessee's own case for assessment years 1998-99 to 2001-02. In the latest order passed for the assessment year 2001-02 in ITA Nos. 8978 & 8746/Mu/2004 dated 23-07-2014, the Tribunal following its earlier orders has held as under:-*

"22.3 We have considered rival contentions and found from the record that exactly similar issue has been dealt by the Tribunal in assessee's own case for the assessment year 1998-99 in ITA No.4179/Mum/2003, vide order dated 12-12-2012, wherein the Tribunal has upheld the action of AO for computing profit of trading export after having detailed discussion, which reads as under:-

"10 We have considered the rival submissions as well as the relevant material on record. Though, the issue before us is limited only to the extent of a finding of the CIT(A) pertaining to the expenditure incurred at Hyderabad branch office to be taken as part of indirect cost for working out the deduction u/s 80HHC (3}(b), However, the said finding of the CIT(A) /s based on the view taken by the Commissioner of Income Tax(Appeals) that u/s sub.sec. 3(b) of sec. 80HHC, indirect cost attributable to export includes the items of expenditure only if it has some connection, link, attributes to - ' export. This proposition propounded by the CIT(A) is apparently against the provisions of section 80HHC(3)(b). If the provisions of sec 80HHC(3)(b) are read in conjunction with clause (e) of Explanation to the said sub. section, it is clear that the indirect cost . for the purpose of allocation under sub.sec (3) shall be taken as the total indirect cost incurred for the total turnover (local + export) and the same has to be allocated in the ratio of export turnover of trading goods to the total turnover

10.1 For ready reference, we quote sec 80HHC(3)(b) and clause (e) of Explanation as under: [(3) For the purposes of sub-section (1) — (a)..... : (b) where the export out of India is of trading goods, the profits ' derived from such export shall be the export tumover45 in respect of such trading goods as reduced by the direct costs and indirect costs attributable to such export; (c)..... , Explanation.—For the purposes of this sub-section,— (a)..... (b) ..... (d)

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

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

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

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

10.5 Though the revenue has not filed any appeal against the findings of the CIT(A); however, the revenue, being the respondent can raise an plea against sustainability of

the order of the CIT(A); but the effect of such plea would be only to the extent of defence against the appeal and if the respondent/revenue succeeds in the said ground/plea, then the appeal of the appellant/assessee would fail.

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

10.7 The scope of Rule 27 of ITAT Rules has been discussed by the Hon'b!e jurisdictions! High Court in the case of Bamasi (B.R.) v. Commissioner of Income-tax reported in 83 ITR 223 as under, "But even if the assesses had not made such a statement, the above judgment shows that the assesses would be entitled to raise a new ground, provided it is a ground of law and does not necessitate any other evidence to be recorded, the nature of which would not only be a defence to the appeal itself, but may also affect the validity of the entire assessment proceedings. If the ground succeeds, the only result would be that the appeal would fail. The acceptance of the ground would show that the entire assessment proceedings were invalid, but yet the Tribunal which hears that appeal would have no power to disturb or to set aside the order in favour of the appellant against which the appeal has been filed. The ground would serve only as a weapon of defence against the appeal, if the respondent has not himself taken any proceedings to challenge the order in appeal, the Tribunal cannot set aside the order appealed against. That order would stand and would have full effect in so far as it is against the respondent. The Tribunal refused to allow the assesses to take up this ground under an

incorrect impression of taw that if the point was allowed to be urged and succeeded, the Tribunal would have not only to dismiss the appeal, but also to set aside the entire assessment. The point would have served as a weapon of defence against the appeal, but it could not be made into a weapon of attack against the order in so far as it was against the assesses.

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

> *28. After careful consideration of the submission, it has to be said that the section of the Assessing Officer does not appear to be correct. What cannot be ignored is that subsection (3}(b)deduction inter-alia of indirect cost attributable to such exports. The phrase attributable to such export cannot be missed out. Therefore, an item of expenditure can be taken as cost for the purpose only if it has some connection, link, attributes to the export, if the expenditure is totally disconnected with the export activity, it cannot be taken as part of the indirect costs, Therefore, the Assessing Officer has definitely gone beyond what is provided in the Act to workout the indirect cost attributable to export of trading goods.*
>
> *29. In order to determine correctly the indirect cost, the appellant's representative was asked to furnish the details of trading export activities. In this regard the details reveal that the trading goods exports comprise partly of goods imported and partly purchased locally either from Mumbai or elsewhere. It was submitted that the material department of the company procured items of trading exports. All actions and formalities for exports are carried out by Export Department. Expenses of both these departments are booked as Head Office Expenses. The appellant's representative furnished the details of Head Office*

Expenses. It was claimed that some of the expenses incurred therein are for domestic activities and only expenditure amounting to Rs.29,04,71,863/- is such that is to be taken as somehow attributable to exports to be taken as part direct expenses. A perusal of the details show that as far as the Head Office Expenses is concerned, the working thereof is correct and hence needed to be accepted.

30 However, the appellant company exported trading goods during the year that were procured from Hyderabad and Mumbai. At both the places the appellant company has branch offices apart from the head office being located in Mumbai. Though it was claimed that the job of procurement of trading goods exported are carried out from head office that is having separate procurement and export divisions, while the involvement of branch office at Mumbai can be ruled out with a specific office for the purpose located therein, in respect of the branch office at Hyderabad, the other place for procurement, the same cannot be accepted. Hence the expenditure incurred at Hyderabad branch office to the extent not directly related to domestic sales is also required to be taken as part of the indirect cost for working out deduction under section 80 HHC (3)(b) of the Act, The Assessing Officer shall rework out the indirect cost under the section accordingly.

" x x x x x x

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

X X X X X X X

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

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

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

87. Respectfully following the above decision and following the principle of consistency, the view taken by the Tribunal in previous Assessment Year is respectfully followed, ground raised by the revenue is accordingly allowed.

88. With regard to, Ground No. 5 which is in respect of DEBP entitlement of ₹.1,68,15,.192/- should be reduced under the proviso to Section 80HHC(3) and or should not be part of profits of the business. Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal and decided the issue in favour of the assessee and against the department. He

brought notice order of the Coordinate Bench in assessee's own case in ITA.No. 3187/Mum/2006 dated 11.08.2021 (Para No. 73 to 74). Copy of the order is placed on record.

89. On the other hand, Ld. DR has fairly accepted the submissions of the Ld.AR.

90. Considered the submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee for the A.Y. 2002-03. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3187/Mum/2006 dated 11.08.2021 held as under: -

> *"73. In grounds 9 to 12, the revenue has challenged partial relief granted by learned Commissioner (Appeals) with regard to deduction claimed on DEPB entitlement.*
>
> *74. The issue raised in these grounds are corresponding to identical issue raised by the assessee in ground 7(c) of ITA No.3092/Mum/2016. Since, we have restored the issue to the assessing officer while deciding the said ground in assessee's appeal, there is no need for separate adjudication of the issue in this appeal. Accordingly, these grounds have become infructuous, hence, dismissed."*

91. Respectfully following the above decision and following the principle of consistency, the view taken by the coordinate Bench in previous

Assessment Year is respectfully followed, accordingly, ground raised by the revenue is dismissed.

92. With regard to Ground No. 6, which is in respect of Ld.CIT(A) erred in directing not to deduct profit of ₹.8,21,42,894/- u/s 80IB while determining profit eligible for deduction u/s 80HHC. Ld. AR of the assessee submitted that the identical issue has been decided in the case of Associated Capsules Pvt. Ltd., *v.* DCIT (1994) 332 ITR 42 (Bom) and the Hon'ble High Court has decided the issue in favour of the assessee. Ld. AR of the assessee requested the principle laid down by the Hon'ble High Court may be followed.

93. On the other hand, Ld.DR relied on the assessment order. Further, Ld.DR relied on the order of the Ahamadad Bench of the Tribunal in the case of ITO *v.* Madhusudhan Industries in ITA.No. 638/Ahd/2012 dated 14.06.2023.

94. Considered the submissions and material placed on record, we observe from the record that in the case of Associated Capsules Pvt. Ltd., *v.* DCIT (supra) the Hon'ble High Court considered the issued and observed as under: -

"38. We find it difficult to subscribe to the views expressed by the Delhi High Court in interpreting the provisions of Section 80IA(9). In that case, in fact, the Counsel for the Revenue had argued (see para-38 of the judgment) that Section 80IA(9) applies at the stage of allowing deduction and not at the stage of computing deduction under other provisions under heading 'C' of Chapter VIA. It was argued that in the matter of grant of deduction, the first stage is computation of deduction and the second stage is the allowance of the deduction. Computation of deduction has to be made as provided in the respective sections and it is only at the stage of allowing deduction under section 80IA(1) and also under other provisions under heading 'C' of Chapter VIA, the provisions of Section 80IA(9) comes into operation. While accepting the arguments advanced by the Counsel for the Revenue, it appears that the Delhi High Court failed to consider the important argument of the Revenue noted in para38 of its judgment. Moreover, without rejecting the argument of the Revenue that Section 80IA(9) applies at the stage of allowing the deduction and not at the stage of computing the deduction, the Delhi High Court could not have held that Section 80IA(9) seeks to disturb the method of computing the deduction provided under other provisions under heading 'C' of Chapter VIA of the Act. In these circumstances, we find it difficult to concur with the views expressed by the Delhi High Court in the case of Great Eastern Exports (supra). For the same reason, we find it difficult to subscribe to the views expressed by the Kerala High Court in the case of Olam Exports (supra).

