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

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER**

**&**

**SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA.NO. 3251/MUM/2009 (A.Y: 2001-02)**

**ITA.NO. 2516/MUM/2010 (A.Y: 2002-03)**

**ITA.NO. 8375/MUM/2011 (A.Y: 2001-02)**

**&**

**ITA.NO. 8387/MUM/2011 (A.Y: 2002-03)**

| | | |
|---|---|---|
| United Phosphorus Ltd<br>(Now Known as Uniphos Enterprises Ltd)<br>Uniphos House, 11-C.D. Marg<br>Opp Madhu Park, Khar (W)<br>Mumbai- 400052<br><br>**PAN: AAACU3440P** | *v.* | DCIT/ACIT, Central Circle-38<br>Aayakar Bhavan, M.K. Road<br>Mumbai- 400020 |
| **(Appellant)** | | **(Respondent)** |

| | | |
|---|---|---|
| **Assessee Represented by** | **:** | **Ms. Saisudha Multani & Shri Kirit Kamdar** |
| **Department Represented by** | **:** | **Shri Rajesh Pardeshi** |
| | | |
| **Date of Conclusion of Hearing** | **:** | **02.11.2023** |
| **Date of Pronouncement** | **:** | **13.12.2023** |

## O R D E R

**PER BENCH**

**1.** These appeals are filed by assessee against order of Learned Commissioner of Income-Tax (Appeals) - Central VI, Mumbai [hereinafter in short "Ld. CIT(A)"] dated 12.01.2009 for the A.Y.2001-02. Appeal in ITA.No. 2516/MUM/2010 is against order of the Learned Commissioner of Income-Tax (Appeals) – 41 dated 12.01.2010 for the A.Y. 2002-03. Appeals in ITA No. 8375 & 8387/MUM/2011 are against common order passed by Learned Commissioner of Income-Tax (Appeals)–41 [hereinafter in short "Ld.CIT(A)"] dated 20.09.2011 passed under section 271(1)(c) of Income-tax Act, 1961 (in short "Act").

**2.** 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 2001-02 as lead assessment year.

**ITA No. 3251/MUM/2009 (A.Y. 2001-02)**

**3.** Assessee has raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding*

*the validity of re-opening of the assessment under section 148 of the Act.*

*2. On the facts and in the circumstances of the case and in law, the Commissioner of income-tax (Appeals) erred in not appreciating the fact that as per the proviso to section 147, re-assessment could not be done unless any income chargeable to tax had escaped assessment by failure of the appellant to disclose fully and truly all material facts necessary for the assessment.*

*3. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assistant Commissioner of Income-tax in disallowing an amount of Rs.65,73,231/- out of expenditure incurred in foreign currency in respect of exports made to Iraq.*

*4. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the Assistant Commissioner of Income-tax in not considering the profits of the business on the basis of assessed profits as per the order passed under section 143(3) read with section 147 of the Act while computing deduction under section 80HHC of the Act.*

*5. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in not giving any finding in respect of the ground pertaining to exclusion of 90% of DEPB benefit while computing the 'profits of the business' for the purpose of computing deduction under section 80HHC.*

**4.** The assessee has raised several issues in the above grounds of appeal and we shall deal with the above issues raised by the assessee ground wise.

**5.** With regard to Ground Nos. 1 and 2 which are in respect of validity of reopening of assessment. At the time of hearing, Ld AR has submitted

that the assessee does not wish to press these grounds, accordingly, these grounds are dismissed as such.

**6.** With regard to Ground No. 3 which is in respect of disallowance of expenditure incurred in foreign currency in respect of exports made to Iraq ₹.65,73,213/-. Brief facts relating to the ground as summarized by the Assessing Officer and the conclusion reached are reproduced below:-

*"6. The table 7 the Volker Committee refers to 5 contracts entered into by assessee company under 'Oil for Food Programme' with Iraq under this programme the Agro Chem Goods were exported to Grain Board of Iraq for ALP and to state company for agriculture of Iraq for Ratol 80%.*

*The Table 7 of Volcker Committee is as under: (Figure in US $)*

| | | |
|---|---|---|
| *United Phosphorous Ltd* | | |
| *No. Of qualifying contracts* | *-* | *5* |
| *Contract face value* | *-* | *$26,66,226* |
| *Contract Disbursement* | *-* | *$26,16,866* |
| *Levied ASSF* | *-* | *$123,328* |
| *Paid ASSF* | *-* | *$129,841* |

*6.1 It is observed that assessee made export to Iraq under Oil for Food Program for export of ALP Quick Phos and Ratol 80% for amount of Rs. 6,57,32,312/- through Grain Board of Iraq and State company for . During the year, the assessee company made export sales totaling to Rs. 6,57,32,312/-. During the assessment proceedings assessee company incurred expenditure on foreign currency of Rs.6,57,39,341/- for exporting goods to different countries.*

*6.2. The assessee company vide letter dated 14.12.2007 & 24.12.2007 denied to have paid any payment of 'After Sale Service Fee' (ASSF) paid USD 123328 and After Sale Service Fee paid USD*

*129841. However, assessee company has incurred expenditure on exporting these goods to Iraq and other countries and debited total expenditure in foreign currency of Rs.6,57,39,341/- under various heads on total export. The major such expenditure in foreign currency are as under:*

| | |
|---|---|
| *Commission on Export Sales* | *Rs.2,68,46,328/-* |
| *Foreign traveling expenses* | *Rs.1,00,89,902/-* |
| *Export Market Development Expenses* | *Rs.1,27,25,975/-* |
| *Freight & forwarding Expenses* | *Rs. 26,39,748/-* |
| *Other expenses – Export* | *Rs. 47,62,000/-* |
| *Training & Seminar Expenses* | *Rs. 11,49,722/-* |

*7. It is observed from the details filed along with the revised return and during the assessment, the assessee has incurred expenditure on Freight attributable to the transport of goods beyond customs station of Rs. 10,72,11,171/- to all countries. Expenditure relating to inland transportation for the export made is embedded in above said expenses of Rs.6,57,39,341/- for the export sales made to Iraq and in expenditure for transport of goods beyond customs stations made for Iraq country. However, the same expenditure is not verifiable. The assessee has not adduced evidence to prove that the expenditure on above said items is genuinely business expenditure.*