39. In the result, we hold that Section 80IA(9) does not affect the computability of deduction under various provisions under heading 'C' of Chapter VIA, but it affects the allowability of deductions computed under various provisions under heading 'C' of Chapter VIA, so that the aggregate deduction under Section 80IA and other provisions under heading 'C' of Chapter VIA do not exceed 100% of the profits of the business of the assessee. Our above view is also supported by the C.B.D.T. Circular No.772 dated 23121998, wherein it is stated that Section 80IA(9) has been introduced with a view to prevent the tax-payers from claiming repeated deductions in respect of the

same amount of eligible income and that too in excess of the eligible profits. Thus, the object of Section 80IA(9) being not to curtail the deductions computable under various provisions under heading 'C' of Chapter, it is reasonable to hold that Section 80IA(9) affects allowability of deduction and not computation of deduction. To illustrate, if Rs.100/ is the profits of the business of the undertaking, Rs.30/ is the profits allowed as deduction under Section 80IA(1) and the deduction computed as per Section 80HHC is Rs.80/, then, in view of Section 80IA(9), the deduction under Section 80HHC would be restricted to Rs.70/, so that the aggregate deduction does not exceed the profits of the business."

95. Respectfully following the above said decision of the Hon'ble High Court, it held that the overall deduction under Chapter VIA should not exceed the profit declared by the assessee, in this case the assessee has first claimed the deduction u/s 80IB and the balance u/s 80HHC. The above method of computation was upheld by the Hon'ble HC, hence the ground raised by the revenue is accordingly dismissed.

96. With regard to Ground No. 7, which is in respect of receipt of ₹.14,26,834/- from Chiron Behring Vaccines Pvt. Ltd should be taxed under the head income from House Property and not as income from business (No such reclassification from AY 2005-06 in the assessment). Ld. AR of the assessee submitted that the identical issue has been decided in the case of CIT *v.* Modi Industries Ltd., (1994) 210 ITR 1 (Del) and the Hon'ble High Court has decided the issue in favour of the

assessee. Ld. AR of the assessee requested the principle laid down by the Hon'ble High Court may be followed.

97. On the other hand, Ld.DR relied on the assessment order and submitted that Chiron is separate person and reimbursement towards rent and electricity is separate income and chargeable to tax under the head income from house property.

98. Considered the submissions and material placed on record, we observe from the record that in the case of CIT *v.* Modi Industries Ltd., (supra), the Hon'ble High Court considered the issue and observed as under: -

> *"In these two references, at the instance of the Revenue, on a direction issued by the Allahabad High Court under s. 256(2) of the IT Act, 1961 (in short, "the Act"), the Tribunal has referred the following questions of law in respect of the asst. yrs. 1963-64 to 1965-66 (IT Ref. No. 67 of 1982) and asst. yr. 1967-68 (IT Ref. No. 70 of 1982) :*
>
> *IT Ref. No. 67 of 1982*
>
> *"(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income from Modi Bhawan should be assessed under the head `Business' and not under the head `House property' ?*
>
> *(ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that deduction for actual*

repairs and depreciation in respect of Modi Bhawan are deductible as business expenses ?"

IT Ref. No. 70 of 1982 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in directing that depreciation be allowed on a sum of Rs. 1,09,876 spent on Modi Bhawan ?"

Since the questions referred to us in both the references are materially identical, we intend to dispose of both the references by this common judgment.

2. *The Division Bench before which the case originally came up for hearing was of the view that : (1) the issue raised should be considered by a Full Bench as it was felt that in the decision of this Court in New Bank of India Ltd. vs. CIT (1983) 33 CTR (Del) 29 : (1983) 140 ITR 132 (Del) : TC 27R.586, some aspects, viz., the Supreme Court's decision in East India Housing & Land Development Trust Ltd. vs. CIT (1961) 42 ITR 49 (SC) : TC 13R.800 and the Andhra Pradesh High Court's decision in P.V.G. Raju Rajah of Vizianagaram vs. CIT (1967) 66 ITR 122 (AP) had not been considered; (2) while interpreting ss. 22 and 23 of the Act, the provisions of s. 38 had to be kept in mind which was not done; (3) the Revenue's counsel's contention regarding non-applicability of the exception in s. 22 had not been dealt with; and (4) there were a large number of important points which required a more detailed consideration. That is how the matter has come up before us.*

3. *The material facts, as found by the Tribunal, are that the assessee, a public limited company, owned a bungalow known as Modi Bhawan. The said bungalow was in occupation of R.B. Gujar Mal Modi and Shri K.N. Modi since 1932 as employees and directors of the assessee-company free of charge. It appears that subsequently M/s R.B. Multani Mal & Sons (P.) Ltd. were appointed as the managing agents of the assessee-company. On 22nd July, 1960, the shareholders of the assessee-company passed a resolution whereby R.B. Gujar Mal Modi and K.N. Modi were permitted to continue the user of Modi Bhawan as their residence but now as nominee directors of the said managing agents and on payment of a rent of Rs. 200 per annum. Thus,*

the bungalow remained in their occupation all through except that instead of occupying it as directors and employees of the assessee, they were allowed to occupy it from 22nd July, 1960, as nominees of R.B. Multani Mal & Sons (P.) Ltd., the managing agents of the assessee-company, on payment of nominal rent. The assessee-company claimed depreciation as also certain amounts incurred on repairs of the said premises in the relevant previous year, on the plea that the said building is a business asset and is being used for its business purposes. While framing assessments for the relevant assessment years, the ITO felt that the charging of the nominal rent of Rs. 200 per annum from the said two directors by the assessee was only with a view to comply with certain provisions of the Companies Act and the real rental of the property was much higher. While pointing out that substantial amounts had been spent by the assessee for the repairs of the building and in providing modern amenities, including air-conditioners, etc., the ITO estimated the annual letting value of the said property and brought it to tax under the head "Income from house property". He also disallowed the expenses claimed by the assessee on repairs as well as depreciation on the property but allowed the statutory deduction under s. 24 of the Act for repairs. In appeal by the assessee, the AAC came to the conclusion that the premises had been occupied by R.B. Gujar Mal Modi and K.N. Modi previously as employees of and for the purposes of the assessee-company's business which was also clear from the fact that the assessee had throughout treated this property as its business asset and that the ITO had not only allowed depreciation but also repairs carried out to the building. The AAC found no difference in the situation simply because the property had been given over to the managing agents. According to him, this did not change the purpose for which the house had been built and that it remained in physical possession of the same persons who were managing the affairs of the assessee-company earlier as its employees and later on behalf of the managing agents of the assessee-company. The AAC, therefore, held that the said property should be treated as the business asset of the assessee-company and its income should be assessed under the head "Profits and gains of business or profession" and not under the head "Income from house property". Aggrieved, the Revenue preferred an appeal to

the Tribunal but the appeal was unsuccessful. The Tribunal came to the conclusion that the income from Modi Bhawan was income from business and, in that view of the matter, it allowed the expenses claimed by the assessee for repairs as also the depreciation. It is this conclusion of the Tribunal which is in challenge before us.

4. *Mr. B. Gupta, learned counsel for the Revenue, has contended that : (i) various heads of income, classified under s. 14 of the Act, being distinct and mutually exclusive, the income derived from a distinct source falling under a specific head is to be computed under the appropriate section irrespective of its user or purpose of letting and, therefore, the income from Modi Bhawan has to be computed as income from house property even though the said property is held to be a business asset; (ii) the property is in the occupation of the representatives (nominee directors) of M/s R.B. Multani Mal & Sons (P.) Ltd., the managing agents of the assessee-company, which is a distinct entity with an independent business income and, therefore, occupation and user of the said property by the said nominees of the managing agents cannot be equated with occupation and user of the property by the assessee for the purpose of its business; and (iii) the property is used for residential purposes and, therefore, it cannot be taken to be used for business purposes of the assessee so as to entitle it to claim exemption from chargeability to tax under s. 22 of the Act. For his first proposition, Mr. Gupta has relied upon a decision of the Andhra Pradesh High Court in P.V.G. Raju's case (supra). On the other hand, Mr. G.C. Sharma, senior counsel for the assessee, in seeking to support the view taken by the Tribunal, has submitted that in view of the two decisions of this Court in CIT vs. Delhi Cloth & General Mills Co. Ltd. (1966) 59 ITR 152 (Del) and New Bank of India's case (supra), no fault can be found with the order of the Tribunal.*

5. *To appreciate the rival contentions, it is necessary to analyse the relevant provisions of the Act. Chapter IV of the Act contains various provisions for computation of total income under different heads, classified under s. 14. One of the heads, so enumerated, is "Income from house property". Secs. 22 to 27 deal with the income from house property. Sec. 22, which*

subjects to tax the income from house property, reads as follows :

> *"22. The annual value of property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax under the head `Income from house property'."*

6. *From a plain reading of s. 22, it is clear that the annual value of the property, consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, is chargeable to income-tax under the head "Income from house property" except such portions of such property which the assessee may occupy for the purposes of any business or profession carried on by him, profits whereof are chargeable to income-tax. In other words, when an owner occupies the whole or any portion of house property for the purposes of his business carried on by him, the profits of which are chargeable to income-tax, the annual value of the whole or that portion of the property, as the case may be, will not be chargeable to tax under the head "Income from house property". The exception in s. 22 itself takes the bottom out of the first contention of Mr. Gupta that income from property must necessarily be computed under that particular head alone and no other.*

7. *In order to claim exemption in respect of the income from house property under s. 22, the assessee must satisfy two conditions, viz., (1) the property or portion thereof must be occupied by the assessee for the purpose of his business or profession; and (2) the profits of such business should be chargeable to income-tax There is no dispute that profits of the assessee-company, which is stated to be "occupying" the property are charged to income-tax. To attract the exemption under s. 22, it has to be seen whether the property is occupied for the purposes of any business of the assessee-company. The property, since July, 1960, has been in the occupation of the functionaries of the managing agents and not directly of the owner-assessee-company and the point falling for consideration*

is whether to avail of the exemption under s. 22 of the Act, the property must necessarily be : (i) in direct occupation of the assessee-company, and (ii) used as such for transaction of the assessee's business or profession. This would depend on the scope of the term "occupy".

8. *The term "occupy" appearing in s. 22 has been judicially interpreted, as would be noticed hereafter, as occupation directly by the assessee himself or through an employee or agent but such occupation by the employees, etc., within the meaning of the exception in the said section, must be subservient to and necessary for the performance of the duties in connection with the business of the company.*

9. *The material question to which we have, therefore, to address ourselves is whether the occupation of Modi Bhawan by the nominee directors of its managing agents, for their residence on payment of rent can, in the facts and circumstances of the case, be deemed as occupation of the property by the assessee for the purposes of its business, profits whereof are assessable to tax, so as to entitle the assessee to exclude the income from its property under s. 22 of the Act.*

10. *In CIT vs. Delhi Cloth & General Mills Co. Ltd. (supra) the assessee-company which carried on a number of businesses, engaged a large number of employees. The company let out quarters to its employees in the vicinity of the mills. The rental of these premises was fixed and it was deducted from the wages of the employees concerned. A question arose whether the income to the assessee from the quarters rented out to its employees was income from business and fell for assessment under s. 10 (profits and gains of business, profession or vocation) of the Indian IT Act, 1922, and not under s. 9 (income from property) of the said Act. The Circuit Bench of the Punjab High Court at Delhi observed that, in each case, where there is a conflict as to whether income from property has to be assessed under s. 9 or s. 10, what has to be determined is whether such income does or does not arise from property occupied by the assessee for purposes of his business. The question is essentially a question of fact and what has to be discovered is whether the occupation of the property by its*

employees is subservient to the main business of the assessee. The point for decision was : is the provision of residential quarters to its employees a part of the business of the company ? The Bench pointed out that the employees in that case were engaged in the main business of the company and their residence in the building in question was incidental to their main occupation, namely, the carrying on of the business of the company : the residential accommodation was provided to them not because the company was trying to earn or was engaged in the business of earning rental income from the employees but for the purpose that the employees carry on efficiently the business of the company and the housing accommodation was an amenity which was provided for the purpose of the business of the company and was not de hors the business. The Court accordingly held that income from the said property was to be assessed under s. 10 of the said Act. The Bench also held that the word "occupy" could not be given a restricted meaning and in the context of ss. 9 and 10 of the said Act, the occupation of a tenant should be treated as occupation of the owner and, therefore, legally the property would be in the occupation of the owner though not in its physical occupation. In taking this view, the Court sought to derive support from a decision of the Patna High Court in Jamshedpur Engineering & Manufacturing Co. Ltd. vs. CIT (1957) 32 ITR 41 (Pat) : TC 16R.1127, holding that letting of the property for residence by the assessee-company to its employees being subservient to the main business of the company, their occupation is to be taken as of the assessee.

11. *In New Bank of India Ltd. vs. CIT (supra), the said bank originally had its head office at Lahore but at the time of partition of the country in 1947, it was shifted to Delhi. The staff at Lahore was transferred and came over to India and the bank considered it necessary that it should make arrangements for the proper residential accommodation for those employees who had been driven away from their homes in Lahore. With the object of providing residential accommodation to its employees in the tragic circumstances surrounding the partition of the country, the bank purchased a property in Delhi soon after the partition of the country. Between 1947 and July 1955, when the building was sold, it was occupied by the employees of the*

assessee-bank. The bank employees who occupied the premises were charged rent at the rent of ten per cent of their salary. On the sale of the said premises, the assessee made a claim under s. 10(2)(vii) (profits chargeable to tax on sale, etc., of a business asset) of the said Act. The question that arose for consideration was whether the property acquired by the bank to utilise it for accommodating its employees, on payment of rent, could be said to be property which was occupied or used by the assessee-bank for the purposes of its business. A Division Bench of this Court pointed out that the assessee-bank was forced to purchase this property in somewhat special circumstances. It was a consequence of migration forced on the bank and its employees at the time of partition of the country that necessitated the purchase. They further pointed out that although the bank did not occupy the premises for running its business, in the extraordinary situation following the partition, the bank considered it necessary that its employees who had to flee their homes in Pakistan should be provided with residential accommodation in order to enable them to function efficiently for the purposes of the business of the assessee-bank. The Bench, thus, observed that the purchase of the property and its allotment to the employees were made not with a view to derive the rental income from the property but on grounds of commercial expediency for carrying on the business of the bank more efficiently and fruitfully and accordingly held that the property was a capital asset and, therefore, the assessee's claim under s. 10(2)(vii) of the said Act should be accepted. While holding so, the Court followed the decision in Delhi Cloth & General Mills Co. Ltd.'s case (supra).

***12.** Expressing a similar view in CIT vs. Vazir Sultan Tobacco Co. Ltd. (1988) 73 CTR (AP) 176 : (1988) 173 ITR 290 (AP) : TC 18R.614, the Andhra Pradesh High Court pointed out that the idea of providing accommodation to the employees is that they should be near the factory or should be housed in hygienic or proper conditions so as to improve their productivity, health and their commitment to the employer and in such a case the purpose of allotment will undoubtedly be business purpose, for it ultimately goes to promote the assessee's business. Drawing a similarity of purpose for provision of accommodation to a worker*

and a senior executive, the Court held that occupation of the company's houses by its employees, whether they are workers or directors, is for the business purpose of the assessee-company and income from such property could not, therefore, be treated as income from house property.

13. *From the aforesaid decisions it would appear that the consistent view of the Courts has been that when a house property is occupied as residence by the employees or its directors, etc., if concerned with the promotion of the business of the assessee-company, whether on payment of rent or otherwise to enable them to discharge their functions efficiently and the letting out of the property is subservient and incidental to the main business of the assessee, such an occupation amounts to an occupation and user of the property by the assessee himself for the purposes of his business, even though no business is actually run in such premises. The abovenoted three cases, relied upon by the assessee, hold that to fall within the ambit of the exemption in s. 22, it is not necessary that the property must be as such in the occupation of the assessee-company itself or necessarily used for carrying on its business activity and not used for residential purposes. We respectfully agree with the proposition of law laid down therein. This disposes of the third leg of arguments of the Revenue's learned counsel, Mr. Gupta, that property used for residential purposes cannot be taken to be used for business purposes. What is important is that it is put to use for the benefit of the assessee to run its business management and activity efficiently to improve its profitability, which is charged to tax as such. In all the three cases, properties were used for residential purposes of its employees/workers/directors/. Herein, the property is occupied as a residence for persons comparatively much higher in status, who are not employees of the assessee-company but nominee directors of the assessee's managing agents. M/s R.B. Multani Mal & Sons (P.) Ltd., which company is distinct from the assessee-company, and the contention of the Revenue is that the analogy of occupation of a worker-employee cannot be stretched to affluent persons like nominee directors of another company only having managing agency charge.*

14. *At first blush, the argument appears to be attractive but does not survive on closer scrutiny. It is true that the status in life of persons in occupation of the property, who as such are not employees of the assessee-company and the posh premises in their occupation bear no comparison with the humble quarters provided for living by the assessee-company to its workers or employees in the three cases, but what is relevant, and indeed the pith and substance of the matter, is the purpose for which the property is given for their occupation. It has to be seen whether letting to and occupation of the building by them is subservient and incidental to the business of the company or a matter of commercial expediency or merely for their enjoyment, which are matters of fact in each case. Their status has no relevance, nor is the rental charged i.e., Rs. 200 per annum tenuous or even ridiculous considering the property and amenities provided. In fact, renting at this paltry sum would show that the purpose of letting was not to earn rental income and this distinguishes the present case from the facts and findings in P.V.G. Raju's case (supra).*

15. *As noted above, R.B. Gujar Mal Modi and K.N. Modi were in occupation of the house property in question since 1932 as employees/directors of the assessee-company and till 1960, the said property was treated as a business asset of the assessee-company. It was only in 1960 that their occupation assumed the character of nominee directors of the managing agents of the assessee-company. The stand of the Revenue in the second leg of the arguments of Mr. Gupta is that this change takes the chargeability of the property income out of the exception carved out in s. 22 of the Act, inasmuch as, the occupation of the managing agents could not be equated with the occupation of the assessee-company within the meaning of said section. We do not feel persuaded to agree. Occupation of the property by the assessee-company's managing agents (appointed for running the business of the assessee-company) or the latter's nominees, as found by the Tribunal, is for and on behalf of the assessee-company. The finding of fact recorded by the Tribunal to the effect that the assessee-company found it expedient to allow the benefit of the occupation of the property by nominees of the managing agents in order to facilitate proper supervision*

by them in the interest of smooth running of the assessee-company's business virtually makes it so. One may feel otherwise but this concurrent finding of fact recorded by the AAC and upheld by the Tribunal has not been assailed before us and, therefore, we cannot review it. In that view of the matter, we find no distinction in the occupation of the assessee-company's property by an employee or its director or its managing agent or the latter's nominees. Occupation of the property by them for the purpose of effectual discharge of their duties vis-a-vis business of the company, in our view, is tantamount to occupation by the assessee-company for the purposes of its business.