*8. Relying upon the findings of Volcker Committee Report that the assessee company paid "Kick Backs" of 10% of export of goods of Rs.6,57,32,312/- to Iraq under the "Oil for Food Programme", I hold that assessee company under the guise of the foreign currency expenditure incurred for supplying the Quick Phos (ALP) & Ratol 80% to Iraq through Grain Board of Iraq & Ministry of Agriculture paid 10% of exported goods of Rs.6,57,32,312/- as Kick backs" under the head "Inland Transportation Fees'(ITF) & 'After Sales Services Fees (ASSF), which works out at Rs. 65,73,231/-.*

*9. I, therefore, treat the payment of Rs.65,73,231/- as illegal payment and hence not allowable as business expenditure while computing income from business. The assessee has Furnished inaccurate particulars of his income and concealed his income of Rs.65,73,231/-, hence, penalty u/s 271(1)(c) is initiated*

**7.** Aggrieved assessee preferred appeal before Ld. CIT(A) and filed detailed submissions. After considering the submissions of the assessee

Ld. CIT(A) rejected the submission of the assessee and sustained the action of the Assessing Officer. The observation of the Ld. CIT(A) is reproduced below: -

> *"7.5 I have considered the submissions made by the AR of the appellant and do not find merit in them. Perusal of Table 7 of the Volker Committee Report shows that the appellant had paid ASSF amounting to US$ 1,29,841/-. I further take note of the observation by the AO that the appellant has debited total expenditure in foreign currency of Rs.6,57,39,341/- under various heads on exports. The AO has further noted that the expenditure on freight attributable to the transportation of goods beyond Customs Station amounted to Rs. 10,72,11,171/- which included the transportation expenditure for exports made to Iraq. This expenditure has been stated by the AO to be not verifiable. The AO has further noted that the appellant did not adduce evidence to substantiate this claim as genuine business expenditure. Thus the AO rightly relied upon the findings of the Volker Committee Report to hold that the aforesaid payment was an illegal payment and hence it was not allowable as a deduction. The order of the Assessing Officer is therefore confirmed and this ground is dismissed."*

**8.** Aggrieved assessee is in appeal before us and raised the above issue. At the time of hearing, Ld. AR of the assessee brought to our notice Copy of the letter dated 19.11.2007 providing details of transactions with Iraq under Oil for Food Program and also submitted relevant documents for exports made to Iraq. Further, he brought to our notice copy of letter dated 14.02.1997, appointment of Mr Jack Heresh as agent to represent UPL for sale of products in Iraq.

**9.** Ld AR submitted that the above transactions entered by the assessee in terms of oil for food programme in Iraq, which are similar to the following cases in which the various courts have decided in favour of the assessee's and relied on these case laws:

*a) Bajaj International (P) Ltd v. DCIT (262 ITD 278) (Mum)*
*b) Metro Exports Pvt Ltd v. ACIT (ITA No. 2026/Mum/2008) (Unreported)*
*c) CIT v. Ajanta Pharma Ltd (85 Taxmann.com 252) (Bom)*
*d) Reliance Industries Ltd v. ACIT (ITA No. 5769/Mum/2013) (Unreported)*
*e) NSIL Exports Ltd V. 3050/Mum/2013) (Unreported) DCIT (ITA No.*
*f) CIT v Rajarani Exports Pvt Ltd (361 ITR 152) (Cal)*
*g) TIL Ltd v. ACIT (16 SOT 33) ( Kolkata)*
*h) PCIT v. TIL Ltd (255 Taxman 373) (Cal)*
*i) Air Pac Exports v ACIT (ITA No. 2981/Mum/2012) (Unreported)*
*j) ACIT v. Cosmos International (ITA No. 4138/Mum/2011) (Unreported)*

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

**11.** Considered the rival submissions and material placed on record, we observe that in the case of Bajaj International (P.) Ltd., *v.* DCIT (262 ITD 278) (MUM), the Coordinate Bench observed as under: -

> *"4.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. The facts of the matter as emanate from the record are that in both these concerned assessment years 2003-04 and 2005-06, the assessee company exported goods to*

*Iraq under the UNO 'Oil for Food Scheme' and in this connection had paid commission to its agent M/s. Winter International Ltd., Jordan for providing services to them and realization of export proceeds such as:—*

*(a) Informing the assessee company about new tenders which are issued in Iraq;*

*(b) Arranging documents required for submission of tender application;*

*(c) Application made for tenders;*

*(d) Tender participation in Iraq;*

*(e) Procurement of orders;*

*(f) Obtaining LC on behalf of the assessee company;*

*(g) Obtaining payment through Bank against LC*

*4.3.2 The authorities below, citing the Volcker Committee Report which reported that illicit kickbacks and surcharges were paid by more than 2000 companies to the Iraqi government in pursuance of the 'Oil for Food Programme', in various nomenclatures like inland transportation fee, loading fee, commission, etc., held that the commissions paid by the assessee to its agent Winter International Ltd. were actually nothing but illicit payments to the Iraqi Government. In our considered view, based on the facts on record, we find that the commission payments made by the assessee to its agent M/s. Winter International Ltd., Jordan were for services that have been rendered by its agent to the assessee in consideration of the same. It is not Revenue's case that no services have been rendered to the assessee by the agent. Further, nothing has been brought on record by Revenue to show that the transactions relating to the payment of commission by the assessee are either non genuine or are excessive or unreasonable. The Volcker Committee Report, cited by Revenue, had discussed about the utilization of money by the recipient of the commission in paying of such commission so received to the Government of Iraq illicitly, which was objected to by the Volcker Committee. From a casual perusal of the details on record and in the orders of the authorities below it has not been proved that the assessee company was involved in illicit payments of commission to the Iraqi Government. Therefore it cannot be concluded that commission payments were not made for the purpose of assessee's business.*

*Explanation to section 37 of the Act cannot be invoked merely on the basis of an unestablished doubt that expenditure incurred could be for infraction of law.*

*4.3.3 On similar facts as in the case on hand, the Coordinate Bench of the Tribunal in the case of Metro Exports (P.) Ltd. (supra), following the decisions of the Hon'ble Calcutta High Court in the case of Rajrani Exports (supra) and other Coordinate Benches in the case of NSIL Exports Ltd. (supra) and Air Pac Exports Ltd. (supra) has decided this issue in favour of the assessee holding as under at paras 7 and 8 thereof, as under:—*

> *'7. Ground No.5 raised in the present appeal is in respect of commission of export to Iraq. AR of assessee argued that this ground of appeal is also covered in favour of assessee by the order Hon'ble Calcutta High Court in CIT v. Rajrani Export (AIT 2013-75-High Court) and Co-ordinate Bench of ITAT, Mumbai in NSIL Exports Ltd. v. DCIT [2014] 44 taxman.com 246, and Air Pac Exports v. ACIT (152 ITD 634), Mumbai. On the other hand, ld. DR for the revenue argued that this ground of appeal is covered against the assessee by the order of ITAT Mumbai vide ITA No. 7285 to 7286/M/2007 in case titled as M/s Cipla Ltd. v. DCIT. We have considered the rival contention of AR as well as DR of the parties and gone through the order passed by the Hon'ble Calcutta High Court and various Tribunals on the issue of payment of commission to Government of Iraq. The Hon'ble Calcutta High Court while dealing with the Grounds of appeal raised by Revenue held as under:*
>
> > *"The commission on export activity had been fully disclosed in all correspondences and an activity in relation to export, the commission was paid through banking channel of RBI approval and it was paid pursuant to an agreement approved by Government of India and UN. The payment of commission was for business consideration and there was apparently no illegality in making payment of commission. Besides this, nothing has brought on record to show that the transactions relating to payment of commission are non-genuine or are excessive and unreasonable. The Volker Commission report had discussed about the utilization of money by the recipient of the commission in parting some of the fund so received as commission with the Government of Iraq and such parting of commission with the Government of Iraq*

> *was objected to by the Volker Commission report which was a pact between the Iraq Government and the UN wherein, as it appears, neither the appellant company is involved nor Government of India is involved."*

*Further, the Co-ordinate Bench of ITAT in NSIL Export Ltd. v. DCIT [2014] 44 taxmann.com 246 - Mum while dealing with similar Ground of appeal held as under:*

> *"Therefore, until and unless it is otherwise proved that the payment was an illicit payment to the Saddam Hussain regime and not to the parties it cannot be concluded that the said payments are not made for the purpose of business of the assessee. The explanation to section 37 cannot be invoked merely on the basis of some doubt about expenditure whether made infraction of law. There should be a direct and cogent evidence to show that the payment made by the assessee is contrary to law. The Authorities below failed to bring anything on record to establish that the payments in question were illegally made by the assessee to the Iraqi Authorities. On the contrary, the assessee has produced the evidence of payment to the agent who is not connected to the Iraqi authorities. Therefore, in the absence of specific finding that the payments were made to the Iraqi Authorities, it cannot be held as illegal payment infraction of law. Even if the assessee fail to prove beyond doubt that the payments in question inconsonance to the service rendered by the agent the same cannot be held as illegal in the absence of any evidence to prove that the assessee intended to pay the amount illegally through agent."*

*Similar view was taken by Co-ordinate Bench of Mumbai Tribunal in Air Pac Exports v. ACIT [152 ITD 634]-Mum in ITA No. 2981 to 2983/M/2012 for AY-2001-02 to 2002-03 vide order dated 11.06.2014. We have also gone through the order of Co-ordinate Bench of this Tribunal in M/s Cipla Ltd. v. DCIT vide order dated 27.09.2009, relied by Ld. DR for Revenue, wherein this Tribunal has taken a contrary view. We have noticed that the order passed in M/s Cipla Ltd. was differentiated by coordinate bench of this Tribunal in NSIL Exports Ltd. (supra) holding that, Cipla was involved*

*in illicit payment made to Iraq Government as per Volker Committee Report holding as under:*

> *"35. It is seen that the revenue authorities as well as the DR placed heavy reliance on the decision of Cipla Ltd. v. ACIT, ITA No. 7284 to 7286/Mum/2007, wherein the coordinate Bench at Mumbai, came to the conclusion that, Cipla was involved in illicit payment made to Iraq Government, as per Volcker Report. It has been held by the coordinate Bench in Para 7.1 that the assessee has not denied payment of ASSF. In para 3 of the order, the order mentions about the payments towards ASSF and on which basis, the cases were reopened.*
>
> *36. However, in the instant case, the facts are different. The dispute is with regard to payment made to Dalala & Company, from where, the alleged illicit payment may have been paid. In such a situation, when the facts themselves are at variance, the decision of Cipla (supra) cannot be relied upon. This argument of the department has to be rejected."*
>
> *8. Hence, keeping in view the above discussion and the legal position, and keeping in view the order of Calcutta High Court (supra), this Ground of appeal is covered in favour of assessee. Hence, this Ground of appeal is allowed in favour of assessee.'*

*4.3.4 In the factual matrix of the case as discussed from paras 4.1 to4.3.3 of this order (supra) and respectfully following the decisions of the Hon'ble High Court of Calcutta in the case of Rajrani Export (supra) and of the Coordinate Bench in the case of Metro Exports (P.) Ltd. (supra) and NSIL Exports Ltd. (supra), we allow the assessee's appeal on this grounds for both assessment years 2003-04 and 2005-06.*

**12.** Further, in the case of M/s. Metro Exporters Pvt Ltd., *v.* ACIT in ITA No. 2026/MUM/2008 dated 08.06.2016, the Coordinate Bench considered the similar issue and held as under: -

*"7. Ground No.5 raised in the present appeal is in respect of commission of export to Iraq. AR of assessee argued that this ground of appeal is also covered in favour of assessee by the order Hon'ble Calcutta High Court in CIT vs. Rajrani Export (AIT 2013-75-High Court) and Co-ordinate Bench of ITAT, Mumbai in NSIL Exports Ltd. vs. DCIT [2014] 44.taxman.com. 246, and Air Pac Exports Vs. ACIT (152 ITD 634), Mumbai. On the other hand, ld. DR for the revenue argued that this ground of appeal is covered against the assessee by the order of ITAT Mumbai vide ITA No. 7285 to 7286/M/2007 in case titled as M/s Cipla Ltd. Vs. DCIT. We have considered the rival contention of AR as well as DR of the parties and gone through the order passed by the Hon'ble Calcutta High Court and various Tribunals on the issue of payment of commission to Government of Iraq. The Hon'ble Calcutta High Court while dealing with the Grounds of appeal raised by Revenue held as under:*

> *"The commission on export activity had been fully disclosed in all correspondences and an activity in relation to export, the commission was paid through banking channel of RBI approval and it was paid pursuant to an agreement approved by Government of India and UN. The payment of commission was for business consideration and there was apparently no illegality in making payment of commission. Besides this, nothing has brought on record to show that the transactions relating to payment of commission are non-genuine or are excessive and unreasonable. The Volker Commission report had discussed about the utilization of money by the recipient of the commission in parting some of the fund so received as commission with the Government of Iraq and such parting of commission with the Government of Iraq was objected to by the Volker Commission report which was a pact between the Iraq Government and the UN wherein, as it appears, neither the appellant company is involved nor Government of India is involved."*