16. *Applying the ratio of the said decisions on the facts found by the Tribunal in the instant case, we are of the view that the answers to the questions proposed have to be in favour of the assessee.*

17. *Adverting to the points raised by the Division Bench, it is true that East India Housing & Land Development Trust Ltd.'s case (supra) and P.V.G. Raju's case (supra) are not referred to in the decisions rendered in Delhi Cloth & General Mills Co. Ltd.'s case (supra) and New Bank of India's case (supra). The ratio decidendi of these decisions is that the distinct heads specified in s. 14 of the Act indicating the sources are mutually exclusive and income derived from different sources falling under specific heads has to be computed for the purpose of taxation in the manner provided by the appropriate section. There is no quarrel with the proposition of law laid therein. But the same had no application to either Delhi Cloth & General Mills Co. Ltd.'s case (supra) or New Bank of India's case (supra), relied upon by the assessee. The ratio of East India Housing &Land Development Trust's case (supra) and P.V.G. Raju's case (supra) is not applicable to the facts of the present case also. If an assessee succeeds in showing that his case is covered by the exception in s. 22, the income from the house property must necessarily go out of the substantive charging provision of s. 22 of the Act.*

18. *As regards the other doubt expressed by the Division Bench that if it is held that when houses are given to its employees, s.*

22 will never apply as the house will be regarded as having been given for the purpose of business and in the process s. 38(1) of the Act, providing for proportionate deductions in respect of buildings, etc., partly used for business etc., or not exclusively so used, will also never apply in the case of a company, although the point has not been argued before us, we would clarify that we are not laying down an abstract proposition of law that whenever a house property is let out by a company to its employees or directors, as the case may be, it must always he taken to have been occupied by the company for the purposes of its business. The question whether the property has been occupied by the assessee for the purpose of business or not would essentially depend on the facts of each case. In other words, it will have to be determined whether the occupation of the assessee-company's property by its employees is with a view to enable them to function more efficiently for the purpose of the assessee's business. In the absence of a clear finding to that effect, it would only be an enjoyment of the company's asset for personal purposes and as such s. 39 may be attracted. Even otherwise, we feel that ss. 22 and 38 of the Act deal with different matters and situations and do not appear to be depending on each other. We do not think that while interpreting s. 22, the provisions of s. 38 must be adverted to or dealt with.

No other point has been urged before us.

19. *In view of the foregoing discussion, we endorse the view taken by the Tribunal that the income from "Modi Bhawan" should be assessed under the head "Profits and gains of business" and not under the head "Income from house property" and, consequently, the assessee would be entitled to deduction for the actual amount spent by it on repairs of the said building as also the depreciation while computing its income under the head "Profits and gains of business". Accordingly, we answer the questions in both the references in the affirmative, in favour of the assessee and against the Revenue."*

99. Respectfully following the above said decision of the Hon'ble High Court, we observe that the issue under consideration is similar and Ld.CIT(A) has considered the same and allowed the ground raised by the assessee before him, we do not see any reason to take divergent view in this regard. Accordingly, the ground raised by the revenue is dismissed.

100. With regard to Ground No. 8 which is in respect of Ld.CIT(A) erred in reducing Discounts from the total turnover of the business for the purpose of 80HHC.

101. At the time of hearing, Ld DR submitted that Ld CIT(A) has not given any reason on the above issues and at the same time, Ld AR also submitted that in the above issue there is no grievance to the assessee. Accordingly, the issue raised by the revenue that the discount should not be part of total turnover is accordingly decided in favour of the revenue and hence this ground is allowed.

102. With regard to Ground No. 9 which is in respect of determining adjusted profits of the business for the purpose of section 80HHC(3). At the time of hearing both the counsels agreed that the above said incomes were already considered for reducing from the profit as per explanation

(baa) to section 80HHC of the Act while determining the net profit for the purpose of deduction u/s 80HHC. Therefore, there is no grievance to the revenue and it is as per the provisions of determining the deduction u/s.80HHC of the Act. Therefore, this ground of appeal raised by the revenue dismissed.

103. In the result, appeal filed by the Revenue is partly allowed.

ITA.NO. 1128/MUM/2009 (ASSESSEE APPEAL) (U/S. 271(1)(C) OF THE ACT.

104. Assessee has raised following grounds in its appeal: -

1. *On the facts and in the circumstances and in law, the learned CIT(A) has erred in confirming the penalty u/s 271(1)(c) on the following additions/disallowance.*

   (i) Addition of long term capital gain of Rs.3,24,40,774/-.

   (ii) Interest refund Rs. 81,83,620/-

2. *On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred while giving decision on penalty imposed on long term capital gain of Rs. 3,24,40,774/-. He has omitted to mention that once the penalty was levied on entire addition on long term capital gain to the extent of Rs. 3,24,40,774/-, penalty was not required to be levied separately of Rs. 2,00,00,000/- as was done in the penalty order passed by the Assessing Officer. He ought not to have done so."*

105. Further, assessee has raised following additional ground: -

> *1) On the facts and in law, learned AO erred in levying penalty under Section 271(1)(c) of Income Tax Act, 1961 without specifically and pin-pointedly invoking either of the limbs of Section 271(1)(c) namely, "has concealed the particulars of his income" or "furnished inaccurate particulars of such income" in the show cause notice dated 23/01/2006 as per ratio laid down in MOHD SHAIKH v. DCIT 434 ITR 1 (BOM) (FB) and other case laws.*
>
> *ii) On the facts and in law, learned AO further erred in this connection in saddling Appellant with penalty under Section 271(1)(c) on grounds different than that mentioned in aforesaid show cause notice and assessment order dated 23/01/2006.*
>
> *III) Appellant craves leave to add to and/or amend and/or modify and/or alter and/or delete the aforesaid additional grounds of appeal.*
>
> *IV) Aforesaid additional grounds of appeal is without prejudice to the original grounds of appeal.*

106. Ld. Counsel for the assessee submitted that the above additional grounds of appeal is purely legal ground and do not require any fresh examination of facts. Therefore, Ld. Counsel for the assessee prayed it may be admitted.

107. Ld. DR objected for admission of the additional grounds as they were never raised before lower authorities and therefore cannot be admitted.

108. Considered the rival submissions and material placed on record, we observe that as the said additional ground is legal grounds, wherein, the facts are on record and facts do not require fresh investigation, following the decision of Hon'ble Supreme Court in the case of National Thermal Power Co., Limited *v.* CIT 229 ITR 383 (SC), we admit the said additional grounds of appeal.

109. At the outset, Ld. Counsel for the assessee referring to the penalty notice issued u/s. 274 r.w.s. 271(1)(c) of the Act submitted that notice was issued stating that assessee has concealed particulars of income or furnished inaccurate particulars of such income. In other words, the notice was issued for both the limbs without striking off the irreverent limb and specifying the charge for which the notice was issued. Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Mohd. Farhan A. Shaikh v. DCIT [2021] 434 ITR 1 (Bombay). Therefore, it is submitted that since the notice issued u/s.274 r.w.s. 271(1)(c) of the Act did not specify the limb for which or the charge for which it was issued the penalty order passed pursuant to such notice is bad in law.

110. Ld. DR vehemently supported the orders of the authorities below.

111. Considered the rival submissions, perused the orders of the authorities below and the decision of the Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh v. DCIT(supra). On a perusal of the notices issued u/s. 274 r.w.s.271(1)(c) of the Act, we observe that the Assessing Officer has not specified any limb for which the notices were issued i.e., either for concealment of particulars of income or for furnishing inaccurate particulars of such income. Assessing Officer did not strike off irrelevant limb in the notices specifying the charge for which notices were issued. It can be seen from the notices issued u/s.271(1)(c) of the Act it appears that the charge was for both the limbs.

112. An identical issue came up before Hon'ble Bombay High Court (Full Bench at Goa)in the case of Mr. Mohd. Farhan A. Shaikh *v.* ACIT [434 ITR 1] and the Hon'ble Jurisdictional High Court held as under: -

> *"**Question No.1:** If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiate the penalty proceedings?*
>
> *181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty*

proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.

183. Therefore, we answer the first question to the effect that Goa Dourado Promotions and other cases have adopted an approach more in consonance with the statutory scheme. That means we must hold that Kaushalya does not lay down the correct proposition of law.

Question No.2: *Has Kaushalya failed to discuss the aspect of 'prejudice'?*

184. Indeed, Kaushalya did discuss the aspect of prejudice. As we have already noted, Kaushalya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushalya, "fully knew in detail the exact charge of the Revenue against him". For Kaushalya, the statutory notice suffered from neither non-application of mind nor any prejudice. According to it, "the so-called ambiguous wording in the notice [has not] impaired or prejudiced the right of the assessee to a reasonable opportunity of being heard". It went onto observe that for sustaining the plea of natural justice on the ground of absence of opportunity, "it has to be established that prejudice is caused to the concerned person by the procedure followed". Kaushalya closes the discussion by observing that the notice issuing "is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done".

185. No doubt, there can exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by

the authority and/or ultimate prejudice to the right of opportunity of hearing contemplated under section 274. So asserts Kaushalya. In fact, for one assessment year, it set aside the penalty proceedings on the grounds of non-application of mind and prejudice.

186. That said, regarding the other assessment year, it reasons that the assessment order, containing the reasons or justification, avoids prejudice to the assessee. That is where, we reckon, the reasoning suffers. Kaushalya's insistence that the previous proceedings supply justification and cure the defect in penalty proceedings has not met our acceptance.

Question No.3: *What is the effect of the Supreme Court's decision in Dilip N. Shroff on the issue of non-application of mind when the irrelevant portions of the printed notices are not struck off ?*

187. In Dilip N. Shroff, for the Supreme Court, it is of "some significance that in the standard Pro-forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done". Then, Dilip N. Shroff, on facts, has felt that the assessing officer himself was not sure whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars.

188. We may, in this context, respectfully observe that a contravention of a mandatory condition or requirement for a communication to be valid communication is fatal, with no further proof. That said, even if the notice contains no caveat that the inapplicable portion be deleted, it is in the interest of fairness and justice that the notice must be precise. It should give no room for ambiguity. Therefore, Dilip N. Shroff disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays nonapplication of mind. And, therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.

189. In Sudhir Kumar Singh, the Supreme Court has encapsulated the principles of prejudice. One of the principles is that "where procedural and/or substantive provisions of law embody the

principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, "except in the case of a mandatory provision of law which is conceived not only in individual interest but also in the public interest".

190. Here, section 271(1)(c) is one such provision. With calamitous, albeit commercial, consequences, the provision is mandatory and brooks no trifling with or dilution. For a further precedential prop, we may refer to Rajesh Kumar v. CIT[74], in which the Apex Court has quoted with approval its earlier judgment in State of Orissa v. Dr. Binapani Dei[75]. According to it, when by reason of action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice must be followed. In such an event, although no express provision is laid down on this behalf, compliance with principles of natural justice would be implicit. If a statue contravenes the principles of natural justice, it may also be held ultra vires Article 14 of the Constitution.

191. As a result, we hold that Dilip N. Shroff treats omnibus show cause notices as betraying non-application of mind and disapproves of the practice, to be particular, of issuing notices in printed form without deleting or striking off the inapplicable parts of that generic notice.

Conclusion: We have, thus, answered the reference as required by us; so we direct the Registry to place these two Tax Appeals before the Division Bench concerned for further adjudication."

113. As could be seen from the above the Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh *v.* ACIT [(2021) 434 ITR 1 (Bom)] while dealing with the issue of non-strike off of the irrelevant part in the notice issued u/s.271(1)(c) of the Act, held that assessee must be informed of the grounds of the penalty proceedings only through statutory notice and an omnibus notice suffers from the vice

of vagueness. Ratio of this full bench decision of the Hon'ble Bombay High Court (Goa) squarely applies to the facts of the assessee's case as the notices u/s. 274 r.w.s. 271(1)(c) of the Act were issued without striking off the irrelevant portion of the limb and failed to intimate the assessee the relevant limb and charge for which the notices were issued. Thus, respectfully following the said decision we hold that the penalty order passed u/s. 271(1)(c) of the Act by the Assessing Officer is bad in law and accordingly the penalty orders passed u/s. 271(1)(c) of the Act for Assessment Years 2007-08 to 2011-12 are quashed. As we have decided the preliminary ground in favour of the assessee and quashed the penalty orders the other grounds raised by the assessee on merits are not gone into as they become only academic at this stage.

114. In the result, appeal filed by the assessee is allowed.

ASSESSMENT YEAR 2004-05:

ITA.No. 5939/MUM/2010 (ASSESSEE APPEAL)

115. Assessee has raised following grounds in its appeal:

> *"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (hereinafter*

referred to as the learned CIT(A)) has erred in confirming the disallowance of write off of tender and security deposits amounting to Rs.11,52,393/-, He ought not to have done so.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of brokerage of Rs.26,63,086/- He ought not to have done so.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of repairs expenditure of Rs.90.09,581/- as capital expenditure and has also erred in allowing only depreciation of 10% with reference to the same. He ought not to have done so.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance of Rs.73,87,293/- representing part of the payment made for encashment of leave. He ought not to have done so.

5. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the fair market value of land at Mulund at Rs.23.52 per sq.ft. as on 1st April, 1981, leading to enhancement of long term capital gain by Rs.25,00,107/-. He ought not to have done so.

6. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in curtailing/restricting deduction u/s.80HHC by:

a) Adjusting profit of the business by reducing 90% of the following income credited to profit and loss account of the year:

Sales tax set off and refund	*Rs. 41,47,859/-*
Sale of Scrap and waste	*Rs.30,30,390/-*
Bad debts recovered, offered to tax u/s 41(1)	*Rs. 6,58,037/-*
Sale of Scrap credited to Misc Income	*Rs. 89,277/-*
Foreign Exchange gain (net)	*Rs. 2,14,030/-*
Insurance Claims	*Rs. 2,27,53,203/-*

b) Reducing profits of the business to the extent of Rs. 11,60,52,292/- being the amount of deduction allowed u/s 80IB of the Act.

7. Your appellants crave leave to add, to amend any one or all the foregoing grounds of appeal and also beg leave to take additional ground, if need be.

116. We proceed to dispose off the appeal by adjudicating the issues raised by the assessee ground wise.

117. With regard to Ground No. 1 which is in respect of disallowance of write off of tender & security deposits of ₹.11,52,393/-, at the time of hearing, Ld.AR of the assessee submitted that the bad debt written off by the assessee are relating to tender and security deposits ₹.11,52,393/- and he brought to our notice Page No. 41 of the Paper Book to demonstrate that these are small tender amounts which are not recoverable, therefore, assessee has claimed the same as bad debts. He submitted that this is part of the business expenditure. Therefore, assessee is eligible to claim the same as business expenditure.

118. On the other hand, Ld. DR relied on the orders of the lower authorities.

119. Considered the rival submissions and material placed on record, we observe that assessee has claimed the unrecoverable tender deposits and other deposits which are outstanding in its books of accounts. Ld. CIT(A)

observed that these tender deposits are made to secure business for the assessee but it is not an expenditure which has been debited to the profit and loss account rather it is a balance sheet item. It is also not in the nature of bad debts in as much as no income was included in the accounts earlier. After considering the submissions and the nature of deposits written off by the assessee we observe that no doubt these advances are made to secure the business for the assessee, however, when these tender deposits are not recoverable it becomes part of the expenditure for the assessee which assessee failed to claim. However, these are all outstanding for a long period of time, it becomes irrecoverable and becomes bad debts. Therefore, it is allowed as allowable expenditure for the assessee. Further, it is also brought to our notice that Ld. CIT(A) has allowed the similar deduction in A.Y. 2000-01 in his order dated 19.03.2004, however, it is brought to our notice that revenue has not preferred any further appeal against the above findings of the Ld. CIT(A). Accordingly, the ground raised by the assessee is allowed.

120. With regard to Ground No. 2, which is in respect of disallowance of brokerage of ₹.26,63,086/- paid for giving premises on leave, this ground

is similar to Ground No. 5 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2004-05. We order accordingly.

121. With regard to Ground No.3 raised by the assessee, at the time of hearing, Ld.AR of the assessee submitted that this ground not pressed. Accordingly, the same is dismissed as not pressed.

122. With regard to Ground No. 4, which is in respect of leave encashment to the extent of ₹.73,87,293/-, this ground is similar to Ground No. 8 of grounds of appeal raised by the assessee for the A.Y.2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2004-05. We order accordingly.