*Further, the Co-ordinate Bench of ITAT in NSIL Export Ltd. Vs. DCIT [2014] 44.taxmann.com 246- Mum while dealing with similar Ground of appeal held as under:*

> *"Therefore, until and unless it is otherwise proved that the payment was an illicit payment to the Saddam Hussain regime and not to the parties it cannot be concluded that the said payments are not made for the*

*purpose of business of the assessee. The explanation to section 37 cannot be invoked merely on the basis of some doubt about expenditure whether made infraction of law. There should be a direct and cogent evidence to show that the payment made by the assessee is contrary to law. The Authorities below failed to bring anything on record to establish that the payments in question were illegally made by the assessee to the Iraqi Authorities. On the contrary, the assessee has produced the evidence of payment to the agent who is not connected to the Iraqi authorities. Therefore, in the absence of specific finding that the payments were made to the Iraqi Authorities, it cannot be held as illegal payment infraction of law. Even if the assessee fail to prove beyond doubt that the payments in question inconsonance to the service rendered by the agent the same cannot be held as illegal in the absence of any evidence to prove that the assessee intended to pay the amount illegally through agent."*

*Similar view was taken by Co-ordinate Bench of Mumbai Tribunal in Air Pac Exports V/s ACIT [152 ITD 634]-Mum in ITA No. 2981 to 2983/M/2012 for AY-2001-02 to 2002-03 vide order dated 11.06.2014. We have also gone through the order of Co-ordinate Bench of this Tribunal in M/s Cipla Ltd. Vs. DCIT vide order dated 27.09.2009, relied by Ld. DR for Revenue, wherein this Tribunal has taken a contrary view. We have noticed that the order passed in M/s Cipla Ltd. was differentiated by coordinate bench of this Tribunal in NSIL Exports Ltd. (supra) holding that, Cipla was involved in illicit payment made to Iraq Government as per Volker Committee Report holding as under:*

*"35. It is seen that the revenue authorities as well as the DR placed heavy reliance on the decision of Cipla Ltd. vs. ACIT, ITA No. 7284 to 7286/Mum/2007, wherein the coordinate Bench at Mumbai, came to the conclusion that, Cipla was involved in illicit payment made to Iraq Government, as per Volcker Report. It has been held by the coordinate Bench in Para 7.1 that the assessee has not denied payment of ASSF. In para 3 of the order, the order mentions about the payments towards ASSF and on which basis, the cases were reopened. 36. However, in the instant case, the facts are different. The dispute is with regard to payment made to Dalala & Company, from where, the alleged illicit payment may have been paid. In such a situation,*

*when the facts themselves are at variance, the decision of Cipla (supra) cannot be relied upon. This argument of the department has to be rejected."*

*8. Hence, keeping in view the above discussion and the legal position, and keeping in view the order of Calcutta High Court (supra), this Ground of appeal is covered in favour of assessee. Hence, this Ground of appeal is allowed in favour of assessee."*

**13.** Respectfully following the above decisions and the facts in this case are exactly similar, we are inclined to allow the claim of the assessee considering the fact that the assessee has exported the goods to Iraq on Food for oil program and had appointed the agent. The assessee had submitted all the relevant documents to support in its cause to show that the transactions are genuine. Therefore, relying on the above case, the ground no.3 raised by the assessee is allowed.

**14.** With regard to Ground No. 4 and 5 which are in respect of profits of the business for the purpose of computing deduction under section 80HHC ought to be computed on the basis of the assessed profits and the issue of Reduction of 90% of duty entitlement Pass book benefit (DEBP) while computing deduction under section 80HHC. Brief facts relating to the ground as summarized by the Assessing Officer and the conclusion reached are reproduced below: -

*"10. In the Revised return filed u/s 148 of IT Act, 1961, assessee has claimed deduction under 80 HHC for 10,51,33,289/-. The matter relating to 80HHC stands disallowed in the original assessment which has been confirmed by CIT (A) vide order no.CIT(A)/Cent.VI/IT 65/2004-05 dt.18/2/2005. The matter is subjudised in the department appeal as well as the assesses appeal before ITAT. Therefore, the income of the assessee is computed with reference to income computed after giving effect to CIT's appeal order. In respect of new issue consequent to Volcker Committee Report which re-opened the assessment of Asst. Year 2001-2002. Therefore, the revised claim made by the assessee as per the return filed on 23/11/2007 is not considered.*

**15.** Aggrieved assessee preferred appeal before Ld. CIT(A) and filed detailed submissions. After considering the submissions of the assessee Ld. CIT(A) rejected the submission of the assessee and sustained the action of the Assessing Officer. The observation of the Ld. CIT(A) is reproduced below: -

*"8.1 A perusal of the computation of 'adjusted profits of business' as given in para 15.5 of the order passed u/s.143(3) dated 22.03.2004 indicates that the same has been worked out at a loss of (Rs. 13,90,50,327/-). This issue has already been adjudicated upon by the first appellate authority in order no.CIT(A)/Cent-VI/IT-65/2004- 05 dated 18.02.2005 which order has been disputed by the appellant before the Hon'ble ITAT, Mumbai. Thus the limited question for consideration in this order could be whether the appellant was entitled to deduction u/s.80HHC in respect of disallowance of illegal payments as discussed above supra."*

**16.** Aggrieved assessee is in appeal before us raising the above issue. At the time of hearing, Ld. AR of the assessee prayed that directions may be given that deduction under section 80HHC may be recomputed on the basis of the assessed profits of the business as finally determined

in the order giving effect to the order of the ITAT in respect of the captioned appeal.

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

**18.** Considered the rival submissions and material placed on record. Considering the overall merits on the submissions made by the assessee we are inclined to remit this issue back to the file of assessing officer with a direction to recompute the deduction under section 80HHC on the basis of the assessed profits of the business as finally determined in the order giving effect to the order of the ITAT, after verifying the records submitted by the assessee on merit and as per law. It is needless to say that assessee may be given a proper opportunity of being heard. In the result the issue under consideration in ground no 4 is remitted back to the file of Assessing Officer for statistical purpose.

**19.** With regard to Ground No. 5 which is in respect of Reduction of 90% of duty entitlement Pass book benefit (DEBP) while computing deduction under section 80HHC, at the time of hearing, Ld. AR of the assessee submitted that 90% of the DEPB benefit ought not to be

excluded while computing the 'profits of the business' while computing deduction under section 80HHC since section 28(iiid) refers to only profits on transfer of DEPB. Further, he submitted that in any case, if 90% is reduced, then the same ought to be added back as per the proviso while working out the deduction under section 80HHC.