123. With regard to Ground No 5, which is in respect of encashment of long term capital gain on account of FMV as on 01.04.1981 by ₹.25,00,107/-, this ground is similar to Ground No. 10 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

124. With regard to Ground No. 6 (i) to 6(iv) which are in respect of reducing profits of the business by 90% of the income credited to the profit and loss account, this ground is similar to Ground No. 11 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision therein in the respective ground shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

125. With regard to Ground No. 6(v) which is relating to foreign exchange gain (net) of ₹.2,14,030/-.

126. Considered the rival submissions and material placed on record, we observe that foreign exchange gain is directly related to export business and if there is any foreign exchange gain or loss it is part of the turnover. Therefore, this can be considered as part of earning from the export business. Accordingly, assessee is eligible to claim the benefit under section 80HHC of the Act. Hence, allowed the ground raised by the assessee in this regard.

127. With regard to Ground No. 6(vi), considered the rival submissions and material placed on record, we observe that assessee has made a claim of insurance, however, we observe that both Assessing Officer and

Ld. CIT(A) has rejected submissions of the assessee that it is not part of earning out of profit from the export business. Therefore, it is not eligible to claim the benefit under section 80HHC of the Act. We are inclined to agree with the findings of the lower authorities and certainly insurance claim made can never be part of profit earned in export business. Therefore, this cannot be allowed for claiming benefit under section 80HHC of the Act. Unless it is claimed out of marine insurance or claim against the export, then it is part of export business. We observe from the details of insurance claim submitted before at page 142 of the paper book, these contains various claims made by the assessee including burglary, transit claim, flood loss claim and export insurance claim. After considering the nature of claims, in our considered view, only export insurance claim of Rs. 33,13,189, transit insurance claim against finished goods lost in transit claim of Rs. 121,79,216/- are eligible to claim as part of export business. Accordingly, we direct the Assessing Officer to allow only the above said claim under this head and other insurance claims disallowed by Assessing Officer are sustained. Accordingly, this ground is partly allowed.

128. With regard to Ground No. 6(b), which is relating to reducing profits of the business to the extent of ₹.11,60,52,292/- being deduction allowed under section 80IB of the Act, this ground is similar to Ground No. 6 of grounds of appeal raised by the revenue for the A.Y. 2003-04 and the decision therein in the respective ground shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

129. In the result, appeal filed by the assessee is partly allowed as indicated above.

ITA.NO. 6548/MUM/2010 (REVENUE APPEAL)

130. Revenue has raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the depreciation on obsolete assets without appreciating the facts of the case."*
>
> *2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Officer to delete the addition of Rs.54,61,324/- u/s. 145A of the Act being the difference between the value of MODVAT relating to opening and closing stock, without appreciating the fact that the AO has made the adjustment inconformity with the decision of ITAT, Mumbai Bench in the case of Hawkins Cookers Ltd."*
>
> *3. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not upholding the Assessing Officer's action in taxing the receipt of Rs.13,91,349/- from Chiron Behring Vaccines Pvt. Ltd. under the head 'Income from House Property' without appreciating that the assessee has accepted that there is letting out of staff quarters to employees of Chiron Behring Vaccines Pvt. Ltd. "*

4. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.14,53,05,157/- u/s. 40A(2)(b) of the IT Act without appreciating the fact that the assessee has paid much higher price to its sister concern for the purchase of Rabipur Vaccine which was sold by the sister concern at much lesser price to other associated enterprises."

5. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to adopt the value of sale consideration at Rs.8.62 Crores instead of Rs.19.03 Crores determined by the Assessing Officer as per the provisions of Section 50C of the I.T. Act without appreciating the facts of the case."

6. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to allow necessary relief by reducing the discount from the total turnover for computation of deduction u/s. 80HHC of the IT Act, without giving any reason why the gross sale before discount should not be regarded as total turnover."

7. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in taking indirect cost attributable to trading export it Rs.34,79,770/- instead of Rs.7,03,120/-, The CIT(A) erred in directing the AO to recomputed the deduction in trading export profit, without appreciating the facts of the case."

8. "On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the AO to re-compute deduction a/s. 80HHC(3) by applying the first Proviso even though the assessee's case was not covered within the first Proviso as discussed elaborately by the AO in the impugned assessment order"

131. We proceed to dispose of the appeal by adjudicating the issues raised by the assessee ground wise.

132. Ground No. 1 which is in respect of disallowance of estimated depreciation on obsolete assets to the extent of ₹.64,62,896/-, this

ground is similar to Ground No. 1 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

133. With regard to Ground No. 2 which is in respect of adjustment under section 145A of Modvat to the extent of ₹.54,64,324/-, this ground is similar to Ground No. 3 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

134. With regard to Ground No. 3 which is in respect of not treating receipts of ₹.13,91,349/- from Chiron Behring Vaccines Pvt. Ltd,. taxable as income from House property, this ground is similar to Ground No. 7 of grounds of appeal raised by the revenue for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

135. With regard to Ground No. 4 which is in respect of deleting addition of ₹.14,53,05,157/- under section 40A(2)(b) in respect of purchases of Raibipur Vaccines from Sister concern, this ground is similar to Ground

No. 7 of grounds of appeal raised by the assessee for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

136. With regard to Ground No. 5 which is relating to deemed sale consideration as per section 50C vs. actual sale consideration, brief facts relating to the above ground are, assessee has declared long term capital loss in respect of development of land at Mulund to M/s. Niramal Life Style. The computation of the capital gains is reproduced in the assessment order at Page No. 19 of the order. After considering the submissions of the assessee, Assessing Officer made two adjustments to the computation of capital gains viz.,

> *(a) adopting lower value of ₹.23.52 per sq.feet as a fair market value of the land as on 01.04.1981 as against the value of ₹.75 square feet adopted by the assessee.*
>
> *(b) Assessing Officer substituted the sale consideration of ₹.8.62 crores by the value adopted by the registering authority for the purpose of payment of stamp duty at ₹. 19,03,41,070/- as per the provisions of section 50C of the Act.*

137. With regard to first adjustment of adopting fair market value as on 01.04.1981 Ld. CIT(A) has decided the issue against the assessee,

therefore, revenue is in not in appeal before us on this ground. Therefore, this issue is not considered for further discussion.

138. With regard to second issue of adopting stamp duty value for computation of capital gains under section 50C of the Act, we observe that the assessee has submitted before Assessing Officer that Memorandum of Understanding (MOU) was entered with M/s.Nirmal Life Style Pvt. Ltd on 31.03.2000 for granting development rights in respect of land admeasuring 1,15,050 sq. meter for a total consideration of ₹.35.82 crores. The development rights were to be transferred in three phases and the necessary approval under section 269UC of the Act was taken from the appropriate authorities. Accordingly, assessee has already recorded the sale consideration for Phase I - 51,7000 sq mtr at the value of ₹.21.20 crores (stamp duty value ₹.18.50 crores) and Phase II-18.945 sq. mtr. (includes Phase II and part of Phase III i.e., 6,245 sq. mtr. Of Phase II and 12,700 sq. mtrs. Of part of Phase III) as per development right agreement for a consideration of ₹.6 Crores (stamp duty value ₹.5,67,32,750). With regard to balance area in Phase III-44,405 sq mtrs which is the remaining land under development agreement for the sale consideration of ₹.8.62 crores (stamp duty value ₹.19,03,41,070) which

is the current issue under consideration. It was submitted that all the development rights for the total area of 1,15,050 sq. mtr were given for development on 31.03.2000 under one MOU. Therefore, the stamp duty value should be considered as on the date of entering into MOU i.e, on 31.03.2000. Further, it was also submitted that the valuation was approved by the respective authorities for a consideration of ₹.35.82 crores. The Assessing Officer cannot adopt the present stamp duty value for the part of the total project. However, Assessing Officer rejected the submissions of the assessee and proceeded to adopt the stamp duty value as on 31.03.2004 to determine the capital gains.

139. Aggrieved assessee preferred appeal before the Ld. CIT(A) and before Ld. CIT(A) assessee has filed detailed submissions, for the sake of clarity it is reproduced below: -

> *"4. As regard the second issue, appellant has not accepted Stamp duty valuation as the value of deemed consideration for determining the capital gain as per the provision of Sec 50C(2)(a). In this regard, the appellant relies on the certificate issued by the Competent Authority as per Sec 269UL. As per this certificate, total value of Rs 35.82 crores was the value approved by the Competent Authority for the said land after evaluating the same. The said certificate approved the MOU dated 31st March 2000, under which development rights were to be transferred in three phases. Accordingly, the appellant has transferred 115,050 sq mtrs and realized the consideration of*

Rs. 35.82 crores over a period of three assessment years as follows:

a) Phase I comprising 51,700 sq mts, was transferred in Asst. Year 2001-02 for Rs. 21.20 crores (development agreement dated 23rd Feb 2001)

b) Phase II and part of Phase III comprising 18,945 sq. mtr, was transferred in asst. year 2003-04 for Rs. 6.0 crore (Development agreement dt. 25th Aug 2002)

c) Balance of Part III comprising 44,405 sq. mtr was transferred in asst. year 2004-05 for Rs. 8.62 crores (development agreement dated 31st March 2004)

The total value of these 3 phases for stamp duty purpose is Rs. 43,20,73.820, amount considered as consideration in the assessment order, the break up of which is as under:

Phase	*Area (Sq. mtr.)*	*Stamp duty value (Rs.)*	*Consideration taxed in the Ass Orders (Rs)*	*Assessment year*
Phase I	*51,700*	*18,50,00,000*	*21,20,00,000*	*2001-02*
Phase II & part of Phase III	*18,945*	*5,67,32,750*	*6,00,00,000*	*2003-04*
Balance Phase in	*44,405*	*19,03,41,0 70*	*19,03,41,070 (under appeal)*	2004-05 (Under appeal)
Total	*115,050*	*43,20,73, 820*	*46,23,41,070*	

The actual consideration of Rs. 35.82 crores was approved by the Appropriate Authority under Chapter XX-C of the Act as it then applied when the MOU was signed. The amount of Rs. 35.82 crores was received as consideration on transfer of development rights in three phases over 3 assessment years. Under the Act, the full value of consideration is required to be considered for determination of capital gain. Sec 50C of the Act provides that the value adopted for stamp duty payment would be deemed to be the full value of consideration. However this provision also requires that before adopting the deemed consideration for the purpose of computation of capital gain, the assessee should be given an opportunity to establish that in his case the agreed consideration is itself the full value of consideration, although it may be found to be lesser that the

value adopted by the stamp authority for the purpose of stamp duty payment. In this regard, reference is being made to the decision of Hon. Madras HC in the case of K R Palanisamy vs Union of India reported in (2008) 306 ITR 61 (Mad) upholding the constitutional validity of Sec 50C. On pursuing the case report, it will be observed that the Hon. Madras HC while upholding the constitutional validity of Sec 50C, has noted that the section 50C itself provides for the safeguard to the assessee in as much in a situation like your appellant, where it is urged that the stamp duty valuation is higher than the full value of consideration. Sec 50C (2) provides for reference to be made to the Department Valuation officer (DVO), if the DVO determines the value which is more than the value adopted for stamp duty purpose, only then the AO shall adopt the market value as determined by Stamp duty authority.

6.1 In view of this legal position which has been adverted to by the Hon Madras HC in the decision cited & relied upon in Para 5, the appellant's request to the AO that in its case to make a reference to the DVO Sec 50C(2)/(3) was erroneously disregarded by him on the wrong footing that he had no option at all but to adopt Stamp duty value since it was higher than the actual consideration. In this regard, it is also reiterated that in the appellant's case the total consideration of Rs 35.82 crores was treated to be representing the FMV as the same was approved by the Appropriate Authority under the provision of Chapter XX-C of the Act. This is evidenced from the certificate dated 12th June 2000 issued by the Appropriate Authority.

6.2 Incidently, ITAT Mumbai, in the case of Abbas T Reshamwaia VS ITO ITA 3093/Mum/09 dated 3ioth Nov 2009 has also held that where the assessee objected to substitution of sale price, AO has no discretion and should refer the matter to valuation officer for determination of fair value. Here to, ITAT has affirmed that 'may' used in Sec 50C(2) is to be read as 'shall'.

7. The appellant claims that the development rights under transfer in Ass year 2004-05 is a part of the overall MOU signed on 31 March 2000 and the overall sale consideration of Rs. 35.82 crores was approved to be appropriate value for the

property by the Appropriate Authority for the purpose of transfer. Therefore the Certificate issued u/s 269UL by the Appropriate Authority approving the value of Rs 35.82 crores has to be considered as full value of consideration even without referring to the DVO and the AO has no reason to replace the same by the valuation considered by Stamp duty Authority for stamp duty purpose.

8. The following documents are attached herewith

Particulars	Page nos.
Valuation Report of IH Shah regarding FMV as on 1st Apr 1981	213 to 223
MOU dated 31st March 2000 with Nirmal Life Style P Ltd.	224 to 243
Development agreement dated 31st March 2004	245 to 273
Certificate u/s 269UL dated 12th June 2000	274 to 275
Copy of Mohd Shoib (2010) 1 ITR (Trib) 452	276 to 295

140. After considering the submissions of the assessee Ld. CIT(A) allowed the claim of the assessee by observing as under: -

"11.4 The second objection of the appellant that the AO has erred in suo motto adopting stamp duty valuation as the full value of consideration as per the provision of Sec 50C of the Act without referring the matter to the DVO when the appellant had objected to the adoption of such value. This proposition finds full support in Madras HC's decision and the decision of ITAT, Lucknow & Mumbai cited before. Accordingly, the AO in the instant case ought to have made reference to the DVO as provided in Sec 50C(2) of the Act. There is force and substance in the submission of the appellant that having regard to the fact that the actual consideration of Rs. 8.62 crores received in respect of balance Phase III land, which is the subject matter of appeal in this ground, being the part of the apparent consideration approved by the Appropriate Authority under Chapter XX-C of the Act by issuing a no objection certificate u/s 269UL(3) dated 12/06/2000, it would not have been fair to adopt the same without referring it to the DVO.

11.5 Moreover, it has to be conceded that the Appropriate Authority as it existed in Statute at that point of time was a high powered one consisting of two Commissioners of Income Tax and a Chief Engineer of CPWD. Thus the value approved by this Authority and adopted by the appellant represented the collective wisdom of three very senior and experienced officers whereas a reference to DVO (if it had been made) would have been at the level of an Executive Engineer only.

11.6 Taking a considered view of the matter, the action of the AO in suo motto adopting the stamp duty rate is not mandated by law. As such the AO is directed to adopt the full value of consideration at Rs.8.62 crores instead of Rs.19,03,41,070/- as taken in assessment order. Accordingly the appeal on this ground is partly allowed."

141. Aggrieved revenue is in appeal before us. At the time of hearing, Ld DR heavily relied on the assessment order.

142. Considered the rival submissions and material placed on record, we observe from the record that assessee has entered into an MOU for developing land at Mulund on 31.03.2000 for the total land admeasuring 1,15,050 sq. mtr and mutually agreed to develop the above said land in three phases and accordingly, two phases were already developed and recorded the sale consideration of ₹.21.2 crores and ₹.6 crores respectively in two phases. While recording the remaining development land in third phase to the extent of 44,405 sq.mtrs the assessee has adopted the balance value of ₹.8.62 crores which was arrived based on

the total consideration of ₹.35.82 crores, this consideration was also approved by the appropriate authorities, the assessee has reduced the value of already declared in Phase – I and Phase – II to the extent of ₹. 27.2 crores and the balance of ₹.8.62 crores (₹.35.82 cores (-) ₹.27.2 crores) was declared as sales consideration. The Assessing Officer rejected the above submissions and proceeded to determine the capital gains by adopting the stamp duty value as on the date of transfer of third phase. It is fact on record that the value which was adopted by the assessee for the total area of land, as approved by the appropriate authorities at ₹.35.82 crores and it was agreed that this land will be developed in three phases. Once the value for development was agreed and relevant MOU was signed as on 31.03.2000 for the total area under consideration then the Assessing Officer has to adopt the value of stamp duty value as on the date of signing of MOU as per section 50C of the Act, (even though the amendment for the above has come into effect only from 01.04.2017, however, the courts have held that this amendment is retrospective in nature) or referred the issue to DVO for fresh valuation. It is also relevant to notice that the value for total land was approved by the appropriate authority and at that point of time the value obtained from appropriate authority existed in statute which is a

high power committee consisting of Two Commissioners of Income Tax and a Chief Engineer of CPWD. Therefore, this valuation cannot be ignored and plays pivotal role in determining the valuation of property. Therefore, we are inclined to agree with the findings of the Ld.CIT(A) and Accordingly, ground raised by the revenue is dismissed.

143. With regard to Ground No. 6 which is in respect of reduced discounts from the total turnover of the business for the purpose of 80HHC, this ground is similar to Ground No. 8 of grounds of appeal raised by the revenue for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

144. With regard to Ground No. 7 which is in respect of indirect cost attributable to trading export at ₹.7,03,120/- instead of ₹.34,79,770/-, this ground is similar to Ground No. 4 of grounds of appeal raised by the revenue for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

145. With regard to Ground No. 8 which is in respect of recomputation of disallowance of deduction under section 80HHC(3) by applying 1st proviso (DEPB entitlement), this ground is similar to Ground No. 5 of grounds of appeal raised by the revenue for the A.Y. 2003-04 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y.2004-05. We order accordingly.

146. In the result, appeal filed by the revenue is partly allowed.

ITA.No. 6745/Mum/2010 (Revenue Appeal u/s. 271(1)(c) of the Act.)

147. Brief facts of the case are, in this case, assessment u/s 143(3) was completed on 22/12/2006 determining total income at ₹.171,68,14,630/- as against total income of ₹.133,72,43,709/- declared by the assessee in the Return of Income. In the assessment order u/s.143(3), the Assessing Officer made various disallowances and additions to the total income of the assessee. The Assessing Officer also initiated penalty proceedings u/s.271(1)(c) in respect of additions and disallowances made in the assessment order. The additions/disallowances which are subject matter of quantum appeal and penalty proceedings are as under: -

Sr. No.	Addition/Disallowance	Amount (Rs.)
1	Addition on account of Encashment of Leave	73,87,293/-
2	Disallowance of Repairs Expenses	1,14,89,823/-
3	Disallowance of Brokerage paid on renting of premises.	7,00,000/-
4	Disallowance of Security Deposit Written off and debited to Profit & Loss Account	11,52,393/-
5	Enhancement of Long Term Capital Gain	25,00,107/-
6	Disallowance of excess claim of Deduction U/S.80HHC	85,16,249/-
7	Disallowance of Software Expenses	37,260/-
	TOTAL	3,17,83,125/-

148. The Ld.CIT(A)-15, Mumbai, vide his order dated 14/06/2010 has confirmed the above additions/disallowances made in the assessment order. The said order of the CIT(A) was received in the office of the CIT-8, Mumbai on 08/07/2010. After confirmation of additions/disallowances on the above accounts, a fresh show cause notice dated 20/01/2012 was issued and served upon the assessee, giving an opportunity to the assessee to represent its case on the issue of levy of penalty under section 271(1)(c).