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

**21.** Considered the rival submissions and material placed on record, we observe that similar issue was considered by the Hon'ble Supreme Court in the case of Topman Exports *v.* CIT [2012] 18 taxmann.com 120 (SC) and held as under: -

> *11. We may now consider the relevant provisions of s. 28 for determining whether DEPB will fall under cl. (iiib) or under cl. (iiid) of s. 28. The relevant provisions of s. 28 of the Act are reproduced hereunder :*
>
> > *"Sec. 28. Profits and gains of business or profession.—The following income shall be chargeable to income-tax under the head 'Profits and gains of business or profession',—*
> >
> > *.....*
> >
> > *(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947);*

*(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India;*

*(iiic) .....*

*(iiid) any profit on the transfer of the DEPB Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under s. 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992);*

*(iiie) any profit on the transfer of the DFRC, being the Duty Remission Scheme under the export and import policy formulated and announced under s. 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)."*

*12. It will be clear from the aforesaid provisions of s. 28 that under cl. (iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India is by itself income chargeable to income-tax under the head "Profits and gains of business or profession". DEPB is a kind of assistance given by the Government of India to an exporter to pay customs duty on its imports and it is receivable once exports are made and an application is made by the exporter for DEPB. We have, therefore, no doubt that DEPB is "cash assistance" receivable by a person against exports under the scheme of the Government of India and falls under cl. (iiib) of s. 28 and is chargeable to income-tax under the head "Profits and gains of business or profession" even before it is transferred by the assessee.*

*13. Under cl. (iiid) of s. 28, any profit on transfer of DEPB is chargeable to income-tax under the head "Profits and gains of business or profession" as an item separate from cash assistance under cl. (iiib). The word "profit" means the gross proceeds of a business transaction less the costs of the transaction. To quote from Black's Law Dictionary (Fifth Edition) :*

*"Profit. Most commonly, the gross proceeds of a business transaction less the costs of the transaction, i.e. net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures."*

*This Court in E.D. Sassoon & Co. Ltd. & Ors. vs. CIT (1954) 26 ITR 27 (SC) has quoted the following observations of Lord Justice Fletcher Moulton in The Spanish Prospecting Company Ltd. (1911) I Ch. 92 on the meaning of the word "profits" :*

*".... 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."*

*'Profits', therefore, imply a comparison of the value of an asset when the asset is acquired with the value of the asset, when the asset is transferred and the difference between the two values is the amount of profit or gain made by a person. As DEPB has direct nexus with the cost of imports for manufacturing an export product, any amount realized by the assessees over and above the DEPB on transfer of the DEPB would represent profit on the transfer of DEPB.*

*14. We are, thus, of the considered opinion that while the face value of the DEPB will fall under cl. (iiib) of s. 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under cl. (iiid) of s. 28 of the Act and the High Court was not right in taking the view in the impugned judgment that the entire sale proceeds of the DEPB realized on transfer of the DEPB and not just the difference between the sale value and the face value of the DEPB represent profit on transfer of the DEPB.*

*15. We may now point out the errors in the impugned judgment of the High Court. The first reason given by the High Court is that cl. (iiia) of s. 28 treats profits on the sale of an import license as income chargeable to tax and when the license is sold, the entire amount is treated as profits of business under cl. (iiia) of s. 28 and thus there is no justification to treat the amount which is received by an exporter on the transfer of the DEPB any differently than the profits which are made on the sale of an import license under cl. (iiia) of s. 28 of the Act. In taking the view that when the import license is sold the entire amount is treated as profits of business, the High Court has visualized a situation where the cost of acquiring the import license is nil. The cost of acquiring DEPB, on the other hand, is not nil because the person acquires it by paying customs duty on the import content of the export product and the DEPB which accrues to a person against exports has a cost element*

*in it. Accordingly, when DEPB is sold by a person, his profit on transfer of DEPB would be the sale value of the DEPB less the face value of DEPB which represents the cost of the DEPB. The second reason given by the High Court in the impugned judgment is that under the DEPB Scheme, DEPB is given at a percentage of the FOB value of the exports so as to neutralize the incidence of customs duty on the import content of the export products, but the exporter may not himself utilize the DEPB for paying customs duty but may transfer it to someone else and therefore the entire sum received on transfer of DEPB would be covered under cl. (iiid) of s. 28. The High Court has failed to appreciate that DEPB represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When, therefore, DEPB is transferred by a person, the entire sum received by him on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB.*

*16. The High Court has sought to meet the argument of double taxation made on behalf of the assessees by holding that where the face value of the DEPB was offered to tax in the year in which the credit accrued to the assessee as business profits, then any further profit arising on transfer of DEPB would be taxed as profits of business under s. 28(iiid) in the year in which the transfer of DEPB took place. This view of the High Court, in our considered opinion, is contrary to the language of s. 28 of the Act under which "cash assistance" received or receivable by any person against exports such as the DEPB and "profit on transfer of the DEPB" are treated as two separate items of income under cls. (iiib) and (iiid) of s. 28. If accrual of DEPB and profit on transfer of DEPB are treated as two separate items of income chargeable to tax under cls. (iiib) and (iiid) of s. 28 of the Act, then DEPB will be chargeable as income under cl. (iiib) of s. 28 in the year in which the person applies for DEPB credit against the exports and the profit on transfer of the DEPB by that person will be chargeable as income under cl. (iiid) of s. 28 in his hands in the year in which he makes the transfer. Accordingly, if in the same previous year the DEPB accrues to a person and he also earns profit on transfer of the DEPB, the DEPB will be business profits under cl. (iiib) and the difference between the sale value and the DEPB (face value) would be the profits on the transfer of DEPB under cl. (iiid) for the same assessment year. Where, however, the DEPB accrues to a person in one previous year and the transfer of DEPB takes place in a subsequent previous year, then the DEPB will be chargeable as*

*income of the person for the first assessment year chargeable under cl. (iiib) of s. 28 and the difference between the DEPB credit and the sale value of the DEPB credit would be income in his hands for the subsequent assessment year chargeable under cl. (iiid) of s. 28. The interpretation suggested by us, therefore, does not lead to double taxation of the same income, which the legislature must be presumed to have avoided.*

*17. The High Court has held that as the assessees had an export turnover exceeding Rs. 10 crores and did not fulfill the conditions set out in the third proviso to s. 80HHC(3) of the Act, the assessees were not entitled to a deduction under s. 80HHC on the amount received on transfer of DEPB and to get over this difficulty the assessees have contended that the profits on transfer of DEPB in s. 28(iiid) would not include the face value of the DEPB so that the assessees get a deduction under s. 80HHC on the face value of the DEPB. This finding of the High Court is not based on an accurate understanding scheme of s. 80HHC of the Act.*

*18. The relevant provisions of s. 80HHC are quoted herein below :*

> *"Sec. 80HHC. Deduction in respect of profits retained for export business.—(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction to the extent of profits, referred to in sub-s. (1B), derived by the assessee from the export of such goods or merchandise :*
>
> *.....*
>
> *(1B) For the purposes of sub-ss. (1) and (1A), the extent of deduction of the profits shall be an amount equal to—*
>
> *(i) eighty per cent thereof for an assessment year beginning on the 1st day of April, 2001;*
>
> *(ii) seventy per cent thereof for an assessment year beginning on the 1st day of April, 2002;*
>
> *(iii) fifty per cent thereof for an assessment year beginning on the 1st day of April, 2003;*

*(iv) thirty per cent thereof for an assessment year beginning on the 1st day of April, 2004,*

*and no deduction shall be allowed in respect of the assessment year beginning on the 1st day of April, 2005 and any subsequent assessment year.*

*.....*

*(3) For the purposes of sub-s. (1),—*

*(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee;*

*.....*

*Provided that the profits computed under cl. (a) or cl. (b) or cl. (c) of this sub-section shall be further increased by the amount which bears to ninety per cent of any sum referred to in cl. (iiia) (not being profits on sale of a licence acquired from any other person), and cls. (iiib) and (iiic) of s. 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

*Provided further that in the case of an asseesee having export turnover not exceeding rupees ten crores during the previous year, the profits computed under cl. (a) or cl. (b) or cl. (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in cl. (iiid) or cl. (iiie), as the case may be, of s. 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee :*

*Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under cl. (a) or cl. (b) or cl. (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in cl. (iiid) of s. 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the*

*assessee, if the assessee has necessary and sufficient evidence to prove that,—*

*(a) he had an option to choose either the duty drawback or the DEPB Scheme, being the Duty Remission Scheme; and*

*(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the DEPB Scheme, being the Duty Remission Scheme :*

*Provided also that in the case of an assessee having export turnover exceeding rupees ten crores during the previous year, the profits computed under cl. (a) or cl. (b) or cl. (c) of this sub-section or after giving effect to the first proviso, as the case may be, shall be further increased by the amount which bears to ninety per cent of any sum referred to in cl. (iiie) of s. 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee, if the assessee has necessary and sufficient evidence to prove that—*

*(a) he had an option to choose either the duty drawback or the DFRC, being the Duty Remission Scheme; and*

*(b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the DFRC, being the Duty Remission Scheme.*

*Explanation.—For the purposes of this clause, 'rate of credit allowable' means the rate of credit allowable under the DFRC, being the Duty Remission Scheme calculated in the manner as may be notified by the Central Government :*

*.....*

*Explanation.—For the purposes of this section,—*

*(baa) 'profits of the business' means the profits of the business as computed under the head 'Profits and gains of business or profession' as reduced by—*

*(1) ninety per cent of any sum referred to in cls. (iiia), (iiib), (iiic), (iiid) and (iiie) of s. 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and*

*(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;"*

*19. Sub-s. (1) of s. 80HHC quoted above makes it clear that an assssee engaged in the business of export out of India of any goods or merchandise to which this section applies shall be allowed, in computing his total income, a deduction to the extent of profits referred to in sub-s. (1B), derived by him from the export of such goods or merchandise. Sub-s. (1B) of s. 80HHC gives the percentages of deduction of the profits allowable for the different assessment years from the asst. yrs. 2001-02 to 2004-05. Sub-s. (3)(a) of s. 80HHC provides that where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such exports shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee. In CIT vs. K. Ravindranathan Nair (2007) 213 CTR (SC) 227 : (2007) 295 ITR 228 (SC), the formula in sub-s. (3)(a) of s. 80HHC was stated by this Court to be as follows :*

*Profits derived from exports =*

*Profits of the business x Export turnover*

*Total turnover*

*20. Explanation (baa) under s. 80HHC states that "profits of the business" in the aforesaid formula means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by (1) ninety per cent of any sum referred to in cls. (iiia), (iiib), (iiic), (iiid) and (iiie) of s. 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature including any such receipts and (2) the profits of any branch, office, warehouse or any other establishment of the assessee situated outside India. Thus, ninety per cent of the DEPB which is "cash assistance" against exports and is covered under cl. (iiib) of s. 28 will get excluded from the "profits of the business" of the assessee if such DEPB has accrued to the assessee during the previous year. Similarly, if during the same previous year, the assessee has transferred the DEPB and the sale value of such DEPB is more than the face value of the DEPB, the difference between the sale value of the DEPB and the face value of the DEPB will represent the profit on transfer of DEPB covered under cl. (iiid) of s. 28 and ninety per cent of such profit on transfer of DEPB certificate will get excluded from "profits*

*of the business". But, where the DEPB accrues to the assessee in the first previous year and the assessee transfers the DEPB certificate in the second previous year, as appears to have happened in the present batch of cases, only ninety per cent of the profits on transfer of DEPB covered under cl. (iiid) and not ninety per cent of the entire sale value including the face value of the DEPB will get excluded from the "profits of the business". Thus, where the ninety per cent of the face value of the DEPB does not get excluded from "profits of the business" under Expln. (baa) and only ninety per cent of the difference between the face value of the DEPB and the sale value of the DEPB gets excluded from "profits of the business", the assessee gets a bigger figure of "profits of the business" and this is possible when the DEPB accrues to the assessee in one previous year and transfer of the DEPB takes place in the subsequent previous year. The result in such case is that a higher figure of "profits of the business" becomes the multiplier in the aforesaid formula under sub-s. (3)(a) of s. 80HHC for arriving at the figure of profits derived from exports.*

*21. To the figure of profits derived from exports worked out as per the aforesaid formula under sub-s. (3)(a) of s. 80HHC, the additions as mentioned in first, second, third and fourth provisos under sub-s. (3) are made to profits derived from exports. Under the first proviso, ninety per cent of the sum referred to in cls. (iiia), (iiib) and (iiic) of s. 28 are added in the same proportion as export turnover bears to the total turnover of the business carried on by the assessee. In this first proviso, there is no addition of any sum referred to in cl. (iiid) or cl. (iiie). Hence, profit on transfer of DEPB or DFRC are not to be added under the first proviso. Where therefore in the previous year no DEPB or DFRC accrues to the assessee, he would not be entitled to the benefit of the first proviso to sub-s. (3) of s. 80HHC because he would not have any sum referred to in cl. (iiib) of s. 28 of the Act. The second proviso to sub-s. (3) of s. 80HHC states that in case of an assessee having export turnover not exceeding Rs. 10 crores during the previous year, after giving effect to the first proviso, the export profits are to be increased further by the amount which bears to ninety per cent of any sum referred to in cls. (iiid) and (iiie) of s. 28, the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee. The third proviso to sub-s. (3) states that in case of an assessee having export turnover exceeding Rs. 10 crores, similar addition of ninety per cent of the sums referred to in cl. (iiid) of s. 28 (sic) only if the assessee has the necessary and sufficient evidence to prove that (a) he had an option to choose either the duty drawback or the DEPB Scheme, being the Duty Remission Scheme; and (b) the rate of drawback*

*credit attributable to the customs duty was higher than the rate of credit allowable under the DEPB Scheme, being the Duty Remission Scheme. Therefore, if the assessee having export turnover of more than Rs. 10 crores does not satisfy these two conditions, he will not be entitled to the addition of profit on transfer of DEPB under the third proviso to sub-s. (3) of s. 80HHC.*

*22. 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 cl. (d) [sic.-(iiid)] of s. 28, he would not get the benefit of addition to export profits under third or fourth proviso to sub-s. (3) of s. 80HHC, but he would get the benefit of exclusion of a smaller figure from "profits of the business" under Expln. (baa) to s. 80HHC of the Act and there is nothing in Expln. (baa) to s. 80HHC to show that this 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 cl. (iiid) of s. 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 (sic) have the export turnover exceeding Rs. 10 crores and as the assessee did not fulfill the conditions set out in the third proviso to s. 80HHC(3), the assessee was not entitled to a deduction under s. 80HHC on the amount received on transfer of DEPB and with a view to get over this difficulty the assessee was contending that the profits on transfer of DEPB under s. 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 Expln. (baa) to s. 80HHC read with the words used in cls. (iiid) and (iiie) of s. 28, the assessee was entitled to a deduction under s. 80HHC on export profits, the benefit of such deduction cannot be denied to the assessee.*

*23. 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 AO is directed to compute the deduction under s. 80HHC in the case of the appellants in accordance with this judgment. There shall be no order as to costs.*

**22.** Respectfully following the above decision, we are inclined to direct the Assessing Officer to allow the claim of the assessee after due verification with proper opportunity of being heard to the assessee. Accordingly, we are inclined to remit this issue also back to the file of Assessing Officer with the above direction.

**23.** Further, assessee has raised following additional grounds: -

> *"i. On the facts and in the circumstances of the case and in law, the appellant submits that advance licence benefit receivable amounting to Rs.3,29,55,054/- ought to be excluded from the total income, particularly as no income had accrued to the appellant until the imports were made and the raw materials were consumed, which events took place in the subsequent year.*
>
> *ii. On the facts and in the circumstances of the case and in law, the appellant submits that Pass Book benefit receivable amounting to Rs.23,40,93,786/- ought to be excluded from the total income.*
>
> *iii. On the facts and in the circumstances of the case and in law, the appellant submits that depreciation ought not to be thrust upon the appellant since no claim was made by the appellant in respect of the same except in the case of the block pertaining to plant and machinery eligible for depreciation at the rate of 25%.*
>
> *iv. On the facts and in the circumstances of the case and in law, the appellant submits that no expenditure ought to have been attributed to earning exempt income since no expenditure was incurred for earning exempt income.*
>
> *v. On the facts and in the circumstances of the case and in law, the appellant submits that deduction of Rs. 1,47,04,451/- ought to be allowed in respect of legal fees paid during the year but treated as an advance in the books of account.*
>
> *vi. DEDUCTION UNDER SECTION 80-IB:*

*6.1 On the facts and in the circumstances of the case and in law, the appellant in respect of deduction under section 80-IB submits as follows:*

*a) Items of "other income" enumerated on page 29 of the assessment order ought not to be reduced from the "profits and gains of the business";*

*b) Items of other income like interest, refund of electricity duty, sales-tax refund, miscellaneous receipts, etc. ought not to be excluded from the profits of the eligible undertakings without reducing the corresponding and matching cost;*

*c) If items of other income like interest, etc. were to be excluded, then only the net amounts ought to have been reduced while computing the profits of the eligible undertaking;*

*d) Advance licence benefit receivable and the pass book benefit receivable ought not to be excluded from the profits and gains derived from the eligible undertakings.*

*6.2 The appellant further submits that the advance licence benefit reversal and the pass book benefit reversal were included as part of the cost of raw materials and in case the said benefits were excluded, the corresponding notional reversals also ought to have been removed from the cost for the purpose of working the profits of the eligible undertakings;*

*VII. DEDUCTION UNDER SECTION 80HHC:*

*7.1 On the facts and in the circumstances of the case and in law, the appellant submits that deduction under section 80HHC ought to be computed in view of the amendment to section 80HHC with retrospective effect by the Taxation Laws (Second) Amendment Act, 2005.*

*7.2 The appellant further submits that while computing 'profits of the business' as per Explanation (baa) below section 80HHC(4A):*

*(a) 90% of the following items were not specifically required to be reduced from the profits of the business as per the definition given in clause (baa) of the Explanation below section 80HHC(4A):*

*Rs. in lacs*

| | |
|---|---|
| *(i) Job Work Charges* | *57.34* |
| *(ii) Sales Tax Refund* | *26.62* |
| *(iii) Discount* | *4.47* |
| *(iv) Insurance Claim* | *29.41* |
| *(v) Excess provision written back* | *62.79* |
| *(vi)Sundry credits written back* | *24.29* |
| *(vii) Exchange rate difference* | *211.59* |
| *(viii) Miscellaneous receipts* | *58.66* |

*(b) Only the net amount of interest received by the appellant ought to have been reduced as per Explanation (baa) below section 80HHC(4A) and in view of the fact that the appellant had credited in the Profit and Loss Account, an amount of Rs.296.97 lacs as interest received and had debited an amount of Rs.3,667.89 lacs as interest paid, the interest paid being more than the interest received, no portion of the interest received ought to have been reduced for the purpose of working out deduction under section 80HHC;*

*(c) The word "receipts" as referred to in the Explanation (baa) below section 80HHC(4A) refers only to the net receipts and accordingly, gross receipts cannot be reduced from the profits of the business.*

*7.3 The appellant submits that unrealised sale proceeds and value of goods reimported / returned ought to be excluded from the total turnover and export turnover as claimed during assessment proceedings while computing the "total turnover" and "export turnover" for the purpose of deduction under section 80HHC.*

*7.4 The appellant submits that the indirect cost of traded goods ought to be recomputed as claimed during assessment proceedings.*

*7.5 The appellant submits that for the purpose of computing book profit under section 115JB, deduction under clause (iv) of the Explanation in respect of profits eligible for deduction under section 80HHC ought to be computed on the basis of the adjusted book profits and not on the basis of the profit and gains of business or profession as per normal provisions of the Act as held by the Hon'ble Supreme Court in the case of Al-Kabeer Exports Ltd. vs. CIT (Civil Appeal No. 1546 of 2012) and CIT vs. Bhari Information Technology Systems (Civil Appeal No. 33750/2009).*

*7.6. The appellant submits that deduction under section 80HHC ought to be granted in respect of Duty Entitlement Pass Book Benefit (DEPB) as per the first proviso to section 80HHC(3) in view of the decision of the Hon'ble Supreme Court in the case of Topman Exports Ltd. (Civil Appeal No. 1699 of 2012).*

*VIII. On the facts and in the circumstances of the case and in law, the appellant submits that interest ought to be granted on delayed granting of interest*

*IX. On the facts and in the circumstances of the case and in law, the appellant submits that deduction in respect of expenditure for service charges for computer software amounting to Rs.35,83,599/- being 1/5th of Rs1,79,17,996/- incurred in assessment year 1997-98 ought to be allowed as per the order dated 20th March, 2003 passed by the Commissioner of Income-tax (Appeals) for the assessment year 1997-98."*

**24.** As we have decided main issues in favour of assessee, these grounds have become academic. Accordingly, the same are not adjudicated at this stage and kept open.

**25.** In the result, appeal filed by the assessee is partly allowed for statistical purpose as indicated above.

**ITA No. 8375/MUM/2011 (A.Y. 2001-02)**

**26.** This appeal is filed by the assessee against order passed under section 271(1)(c) of the Act, assessee has raised following grounds in its appeal: -

> *"1. LEVY OF PENALTY U/S 271(1)(c) R.W.S. 274 OF THE INCOME TAX ACT, 1961.*
>
> *1.1 On the facts and in the circumstances of the case and in the law, the Commissioner of Income Tax (A) erred in upholding the action of Dy. Commissioner of Income Tax in levying penalty under section 271(1) (c) of the Act amounting to Rs. 23,00,630/- on the assumption that assessee deliberately filed inaccurate particulars and claimed the expenses on account of "kick backs paid in the form of Inland Transportation Fees (ITF) and After Sales Service Fees (ASSF) ignoring all the evidences furnished during assessment proceedings as well penalty proceedings u/s.271(1)(c) of the Act."*

**27.** As we have accepted the claim of the assessee and deleted quantum addition, the consequential penalty u/s. 271(1)(c) of the Act has no legs to stand. In the circumstances, since the very basis for levy of penalty i.e. addition made in the assessment proceedings was deleted, penalty proceedings will not survive. Thus, we allow the grounds raised by the assessee and set-aside the order of the Ld.CIT(A).

**28.** In the result, appeal filed by the assessee is allowed.

## ITA No. 2516/MUM/2010 (A.Y. 2002-03)

**29.** Assessee has raised following grounds in its appeal: -

*"ON VALIDITY*

*1. On the facts and in the circumstances of the case and in law, the Commissioner of Income- tax (Appeals) erred in upholding the validity of re-opening the assessment under section 148 of the Act.*

*ON MERITS*

*2. On the facts and in the circumstances of the case and in law, the Commissioner of Income- tax (Appeals) erred in upholding the action of Deputy Commissioner of Income-tax in disallowing an amount of Rs 5,319,254/- out of expenditure incurred in foreign currency in respect of exports made to Iraq.*

*3. On the facts and in the circumstances of the case and in law, the Commissioner of Income- tax (Appeals) erred in holding that the ground pertaining to deduction under section 80HHC cannot be adjudicated again since it has already been decided by the Commissioner of Income tax (Appeals) vide order dated 30 December 2005 passed in respect of the appeal filed against the original assessment order*

**30.** Coming to the appeal relating to A.Y. 2002-03 since facts in this case are mutatis mutandis, therefore the decision taken in A.Y.2001-02 are applicable to this assessment year also. Accordingly, this appeal is partly allowed as indicated in the para no.25 above.

**31.** In the result, appeal filed by the assessee is partly allowed for statistical purpose.

**ITA No. 8387/MUM/2011 (A.Y. 2002-03)**

**32.** This appeal is filed by the assessee against order passed under section 271(1)(c) of the Act, assessee has raised following grounds in its appeal: -

> *"I. LEVY OF PENALTY U/S 271(1)(c) R.W.S. 274 OF THE INCOME TAX ACT,1961.*
>
> *1.1 On the facts and in the circumstances of the case and in the law, the Commissioner of Income Tax (A) erred in upholding the action of Dy. Commissioner of Income Tax in levying penalty under section 271(1) (c) of the Act amounting to Rs.18,98,974/- on the assumption that assessee deliberately filed inaccurate particulars and claimed the expenses on account of "kick backs" paid in the form of Inland Transportation Fees (ITF) and After Sales Service Fees (ASSF) ignoring all the evidences furnished during assessment proceedings as well penalty proceedings u/s.271(1)(c) of the Act."*

**33.** As we have accepted the claim of the assessee and deleted quantum addition the consequential penalty u/s. 271(1)(c) of the Act has no legs to stand. In the circumstances, since the very basis for levy of penalty i.e. addition made in the assessment proceedings was deleted, penalty proceedings will not survive. Thus, we allow the grounds raised by the assessee and set-aside the order of the Ld.CIT(A).

**34.** In the result, appeal filed by the assessee is allowed.

**35.** To sum-up, appeal filed by the assessee is ITA No. 3251/MUM/2009 and ITA No. 2516/MUM/2010 are partly allowed for statistical purpose. Appeals filed by the assessee in ITA No. 8375/MUM/2011 and 8387/MUM/2011 are allowed.

Order pronounced in the open court on 13th December, 2023

| | |
|---|---|
| Sd/- | Sd/- |
| **(KULDIP SINGH)** | **(S. RIFAUR RAHMAN)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai / Dated 13.12.2023
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**