149. In response to above notices, the assessee company, vide letter dated 27/02/2012 has submitted its contention on the issue of levy of penalty in respect of above additions/disallowances, confirmed by the Ld.CIT(A). The assessee in the said letter has referred to various case laws and has taken the plea that no penalty can be levied in their case.

Without prejudice the assessee has also discussed the issues one by one and has urged not to levy penalty u/s.271(1)(c).

150. After considering the submissions of the assessee, Assessing Officer levied the penalty by observing as under:-

5. To sum up, penalty is attracted on the following additions/disallowances:

Sr. No.	Addition/Disallowance	Amount (Rs.)
1	Disallowance of Repairs Expenses	1,14,89,823/-
2	Disallowance of Brokerage paid on renting of premises.	7,00,000/-
3	Disallowance of Security Deposit Written off and debited to Profit & Loss Account	11,52,393/-
4	Enhancement of Long Term Capital Gain	25,00,107/-
5	Disallowance of Software Expenses	37,260/-
	TOTAL	1,58,79,583

6. Without prejudice to above, penalty u/s 271(1)(c) is also leviable in view of the following discussion

(1) The Supreme Court decision in the case of Reliance Petroproducts (supra) as has been relied upon by the assessee is not applicable to the facts of the present case as the additions and disallowance made by the AO were not mere disallowances as has been referred by the Hon'ble Supreme Court in the case of Reliance Petroproducts. The additions and disallowances were made on the basis of solid material and evidences gathered by the AO. while making assessment, which has been confirmed by the CIT(A) vide his above referred order. The assessee has surely made inaccurate particulars of income and/or concealed particulars of income which lead to the above additions and disallowances. Hence, the provisions of Section 271(1)(c) are clearly applicable to the facts of the present case.

(1) The Hon'ble Supreme Court in the case of Dilip N. Shroff vs. Jt.CIT (291 ITR 519) and in the case of T. Ashok Pai vs. CIT (292 ITR 11) has held that after the introduction of Explanation 1 to Section 271(1)(c) deeming concealment the requirement of proof of mens rea on the part of the revenue would no longer be necessary The Hon'ble Supreme Court further held that the role of Explanation 1 was only to place burden of proof squarely on the tax payer. The Hon'ble Supreme Court in the case of Dharmendra Textiles Processors (295

ITR 244) has held that penalty u/s 271(1)(c) is a civil liability and the willful concealment is not an essential ingredient for attracting civil liability. In the present case, it is quite clear that during the course of assessment, the AO was satisfied that the assessee has concealed the particulars of its income or furnished inaccurate particulars of such income. That's why the AO. initiated penalty proceedings in respect of above additions and disallowances by issue of Notices accordingly

7. It may be mentioned here that if the case of the assessee had not come under scrutiny assessment, the assessee could have got away with illegal and unlawful deductions, the additions/disallowances of which, have been confirmed by CIT(A).

8. Further to above it may be mentioned here that in accountancy practice, concealment of income can be done in many manners, concealment should not be taken in its common literal meaning. The concealment can result in accountancy by claiming wrong deduction in the manner different from the one prescribed under law. Therefore, concealment does not only mean the non- reporting of any item of income. It also means claiming wrongful deduction and reducing its taxable income. The assessee has done exactly the same thing. It has been held that "Falsehood in accounts can take either of the two forms: either an item of receipt may be suppressed fraudulently, or, an item of expenditure may be falsely (or in an exaggerated amount) claimed. Both types attempt to reduce the taxable income. Both types amount of concealment of the particulars of one's income as well as furnishing of inaccurate particulars of income. Penalty may be imposed for either or both such attempts [CIT v. India Sea Foods (1976) 105 ITR 708 (ker.) Nagin Chand Shiv Sahai v CIT (1938) 6 ITR 534 (Lah), CIT v. Gates Foam & Rubber Co. (1973) 91 ITR 467 (Ker.)]

9. Under the Act, penalty u/s 271(1)(c) is leviable not only for concealing the income but also for furnishing inaccurate particulars of such income. In the instant case, the assessee has furnished inaccurate particulars of its income. By furnishing inaccurate particulars of income the assessee has tried to get undue benefit and thus has concealed its income. It has been held the word 'income' in section 271(1)(c) is not used in the popular sense of money received but connotes the assessable figures arrived at after accounting for all the legitimate and exemptions (Naginchand v. CIT 6 ITR 534). Therefore, if an assessee falsely claims a deduction, it would amounts to concealing the particulars of his income or deliberately furnishing inaccurate particulars of such income within the meaning of the section 271(1)(c) and the assessee can be penalised

10. In view of the above facts & circumstances of the case, it is proved beyond doubt that the assessee has willfully claimed wrong deductions which means the assessee has furnished inaccurate particulars of income and finally has concealed its income to that extent and therefore the assessee is liable for levy of penalty. I am,

therefore, fully satisfied that the assessee has committed a default under section 271(1)(c) and this is a fit case for levy of penalty.

11 Minimum penalty and maximum penalty on the income sought to be evaded is calculated, as follows:

income sought to be evaded		Rs.1 ,58,79,583/-
Tax thereon @ 35%		Rs.55,57,854/-
Surcharge @ 2.5%		Rs.1, 38,946/-
Minimum Penalty @ 100%		Rs.56,96,800/-
Maximum Penalty @ 300%	•	Rs.1 ,70,90,401/-

12. Subject to above discussion and after considering the facts and circumstances of the case and after being satisfied, I hereby levy minimum penalty of Rs.56,96,800/-, being 100% of the tax sought to be evaded. I, hereby direct the assessee viz. Aventis Pharma Limited to pay a sum of Rs.56,96,800/- as and by way of penalty u/s 271(1)(c) of the Income Tax Act, 1961."

151. Aggrieved, assessee preferred an appeal before Ld.CIT(A) and filed detailed submissions before Ld.CIT(A). After considering the detailed submissions, Ld.CIT(A) allowed the appeal of the assessee by deleting the penalty levied by the Assessing Officer.

152. Aggrieved with the above order, revenue is in appeal before us and raised following grounds in its appeal: -

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.11,52,393/- on account of security deposit written off without appreciating that the assessee had failed to substantiate the deductibility of the said amount either during the assessment proceedings or during the appellate proceedings and therefore the Assessing Officer was justified in imposing penalty u/s.271(1)(c) read with Explanation 1 thereof."

2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty imposed in respect of addition to long term capital gains on account of the disallowance of higher cost of acquisition adopted by the assessee as on 01.04.1981, accepting the assessee's plea that the cost of acquisition as on 01.04.1981 was based on the report of the approved valuer and similar disallowance in the past was being disputed by the assessee before appellate authorities, without appreciating that by adopting such higher cost of acquisition as on 01.04.1981, the assessee had deliberately reduced its capital gains liable for tax and hence penalty was rightly imposed by the Assessing Officer under section 271(1)(c) read with Explanation 1 thereof."

3. "The Appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the A.O. be restored."

4. "The Appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

153. Considered the rival submissions and material placed on record, at the time of hearing, both the counsels agreed that most of the issues on which Assessing Officer has levied penalty on the following additions are subject matter of appeal in the cross appeals filed by both the parties: -

Sr. No.	Addition/Disallowance	Amount (Rs.)
1	Addition on account of Encashment of Leave	73,87,293/-
2	Disallowance of Repairs Expenses	1,14,89,823/-
3	Disallowance of Brokerage paid on renting of premises.	7,00,000/-
4	Disallowance of Security Deposit Written off and debited to Profit & Loss Account	11,52,393/-
5	Enhancement of Long Term Capital Gain	25,00,107/-
6	Disallowance of excess claim of Deduction U/S.80HHC	85,16,249/-
7	Disallowance of Software Expenses	37,260/-
	TOTAL	3,17,83,125/-

In the quantum appeals, the above additions were deleted by us or remitted the issues back to the file of Assessing Officer in the quantum appeal proceedings. The other issues, which are sustained by us are all debatable issues as adjudicated by Ld. CIT(A). Therefore, as such this penalty order is not sustainable. Accordingly, this appeal preferred by revenue is dismissed.

154. In the result, appeal filed by the Revenue is dismissed.

155. To sum-up, appeals filed by the assessee and revenue are partly allowed. Appeal filed by the assessee on penalty is allowed and appeal filed by the Revenue on penalty is dismissed.

Order pronounced in the open court on 31st October, 2023.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 31/10/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum