IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G ', NEW DELHI

Before Sri C.M.Garg, JM And Sri L.P.Sahu, AM

ITA No. 406,407/Del./2010
Asstt. Year : 2002-03
Asstt. Year : 2003-04

Sara Services & Engineers Pvt. Ltd. (Now Known as NOV Sara India Pvt. Ltd.) GL-3. Ashoka Estate-24, Barakhamba Road, Connaught Place New Delhi	Vs	ACIT Circle-7(1), Room No. 323 C.R.Building. I.P.Estate New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACS6857L		

ITA No. 543, 544/Del/2010
Asstt. Year : 2002-03
Asstt. Year : 2003-04

ACIT Circle-7(1), Room No. 323 C.R.Building. I.P.Estate New Delhi	Vs	Sara Services & Engineers Pvt. Ltd. (Now Known as NOV Sara India Pvt. Ltd.) GL-3. Ashoka Estate-24, Barakhamba Road, Connaught Place New Delhi
(APPELLANT)		**(RESPONDENT)**
		PAN No. AAACS6857L

Assessee by : Sri O.P. Sapra, Sri Sandeep Sapara, Adv. , Shri Hemant Arora, CA, Sri Jeetan Nagpal, C.A.
Revenue by : Sri Sujit kumar, Sr. DR & Smt. Sunita Kejriwal, CIT,DR

Date of Hearing : 21 .10.2015		**Date of Pronouncement : 18.01.2016**

ORDER

PER C.M.Garg, J.M.

Above captioned cross appeals have been filed against the orders of Commissioner of Income Tax (Appeals). Both dated 17.11.2009 in appeal no. 136/2008-09 and 141/2008-09 for AY 2002-03 and 2003-04 respectively. Since these cross appeals by the assessee as well as by the revenue have been filed agitating issues pertaining two orders of the CIT(A) (Supra) therefore, for the sake of brevity and convenience and in order to avoid multiplicity of orders they have been clubbed and we are disposing them together by this consolidated order.

2. Grounds raised by the assessee in ITA No. 406/Del/2010 :-

> 1. That the impugned assessment order as passed u/s *147/143(3) of the Income-tax Act by the AO is arbitrary, unjust and illegal on various factual and legal grounds including the following:*
>
> *a) Provisions of section 147/148 of I.T.Act were not applicable to the facts of this case.*
>
> *b) There was no nexus between the* reasons recorded and the alleged escapement of income."
>
> *"2. That the ld. CIT(A) has erred in law and on facts in upholding the addition of Rs. 38,35,079/- on account of payment of commission on sales to Iraq by stating that the Appellant has not been able to co-relate the sales of earlier years with such fee. The observation of the ld. CIT(A) are incorrect in as much as complete details of the sales to Iraq and also the ASSF paid in respect thereof were filed not only before*

the ld. AO during the course of assessment proceedings but were also filed before the CIT(A) during the course of appellate proceedings. The said details have either been ignored or not appreciated by the ld. CIT(A)."

3. Grounds raised by the assessee in ITA No. 407/Del/2010 :-

Grounds raised by the assessee for AY 2003-04 read as under :-

1. *That the ld. CIT(A) erred in law and in facts in holding that the re-opening was valid, although the Appellant had demonstrated before him that there was no escapement of income within meaning of section 147 r.w.s 148 of the Income Tax Act, 1961.*
2. *"That the ld. CIT(A) has erred in law and on facts in holding that a sum of Rs. 34,62,807/- included in other income on account of insurance claim, service charges, dividend income and interest from others has to be reduced for the purpose of arriving at adjusted profits while computing the profits for the purpose of section 80HHC of the Income Tax Act, 1961."*

4. Briefly stated the facts giving rise to these appeals are that the return was filed on 28.10.2002 declaring total income of Rs. 55,35,426/- which was processed and finalized at the return of income vide intimation / order passed u/s 143(1) dated 24.02.2003 Section 143(1) of the Income Tax Act, 1961 (for short Act) dated 24.02.2003. Similarly return was filed on 28.11.2003 declaring total income of Rs. 76,24,073/- which was processed on the returned income under vide intimation/ order u/s 143(!) of the Act dated 10.03.2004 for AY 2003-04.

5. Subsequently, notices u/s 148 of the Act was issued on 02.08.2007 and 20.03.2007 respectively for both the assessment year under consideration. Admittedly, notice u/s 148 of the Act dated 02.08.2007 for AY 2002-03 was issued after four years from the end of assessment year which was ended on 31.03.2003. The assessing officer issued copies of the reasons recorded for the respective assessment years before initiation of proceeding u/s 147/148 of the Act for AY 2002-03. The assessing officer showed his intention to reopen completed assessment u/s 147/148 of the Act mainly on the two issues i.e. on the issue of claim of the assessee u/s 80HHC of the Act in the light of amended provisions of section 80HHC and secondly, on the issues of information which was received from CBDT wherein it was informed to the AO that the assessee company had engaged in the foreign exchange transaction and Income Tax return for AY 2002-03 does not reveal recording of any such transaction in its accounts as to what was nature of contract and how the foreign exchange had been received and how the outgoing expenditure of After Sales Service Fee ('ASSF') has been recorded in the books is not known and clear in absence of entries in the final accounts or related documents filed along with return filed for AY 2002-03. For AY 2003-04, the assessing officer recorded similarly worded reasons on the aforesaid two issues and besides these issues the AO also raised third issue pertaining to loss on account of foreign exchange amounting to Rs. 16,20,398/-. It is relevant to mention here that in the order passed u/s 147/143(3) of the Act for the both assessment year. No addition has been made in both the years on the basis of reason recorded with regard to issue of foreign exchange transaction and for AY 2003-04 no addition has been made on the issue of loss of account of foreign exchange fluctuations.

ASSESSEES GROUND NO. 1 FOR AY 2002-03 AND 2003-04

6. We have heard arguments of both the sides have perused the relevant material placed on record, the ld. Counsel of the assessee pressed into service amended ground no. 1 for AY: 2002-03 and since ld. Departmental representative fairly submitted that she has no objection regarding amended ground no. 1 submitted by the assessee, thus, amended ground no. 1 for AY: 2002-03 as reproduced above is admitted for consideration and adjudication.

7. We have heard the arguments of both the sides and carefully perused the relevant material placed before us. Apropos amended ground no. 1 for AY 2002-03 and ground no.1 AY 2003-04 challenging the initiation of proceeding and issuance of notice u/s 147/148 of the Act. The ld. Counsel of the assessee pointed out for AY 2002-03 the four years period was completed on 31.03.2003 whereas the notice u/s 148 of the Act was issued on 02.08.2007 i.e. after 4 years from the end of assessment year, therefore, as per first proviso to section 147 no action could be taken against the assessee after expiry of 4 years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return u/s 139 of the Act or in response to a notice issued under sub-section 1 of section 142 or section 148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. The ld. Counsel further placed in reliance on the decision of Hon'ble Gujarat High Court in the case of Avni Exports and others vs. CIT reported as 34 ITR 391 (Gujarat) and submitted that retrospective nature of amendment fees 2nd, 3rd and 4th provisos to Section 80HHC(3) of the Act inserted by taxation law amendment Act, 2005 with retrospective effect of 01.04.1998 was declared unconstitutional. The

amendment was valid only prospectively therefore , reasons recorded by the AO for both the years on the basis of retrospective amendment u/s 80HHC of the Act, subsequently have been held to be unconstitutional by Hon'ble Gujarat High Court hence, the initiation of proceedings u/s 147/148 of the Act on the basis of such reasons is legally untenable .

8. The ld. Counsel further submitted that as per order of the ITAT, Kolkata bench in the case of DCIT vs. Raj Rani Export Pvt. Ltd. 22 taxman.com 13 (Kolkata) payments made to Iraqi Company for receiving services to facilitate export to Iraq under " Oil for Food programme" is allowable as business expenditure irrespective of the fact that such payment was passed on by Iraq company as kick back to Iraqi authorities. The ld. Counsel of the assessee vehemently pointed out that order of the ITAT, Kolkata in the case of Raj Rani Exports (Supra) has been upheld by Hon'ble High Court of Kolkata in the case of CIT vs. Raj Rani Export Pvt. Ltd. reported as 361 ITR 152 (Kolkata) wherein it has been held that where the assessee had paid commission on exports through banking channel, in pursuance to an agreement approved by Government of India and United Nations, the same could not be disallowed the absence of evidence of its illegality. The ld. Counsel strenuously pointed out that the claim of the assessee was squarely covered by the order of Hon'ble High Court of Kolkata in the case of CIT vs. Raj Rani Export (Supra) and in this situation reopening of assessment in the similar said facts and circumstances cannot be held as valid and tenable.

9. The ld. Counsel of the assessee finally submitted that the reasons recorded by the AO for initiation of the reopening of the assessment for both the years and issuance of notice u/s 148 of the Act and order passed u/s 147/143(3) of the Act passed therein are not sustainable as the AO initiated proceedings of

reopening of assessment after 4 years for AY 2002-03 without any allegation on record as required by first proviso to section 147 of the Act. The ld. Counsel vehemently pointed out there is no allegation in the reasons recorded by for AY 2002-03 that any income chargeable to tax has escaped the assessment by reason of the failure on the part of the assessee to disclose fully and truly all materials facts necessary for its assessment for that assessment year which is under consideration. The Ld. Counsel also pointed out that for AY 2003-04 the reasons recorded by the AO do not clothe the AO with valid assumption of jurisdiction as on third and second issue no addition has been made and on the first issue reopening of assessment was made on the basis of retrospective amendment which was declared unconstitutional by Hon'ble Gujarat High Court.

10. Replying to the above ld. Departmental representative vehemently pointed out the returns of the assessee were processed and accepted at the return income u/s 143(1) of the Act , therefore, the AO had no occasion to form any opinion about the details and particulars submitted by the assessee in the return of income and first proviso to section 147 of the Act is only applicable to the cases wherein the assessment was completed u/s 143(3) of the Act and not u/s 143(1) of the Act. The ld. DR supported the action of the AO and submitted that the assessing officer was quite correct in assuming valid jurisdiction in recording reasons for reopening of assessment and issue notice u/s 148 of the Act even beyond 4 years because the original returns were processed u/s 143(1) of the Act and therefore the assessee cannot take shelter of first proviso to section 147 of the Act.

11. On carefully consideration of rival condition of both sides at the very outset, we find it appropriate to reproduce section 147 alongwith first proviso reads as under :-

> *" **147.** If the [89][Assessing] Officer [90][has reason to believe[91]] that any income chargeable to tax has escaped assessment[91] for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess[91] such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings[91] under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
> ***"Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year[92], unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure[92] on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts[92] necessary for his assessment, for that assessment year:"*

12. On bare reading of first proviso to section 147 to the Act it is ample clear that the first proviso is applicable only to the cases were assessment has been made u/s 143(3) of the Act and in the present case, admittedly and undisputedly returns for both the years under consideration were processed u/s 143(1) of the Act and hence, we can safely presume that there was no opportunity for the AO to form any opinion regarding details filed by the assessee in its return of income and other documents filed alongwith return of income and on the and thus we are considered view that the assessee is not eligible for the shelter of first proviso to section1 47 of the Act. At this juncture,

it is necessary and relevant to consider the ratio laid down by Hon'ble Supreme Court in the case of DCIT vs. Juari State Development and Investment Company Ltd. reported as 373 ITR 661 (SC) wherein their lordship speaking for the Apex court of India allowing the appeal of the revenue held the main issue involved in the case had not been addressed by the Hon'ble High Court and the asessee's return was accepted u/s 143(1) of the Act and there was no question of "change of opinion" inasmuch as while accepting the return, no opinion was formed and therefore on this basis the notice issued by the AO u/s 148 of the Act was held as valid.

13. On the basis of foregoing discussion and respectfully following the decta laid down by Hon'ble Supreme Court of India in the case of Juari State (Supra) we are inclined to hold that since the original returns for both the assessment years were processed u/s 143(1) of the Act, thus, the assessing officer had no opportunity to form an opinion and therefore initiation of proceedings u/s 147 of the Act and issuance of the notice u/s 148 of the Act cannot be held as invalid assumption of jurisdiction or untenable and we decline to accept legal contention of the assessee placed in the legal grounds under consideration. At the same time we have no hesitation to hold that the assessing officer was quite justified in initiating of proceeding u/s 147 of the Act for both the assessment years and thus we are inclined to hold that amended ground no. 1 for AY 2002-03 and ground no. 1 for AY 2003-04 being devoid of the merits deserve to be dismiss and we dismissed the same and conclusion of the CIT(A) in this regard is upheld. Accordingly, ground no. 1 of the assessee in both the years are dismissed.

ADJUDICATION ON MERITS

14. Since the revenue has also filed appeals for both the assessment years challenging the relief granted by the CIT(A) to the assessee. Therefore we find it necessary and appropriate to deal with the grounds of the assessee as well as the revenue on merits together.

Revenue's ground in ITA no. 543/Del/2010 :-

"1. Ld. Commissioner of Income Tax (appeal) erred, in law and on the facts and circumstances of the case, in restricting the addition to Rs. 38,35,079/- as against Rs. 97,48,138/- made by the AO on account of commission on sale.
2. Ld. Commissioner of Income Tax (Appeal) erred, in law and on the facts and circumstances of the case, in directing the AO to consider only the profit element for the purpose of computing the adjusted profit u/s 80HHC."

15. Revenue's ground in ITA no. 544/Del/2010 :-

"1. Ld. Commissioner of Income Tax (Appeal) erred, in law and on the facts and circumstances of the case, in deleting the addition to Rs. 40,52,998/- made by the AO on account of commission on sale.
2. Ld. Commissioner of Income Tax(Appeal) erred, in law and on the facts and circumstances of the case, in directing the AO to consider only the profit element for the purpose of computing the adjusted profit u/s 80HHC."

Ground no. 2 of the assessee and ground 1 of the revenue for AY 2002-03.

16. The assessing officer made addition of Rs. 97,48,138/- on account of disallowance made dismissing the claim of the assessee regarding payment of commission on sale. During first appellate proceedings, the CIT(A) granted part relief to the assessee and upheld part disallowance of Rs. 38,35,079/-. Therefore, in ground no. 1 , revenue is challenging first appellate order which granted part

of the relief to the assessee and the assessee in ground no. 2 has challenged the upholding of part disallowance made by the CIT(A), thus, we are adjudicating these grounds together for the sake convenience and brevity in our order.

17. Apropos ground no. 2 of the assessee and ground no. 1 of the revenue, we have heard argued of both the sides and carefully perused the relevant material placed before us. The Ld. Counsel of the assessee submitted that the allegation of the AO in the reasons recorded was that what is the nature of contract and how foreign exchange had been received and how the outgoing expenditure of After Sale Service Fee (ASSF) has been recorded in the books of accounts is not known in the absence of entries in its final accounts or related documents filed during the original assessment proceedings. The ld. Counsel vehemently pointed out these observations of the AO in the reasons recorded are factually incorrect as during the year, under consideration, the assessee made exports to Iraq under the United Nations sanctioned " Oil for Food Program" against a purchase order from the Economic and Finance Department, Ministry of Oil, Bagdad, republic of Iraq, copy of which has been placed by the assessee at pages 40 to 46 of the assessee's paper book. The ld. Counsel further pointed out the assessee paid ASSF to foreign agents on Exports to Iraq to through banking channels and copies of the ledger accounts of foreign agents and bank advice are placed at pages 63 to 75 of the assessee's paper book. The ld. Counsel pointed out that the CIT(A) granted part relief to the assessee by accepting explanation, submission and contention of the assessee but denied part relief and uphold the disallowance of Rs. 38,35,079/- by stating that the assessee has not been able to correlate the sales of earlier year which such fee.

18. The ld. Counsel vehemently pointed out these observations of the CIT(A) are actually incorrect inasmuch as complete details of the sales to Iraq

and also regarding ASSF paid in respect thereof were filed not only before the AO during the course of assessment proceedings but were also filed before the CIT(A) during the course of first appellate proceedings and the said details have either been ignored or not appreciated by the CIT(A) in the impugned order. The ld. Counsel also pointed out that the issue is squarely covered in assessee's favour by the tribunal order of ITAT, Kolkata 'B' bench in the case of DCIT vs. Rajrani Export Pvt. Ltd. (supra) since recorded in (2012) 22 taxman.com 13 (Kolkata) where on the similar facts and circumstances the coordinate ITAT Kolkata bench has held that the payments having been made by the assessee for bona fide business purpose which ended up being used illegal kick backs between alia – Iraqi regime over which the assessee had no control, the same could not be disallowed by the revenue. The ld. Counsel also pointed out that the said tribunal order has been confirmed by Hon'ble Kolkata High Court by judgment dated 24.04.2013 since reported in 361 ITR 152.

19. Replying to the above, the ld. DR supported the action of the AO and submitted that the assessee has paid commission to the foreign agents as has been reflected in the bank statement submitted by the assessee but the AO noted that the identity of the agents to whom this commission has been paid remained unverifiable, therefore, the entire commission payment to Iraq was rightly disallowed in absence of satisfactory documentary evidences. The ld. DR vehemently pointed out the assessee had paid commission to other foreign agents and the names of the payees were provided but the identity of the agents to whom commission has been claimed to be paid by the assessee remained unverifiable and the assessee has failed to establish with any reliable evidence that the parties to whom alleged commission had rendered any such services so

as to receive the commission, thus, in absence of evidence to support claim of commission the entire amount was rightly disallowed.

20. The ld. DR challenging the relief part of the first appellate order submitted that the CIT(A) uphold part disallowance an addition and he granted part relief to the assessee without any basis, therefore, the impugned order may be set aside by restoring that of the AO. The ld. DR strongly supporting the upholding part of the impugned order submitted that the AO strongly doubted the identity of the recipient of ASSF on commission of sale, therefore the first appellate authority has no justified reason or basis to delete part disallowance made by the AO specially when he is upholding the part disallowance regarding payment of ASSF on the similar facts and circumstances. The ld DR also pointed out that the disallowance of Rs. 38,35,079/- on account of ASSF relating to payments connected with supplies made to Iraq was upheld by the CIT(A) by observing that the appellant has not been able to co-relate the sales of early arrears with such fees as it is seen that the assessee has claimed that no sales have been made to Iraq during the year as per affidavit of Managing Director.

21. Replying to the above, the ld. Counsel of the assessee also placed rejoinder to the above noted submission of the Ld. DR and contended that the assessee submitted entire detail regarding payment of ASSF by submitting the copy of supply contact entered into between economic and finance department, Ministry of Oil, Baghdad Republic of Iraq; copy of the ledger account of Ministry of Oil in assessee's books of accounts filed before the AO; copy of the ledger account of commission paid to foreign agents in assessee's books of accounts filed before the AO; copies of the bank advice for remittance of commission filed before the AO; copies of the confirmation of receipts from agents filed before the AO and affidavit of Mr. V.K.Dhawan, Managing

Director of the company filed before the AO and these documents including aid affidavit clearly establish that during the financial year ended on 31.03.2002 relevant to AY 2002-03, the company has exported the Oil Drilling Equipment for USD 796152/- entered into the Economic and Finance Department, Ministry of Oil, Republic Baghdad after approvals of Government of India and Reserve Bank of India. The ld. Counsel vehemently pointed out that the CIT(A) in the impugned order in para 23 wrongly noted that the appellant has claimed that no sales have been made to Iraq during the year as per affidavit of the Managing Director which is factually incorrect because as per affidavit of Mr. Dhawan placed at page 76 of the assessee's paper book for AY 2002-03 it is ample clear that Mr. V.K. Dhawan stated therein about the Export of Oil Drilling Equipments to Iraq during financial year ended on 31.03.2002 relevant to AY 2002-03. The ld. Counsel reiterating its submission before the authorities below and placing reliance on the decision of ITAT, Kolkata in the case of Rajrani export (Supra) which has been upheld by Hon'ble Kolkata High Court, submitted that the CIT(A) was not justified in upholding the disallowance pertaining to the claim of assessee regarding payment on account of ASSF relating to the payments connected with the said supplies made to Iraq during the relevant period.

22. On careful consideration of above submissions of both the sides from the assessment order, we note that the AO made disallowance with following observations submissions :-

> *The submission filed by the assesse company has been duly considered but not acceptable. From the perusal of the copy of the contract between the Sara Services & Engineers Pvt. Ltd. and economic and finance department, Ministry of Oil, Baghdad, Republic of Iraq, it is very clear that there is no provision / requirement for the payment of*

after sale services / commission as has been claimed by the assessee. The copy of contract between the two concerns only says about the value of equipments being sold to Iraqi company. As there is no mention in the contract note regarding commission after sales services and also the fact that whatever commission has been paid by the assessee has not been supported by any satisfactory documentary evidence. The assessee has paid commission to the foreign agents as has been reflected in the bank statement submitted by the assessee. But the very fact that the identity of the agents to whom this commission has been paid remains unverifiable, therefore, the entire commission payment to Iraq of the amount of Rs.97,48,138/- Is being disallowed in the absence of satisfactory documentary evidences.

It is further seen that the assessee has paid commission to other foreign agents as well the names of whom the assessee has provided. But again as discussed above, the identity of the agents' to whom the commission has been claimed to be paid by the assessee remains unverifiable. Further, the assessee has failed to establish with any reliable evidence that the parties to whom the alleged commission **was** *paid had rendered any such s***ervices so** *as to receive the commission. In the absence of evidence to support its claim of commission, the entire amount of Rs. 97,48,138/- is being disallowed. Further, I am satisfied that the assessee has filed inaccurate particulars of its income, hence penalty proceedings u/s 271(1)(c) are also being initiated separately."(assessment Order)*

23. The First Appellate Authority noted that the assessee placed following documentary evidence and papers during the first appellate proceedings before the AO to support his claim of payment of commission out of which partly was allowed by the CIT(A) during the part addition and partly disallowance pertaining to ASSF commission was upheld by the CIT(A). The

relevant part of the impugned order wherein the CIT(A) noted the document placed before the AO, before the CIT(A) as well as before this tribunal in this regard and adjudication on the acceptability of the affidavit of Shri Dhawan, Managing Director of the assessee company is being reproduced below :

"In support of their claim, the Appellant places reliance on following documents filed before the Id. AO as statedly also duly acknowledged by her in the impugned order:

- **a)** *Assessee's letter dated 17.7.2008 filed before the Id. AO - copy placed at pages 33-35.*
- **b)** *Assessee's letter dated 6.11.2008 filed before the Id. AO - copy placed at pages 36-40*
- **c)** *Copy of the purchase order from the Economic and Finance Department, Ministry of OH, Baghdad, Republic of Iraq which also reflects that the ultimate user shall be Iraq Drilling Company. - copy placed at pages 41-60*
- **d)** *Approval of United Nations UNIES, under whose aegis the supplies to Iraq were made - copy placed at pages 54.*
- **e)** *Copy of ledger account of M O Oil in the books of the Appellant - copy placed at pages 61-62 .*
- **f)** *Copy of ledger account of commission to foreign agents, copy Placed at pages 63-65*
- **g)** *Copies of Bank advice for remittance of commission to the agents, copies placed at pages 66-70.*
- **h)** *Copies of the confirmation/receipt from the agents about receipt of commission on account of sale to Iraq, copies placed at pages 71-75.*
- **i)** *Affidavit of Shri* V. *K. Dhawan, Managing Director of the Appellant company affirming the payment of ASSF to the two agents through wire transfer from the Appellant's bank account with Punjab National Bank, copy placed at pages*

It has been further stated that there were two aspects to the information received by the Id. AO from the CBDT. Firstly, the contract for supply to Iraq and secondly the payment of ASSF. It is not in dispute that the assessment was re-opened to examine whether both the transactions were recorded in the books of account or not. Upon verification of the books of accounts and on the basis of the information/documents submitted by the Appellant before the Id. AO it was also not in dispute that the transactions reported by the CBDT were found recorded in the books of the Appellant.

It has been claimed that the Affidavit of Shri V K Dhawan conclusively laid at rest the Id. AO's apprehensions whether the transactions reported by the CBDT were recorded in the books of the Appellant. It is further contended that the additions made by the Id. AO are purely based on surmises and conjectures and on whimsical grounds not permitted by law. It is stated that in ***Hanutram Ram Prasad v CIT 114 ITR 19 (Gau)*** *it has been held that evidence may be tendered on an affidavit before the assessing officer. Such evidence is legal and can be acted upon by the assessing/ appellant authority . Should the assessing officer or the deputy commissioner (Appeals) or the appellate tribunal regard the same as not sufficient proof of the contents thereof, they should Cross examine the deponent and, if dissatisfied, call upon the assessee to produce documentary evidence in support of the contents of the affidavit. It has been argued that if no such thing is done, the affidavit by itself should be regarded as sufficient proof. Statedly, this was so held by the* ***Supreme Court in Mehta Parikh & Co v CIT 30 ITR 181.*** *This decision only lays down that if there is no material whatsoever on record for doubting the veracity of the statements made in the affidavit and if*

the deponent has also not been subjected to cross examination for bringing out the falsity of his statements then the tribunal will not be justified in doubting the correctness of the statement made by the deponent in the affidavit. The finding arrived at in such a case would, according to the Supreme Court, be a finding based on pure surmise.

24. Furthermore, from the Ld. CIT(A) order we observe that the assessee submitted detailed submissions and contention supporting the claim of payment of commission and ASSF amount during the relevant period, during the first appellate proceedings which reads as follows :-

i) Firstly it is to be submitted that the Appellant nowhere stated that the commissions were paid to the Government of Iraq as has been wrongly presumed by the Id. AO. The commissions are never paid to the end customer but are paid to the agents and facilitators. What is paid to the customer is in accounting parlance called discounts/rebates. So the Id. AO's argument that the contract with the customer i.e. Government of Iraq does not provide for payment of commission is misplaced and erroneous and has no bearing on allowability of the commission and ASSF expenditure under the IT Act.

ii) Secondly, it has been submitted that in fact the names of the recipients of ASSF were st**arted to have b**een duly provided to the ld. AO, their addresses were provided to the id. AO and in some cases even the telephone numbers **were statedly also** on record**. The payments have** been statedly-made through banking channels, and the details of the mode of payment through banking channels were also provided to the ld. AO wherein the **necessary inf**ormation is stated to **be available**. Hence to hold that the identity of the recipients was not clear is

far from truth. Accordingly even the second argument of the Id. AO that the identity of the persons to whom the commission have been paid remains unverifiable is misplaced and erroneous as per the appellant. It is stated that in ***Shahzada Nand & Sons v CIT 108 ITR 358 (SC)*** the Supreme Court has held that it is not essential that the commission should be paid under a contractual obligation. It may be paid voluntary. But it must be for services rendered. The ***Bombay High Court in 188 ITR 1 in the case of CIT v Good lass Nerolac Paints Ltd.*** has held that where on the basis of facts and materials on record the Tribunal concluded that the payment of commission was established, and that payments were made for the purpose of business, inspite of the fact that names and addresses of recipients were not given, the Tribunal was held justified in allowing deduction of commissions. In ***Mather & Platt (India) Ltd. v. CIT 168 ITR 493 (Cal.)*** it was held that where the assessee had established identities of commission agents to whom it had made payments, the fact that summons sent to them four years later by department came back undelivered would not mean that they were non-existent at the time of payment. Thus the commission was held to be allowable. Thirdly, it has been submitted that the Id. AO has alleged that the said agents to whom the commissions have been paid may not have rendered services so as to justify receipt of commissions. As per the appellant, this is a plain and baseless allegation without facts or evidence. The payment of commissions is stated to be intricately linked to each and every sales invoice and details are available from the copies of ledger of commissions and sales on record (Paper Book). It is an accepted fact that the payments have indeed been made

through banking channels to various parties. None of the parties are stated to be related to the Appellant or any of it's Directors. The payment of commission is claimed to be in accordance with the normally accepted business practices. The payment of commission is claimed to be at arms length price at prevailing market rates. It is stated that the Id. AO has neither disputed nor controverted any of these facts. Hence her allegation that no services have been rendered is not only baseless and erroneous as per the appellant but also grossly against the facts on record. The appellant has stated that

(i) It has been so held in ***Ritz Hotel (Mysore) Ltd. v CIT (1992) 196ITR 614 (Kar.)****that the burden is quite heavy On the revenue to establish that no services were rendered and the payment of commission was unauthorized or not warranted by any business considerations. Otherwise the commission payment made by the assessee was to be allowed.*

ii) The jurisdictional Delhi Tribunal in Ensons v***ITO 23 Taxman 41*** has held that where the burden to establish that the selling agent was "benami" of the assessee firm was not discharged by the revenue, commission could not be disallowed by making reassessment.

iii) in ***CIT V. Chandulal Keshavalal & Co.(1960) 38 ITR 601 (SC)*** the Apex Court has held that in order to justify deduction, the sum should be given up for reasons of commercial expenditure; it might be voluntary, but so long as it was incurred for the assessee's benefit, the deduction would be claimable.

Further, the Appellant's case is stated to be totally covered by the decision of the ***Kolkata Bench of ITAT in TIL Ltd. v Assistant CIT reported in 16 SOT 33*** wherein it has been held that where the assessee company supplied forklift Trucks and paid commission thereon, such commission

was fully allowable as the assessing officer could not disallow the same on the basis of Volker Commission Report. "

25. Finally, from the relevant operative part of the impugned order we note that the CIT granted part relief to the assessee with following observations and conclusion :-

"The appellant has submitted that while framing the impugned assessment order and while disallowing the commissions (ASSF/the Id. AO has given a new twist to the facts and stated that the commissions in question though recorded in books of accounts were still not allowable for certain reasons as stated in the impugned assessment order, the most important of them being that there was no detail of services rendered. It is seen that the AO also doubted the identity of the recipients of such fee.

In this regard, the appellant has submitted that the nature of expenditure in question is undoubtedly commission and after sales
service fee paid to foreign agents. The appellant has explained that it is not possible for any person to attend all the functions which are required for smooth conduct of business single handedly. Therefore, he has to take the help of others to perform various specified v4 functions. It is stated that for this purpose he has two options, either to employ someone to do the work and pay salary or getthe *work done through agents on payment of commission. It is stated that the expenditure on payment of commission to agents etc. is deductible u/s 37(1) of the Act. The only condition when such expenditure is not deductible is statedly provided in explanation to said section which states that expenditure "incurred by an assessee for any purpose which is an offence or which is prohibited by law*
shall not be deemed to be incurred for the purpose of business or profession and no deduction shall be made in respect of such expenditure." It has been contended that

the payment of commission and ASSF were not barred by any law whatsoever nor did the Appellant commit any offence in making such payments. It is also contended that there is no allegation to this effect by the Id. AO while disallowing the expenditure on commissions. Hence it is statedly impliedly accepted by the Id. AO that the expenditure is for the purpose of business of the Appellant. It is stated that Foreign commission (ASSF) paid was incurred wholly and exclusively for the business of the appellant although as per the AO no convincing evidence has been filed in this regard by the appellant. Further it was also stated that it was incurred on account of commercial expediency. Thus it statedly complies effectively with both the preconditions laid down in section 37(1) of Income tax Act 1961making it eligible for full admissibility of the business expenditure as deduction. It is an accepted fact that commissions have been paid by the Appellant to the agents for sales to Iraq and also to various other agents for various sales. The Id. AO herself concedes this fact by stating that "The assessee has paid commission to the foreign agents as has been reflected in the bank statement submitted by the assessee." Refer second last para of page 4 of the impugned assessment order.

*What is **not in dispute** is the fact that the subject payments are not illegal and that the said payments have indeed been made.*

*What has been **disputed by the Id. AO** while disallowing the said expenditure are the following facts:*

a. *That the contract with the Government of Iraq did not provide for payment of commission,*
b. *That the identity of the agents to whom this commission has been paid remains unverifiable.*
c. *That in respect of the commissions paid to other agents*

the Id. AO has also remarked that whether such agents rendered any such services so as to receive the commission."

26. From last operative part of the impugned order, we note that finally the CIT(A) granted part relief to the assessee and upheld part this disallowance on account of ASSF relating to payments connected with supplies with following findings and conclusions :-

"As per the appellant, there is another aspect to the facts of this case. The Appellant has been in the same line of business for over twenty years and has been statedly exporting goods in the past also. The Appellant has statedly utilized services of foreign agents for several years now. It is seen in the immediately preceding year also such commission has been paid amounting to Rs.20,04,088/-.The services are explained to have been rendered for procuring Orders, recovering debts and for maintaining liaison with overseas customers. In the past too commissions have been paid by the Appellant to the foreign agents and the same have been statedly allowed as deductible business expenditure by the department while assessing the appellant u/s 143(3) of the Act. The facts in present year are statedly no different from those in preceding years. Hence the disallowance of foreign commission is totally uncalled for and unwarranted as per the appellant.

16. *The Id AR has further submitted a chart providing details of commission debited to accounts and paid to agents. Thereafter it was argued that the total disallowance made in the impugned assessment order is of Rs.97,48,138 which also includes a*

disallowance of US$ 79,812 (converted into INR 3,835,079) on account of ASSF dealt with by us in para 1 supra.

The balance of Rs. 59,13,059 being commissions to foreign agents has been disallowed by the Id. AO only on the ground that the identity of the agents is not know.

The appellant's relevant submission is reproduced below:

Furthermore, on the basis of the examination of assessment record, we are to make a categorical statement before Your Honour that the Id. AO never queried the Appellant during the course of the proceedings with regards to the commissions paid to agents for foreign sales other than the ASSF of US$ 79,812 on account of sales made to Iraqi client which were subject matter of re-opening of assessment u/s 147. Hence the addition of balance amount being commissions paid to all foreign agents was made behind the back of the Appellant and without giving them any opportunity to furnish the details and explanations. The Id. AO's remarks that the identity of the agents to whom such commissions have been paid remains unverifiable is factually incorrect in so far as the Appellant was not accorded any opportunity to provide the same. This is in gross violation of the Principles of Natural Justice. It is now a settled principle that a fair opportunity of hearing is a pre-condition even for an administrative order. This is a basic principle of natural justice. The principle of natural justice embodied in the Latin dictum "audi alteram partem" only means that a person has right to be heard by way of an opportunity, which should be adequate and reasonable, so as to enable the person affected to meet the case against him. In order that he is so enabled he should know the case against him. It is this principle which was enforced by a Bench of three Judges in the case of ***Rakesh C Rastogi v Appropriate Authority (2002) 253 ITR 94 (SC).***

*In **Tin Box Co. v CIT (2001) 249 ITR 216** the Supreme Court found that in light of the finding of the Tribunal that the assessee did not have proper opportunity before the Assessing Officer, the only course of action was to set aside the assessment, so that the assessment could be made after such opportunity. The view that such lack of opportunity can be made good in first appeal, was obviously found to be erroneous. From this angle also the impugned order deserves to be annulled.*
*However on the technical issue of whether such disallowance could have been made at all in light of the fact that the same had no connection with the reasons articulated which formed the basis of a notice u/s 148(1), reliance is once again placed on the decision of the **jurisdictional Delhi High Court in Jay Bharat Maruti Limited** discussed above. The Hon'ble High Court has held that "the ■assessment order in so far as it dealt with items other than those which formed the basis of the reasons disclosed are bad in law or*
stood vitiated in law." In the present case also the commission to foreign agent had no connection with the recorded reason and therefore could not have been a subject matter of re-assessment proceedings. The decision of the jurisdictional High Court deserves to be followed and the addition made on this account be kindly deleted.

The above submissions have been carefully considered. It is seen that the appellant is not correct in alleging that adequate opportunity was not given to them and the addition was made behind their back. It is seen that the appellant had filed the details of commission paid before the AO during the course of assessment proceedings stating the names, addresses and the details of bills also against which such commission was paid. These details are available at page 24 and 25 of the Paper Book and the appellant has certified that no such document has been included in the paper book which was not filed before the AO. Hence, it is held that the

lack of opportunity argument of the appellant deserves to be rejected."

17.Having held so, now the issue is whether the payment of commissions and ASSF by the Appellant have been recorded in the appellant's books of account. Also whether the payments were made for the purpose of business and also whether any service was provided by the recipients to the appellant, as discussed by the AO in the assessment order. At the time of re-opening the AO was to examine the fact that the transactions involving sales to the Government of Iraq and the payment of ASSF in respect to said transactions were legal payments or not. The said fact was apparently examined on the basis of the AO's consideration of the purchase order, UN approval, the extracts of books of the Appellant, ledger account of Ministry of Oil, Ledger account of foreign agents, copies of confirmations from agents and affidavit of the Managing Director of the Appellant company. All these documents are statedly part of the assessment record, as per the appellant. The AR of the appellant has certified on the Paper Books that all documents filed during the appellate proceedings were before the AO also at the time of assessment.

18. There does not appear to be any dispute that the transactions were found recorded in the books of the Appellant. The veracity of the transactions was statedly duly verified by the AO.

19. It is seen that in spite of this the AO has disallowed not only the ASSF paid against sales to Iraq but also all other commissions paid to foreign agents. The AO while doing so has reasoned that the identity of the recipients could not be proved and it has not been established what services were provide by the agents to the

Appellant.

20. The Id. AR on the other hand has stated jtiat the details of recipients of ASSF were given to the AO. Payments were made through banking channels. The payments were made in accordance with the instructions from buyer i.e. the Government of Iraq. It has further been contended that the payments of commissions are being made for the past twenty years, the Appellant has been regularly assessed to tax and never have such commissions been disallowed by the department. The details of the addresses of the agents and also the contracts with them are stated to be on record.

21. Various cases laws have been relied upon by the Id. AO which have been duly considered.

22. On a perusal of the material on record and after considering the rival contentions I am of the view that the commissions were paid by the Appellant to it's agents firstly for effecting export sales to various countries and for ensuring smooth after sales service for the sold equipment. The payment of said commissions is in accordance with the normal business practices. As regards the payment of ASSF, it has not been shown to be correlated with particular sales of earlier years, by the appellant.

22. In light of the aforesaid I find no plausible reason for disallowance of Rs.59,13,059/- being expenditure debited under the head commissions and direct the AO to allow the same as similar commission has been paid in earlier years also, and for other reasons as discussed above. However, the disallowance of Rs.38,35,079/- on account of ASSF relating to payments connected with supplies made to Iraq, is upheld as

the appellant has not been able to correlate the sales of earlier years with such fees as it is seen that the appellant has claimed that no sales have been made to Iraq during the year as per the affidavit of the Managing Director. The disallowance of Rs.38,35,079/- is upheld and the balance of Rs.54,13,059/- is deleted."

27. In view of the above first issue for adjudication before us is that whether the CIT(A) was not correct in granting part relief to the assessee in regard to deleting the addition made by the AO of disallowance of Rs. 59,13,059/- being expenditure debited under the head of commission ? From the operative part of the first appellate order as reproduced hereinabove. We note that the assessee submitted before the authorities below that the expenditure on payment of commission to agents etc. is deductable u/s 37 of the Act. As per explanation to section 37(1) of the Act the only condition when such expenditure is not allowable is that the expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to be incurred for the purpose of business or profession and no deduction shall be made in respective such expenditure. The assessing officer noted that the assessee paid commission to foreign agents as has been reflected in the bank statement submitted by the assessee but the identity of the agents to whom this commission has been paid remained unverifiable, therefore, the entire commission payment to Iraq is disallowed due to absence of reliable documentary evidences. The AO also alleged that there was no mention in the contract no regarding payment of commission and after service fee. The third allegation of the AO is that the assessee has paid commission to other foreign agents, the names of whom has provided by the assessee but the identity of the

agents to whom commission has been claimed to be paid by the assessee remained unverifiable and the assessee has failed to establish with any reliable evidence that the parties to whom the alleged commission was paid had rendered any such services so as to receive the commission.

28. The CIT(A) noted that the assessee had filed the details of commission paid before the AO during the course of assessment proceedings stating the names, addresses and details of bills against which such commission was paid. The CIT(A) noted the certification of the assessee that these documents have been filed before the AO and thus, held that the assessee got ample opportunity before the AO and he rejected the arguments of lack of opportunity as alleged by the assessee. On bare analysis of the impugned order on this issue we are in agreement with the finance of the CIT(A) that the commission were paid by the assessee to its agents, firstly for an effecting export sales to various countries and for ensuring smooth after sale service for the sole equipments. The CIT(A) after considering the documentary evidence filed by the assessee, as a list hereinabove, available at assessee's paper book from pages 33 to 40 and 63 to 76 of the assessee's paper book we observe that the payment of said commission was made for effecting export sales of equipments to various countries for ensuring smooth after sale services for the sales effected by the assessee. It is also pertinent to note that the Ld. DR has no controverted or disputed the fact that the commission paid to foreign agent on export was allowed in earlier assessment year 2000-01 & 2001-02 and also during the subsequent assessment years from 2007-08 to 2011-12 in the assessment order passed u/s 143(3) of the Act. Thus, we are considered opinion that , however, the principle of res judicata does not apply to the tax proceedings

but rule of consistency is always respect by the revenue authorities unless sufficient reason and dissimilarity in the facts and circumstances exist before the revenue authorities to take a deviate or different view on the issue.

29. During the appellate proceedings, after analyzing the entire facts, it was held that the commission payment made by the assessee is allowable expenses as the same was incurred during the normal course of business over the year. As we have already observed earlier that the payment of commission was made by the assessee to its agent for affecting export sales to various countries and ensuring smooth after sale services for the sole equipment and the assessee placed entire details pertaining to commission paid during the assessment proceedings stating the names, addresses and the details of bills against which impugned commission was paid. In this situation, we are unable to see any valid reason to interfere with the impugned order wherein the CIT(A) granted part relief to the assessee and directed the AO to allow the same amounting to Rs. 59,13,059/- by holding that similar commission has been paid in the earlier years. On the basis of foregoing discussion we are unable to see any perversity or any other valid reason to interfere with the impugned first appellate order and we uphold the same. Accordingly ground no. 1 of the revenue being devoid of the merits is being dismissed.

30. Next question for adjudication placed before us for adjudication by the assessee as ground no. 2 for AY 2002-03 is that whether the CIT(A) was right and correct in upholding the disallowance made by the AO on account of ASSF relating to payments connected with supplies made to Iraq ?

31. The ld Counsel of the assessee mainly contended that the issue is squarely covered in favour of the assessee by the order of the ITAT, Kolkata Bench B in the case of DCIT vs. Rajrani Pvt. Ltd. (Supra) wherein it was held

that the payment having made by the assessee for bonafide business purpose which ended up being used illegal kick backs between recipient Alia and Iraqi regime over which the assessee had no control the same could not be disallowed by the revenue.

32. At the cost of repetition, we may point out that the AO made additions by alleging that claim of the assessee has not been supported by any satisfactory documentary evidence; the assessee paid commission to foreign agent but the identity of the agents to whom commission has paid remained unverifiable and the names of whom the assessee has paid commission were not provided and the identity of the agents to whom commission has been paid remained unverifiable and the assessee has failed to establish with any reliable evidence that the party to whom the alleged commission was paid has rendered any such services. As we have already noted during adjudication of ground no. 1 of the revenue for AY 2002-03 that the CIT(A) granted appellate relief to the assessee by observing that the assessee submitted all required detail during the assessment proceedings to establish the claim of commission payment during the assessment proceedings and hence the first appellate authority granted part relief to the assessee. However, the CIT(A) confirmed and upheld the disallowance on account of ASSF relating to the payments connected with supplies made to Iraq by observing that the assessee has not been able to co-relate the sales of early arrears with such fees as it is seen that the assessee has claimed that no sales have been made to Iraq during the year as per affidavit of the Managing Director.

33. In our considered view above noted conclusion of the CIT(A) in para 23 of the impugned order are actually incorrect because in the affidavit showed

on 22.12.2008 Shri V.K.Dhawan Managing Director of the assessee company stated as follows :-

> *"1. That during the financial year ended on 31.03.2002 (AY 2002-03) the company has exported the Oil Drilling equipment for USD 796152(Equivalent to 549345) to EFD (Economic & Finance Department) Ministry of Oil, Baghdad, Republic of Iraq after Govt. and RBI approvals.*
> *2. That during the said financial year amount of 54935 was paid towards the after sale services charges to A1 Waseel and Babel General Trading in account of Ministry of Oil Iraqi Drilling Co. This was paid through wire transfer from our account with Punbaj National Bank, Dehradun."*

34. In view of the above, besides other documentary evidence filed before the AO during the assessment proceedings and again filed before the CIT(A) during the first appellate proceedings and also filed before us in the form of assessee's paper book placed at pages 30 to 76 it is ample clear that during the financial year ended on 31.03.2002 relevant to AY 2002-03, the assessee company has exported the Oil Drilling Equipment to Economic and Finance Department, Ministry of Oil, Bagdad, Republic of Iraq, after Government of India and RBI approvals. The Managing Director of the company in his affidavit (Supra) also stated that during the said financial year amount of 54,935/- was paid towards ASSF to Alwasil and Babel general trading in the account of Ministry of Oil Iraqi Drilling Company and this amount was paid through wire transfer from the account of the assessee with Punjab National Bank, Dehradun.

35. It is pertinent to note that the assessing officer as well as the CIT(A) has not disputed the quantum of commission paid as ASSF and neither there is any allegation that the claim of the assessee is bogus. However, the claim of

assessee was disallowed by the AO on the allegations as noted above, precisely, on the basis of allegation that the identity of the agents remained unverifiable and the assessee failed to establish with any reliable evidence about the services rendered by the recipients so as to receive the commission. The CIT(A) uphold the part disallowance by incorrectly observing that as per affidavit of the managing director of the assessee company, no sales have been made to Iraq during the year. But as we have noted above the contents of the affidavit of the Managing Director Shri V.K. Dhawan does not state that no sales have been made during AY 2002-03. Per contra as per affidavit of the Managing Director it is ample clear that the assessee made sales to Iraq and commission was paid thereon to Alwasil and Babel General Company as ASSF on the account of payee i.e. Ministry of Oil, Iraq Drilling Company.

36. In this regard, it is relevant to take into consideration observation of the CIT(A) as reproduced hereinabove, wherein he noted that as per dicta laid down by Hon'ble Gujarat High Court in the case of Hanutram Ram Prasad vs. CIT 114 ITR 19 (Supra) the evidence of claim may be rendered on affidavit before the assessing officer and such evidence is legal and can be affected upon by the assessing officer / appellate authority. The CIT(A) in the order also noted the proposition laid down by Hon'ble Supreme Court in the case of Mehta Parikh & Co. v. CIT 30 ITR 181 (SC) , wherein their lordship speaking for the apex court of India held that if there is no material whatsoever on record for doubting the veracity of the statements made in the affidavit and if the deponent has also not been subjected to cross examination for bringing out the falsity of his statements then the tribunal will not be justified in doubting the correctness of the statement made by the deponent in the affidavit filed before the revenue authorities.

37. In view of above, we have no hesitation to hold that the CIT(A) uphold the part disallowance on account of ASSF relating to payments connected with supplies made to Iraq on the basis of incorrect observations appreciation of facts and on the very wrong and perverse premise which is not sustainable and acceptable.

38. At the juncture, it would be relevant to take cognizance of the decision of Hon'ble Kolkata High Court in the case of CIT v. Rajrani Exports Pvt. Ltd. (Supra) wherein it was held that where assessee has paid commission on exports through banking channels in pursuant to agreements approved by Government and United Nations that the same could not be disallowed in absence of evidence of its illegality, the relevant observations of Hon'ble High Court are being respectfully reproduced below :-

"*3. The question suggested by the Revenue is as follows:*

" Whether on the facts and in the circumstances of the case the Tribunal was justified in law to dismiss the appeal of the revenue by confirming the order of the CIT(A) on account of disallowing the commission payments in view of Explanation to Section 37(1) of the said Act."

4.Against the order of the Assessing Officer, the assessee preferred an appeal before the CIT(A), who in his order allowing the appeal, held as follows :

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

5. Aggrieved by the order of the CIT(A), the Revenue preferred an appeal before the Tribunal. The Tribunal dismissed the appeal holding, inter alia, as follows :

" The assessee has made payment for commission and has been rendered services in consideration of the same. As a matter of fact, it is not even revenue's case that no services have been rendered at all. The fact that services have been rendered by a party other than the agent to whom commission is paid is wholly immaterial so far as deductibility in the hands of the assessee is concerned.

As for the position that the payment was highly excessive vis-à-vis the local costs, even if that be so, that aspect of the matter does not affect the deductibility in the hands of the assessee either. The assessee is concerned with commercial expediency of the said payment and not with what are the actual costs incurred in rendering the services for which the payment is made. As we have seen earlier in this order, from the extracts of the Volker Committee report itself, it was absolutely necessary for the assessee to make the impugned payments and, in any event, the commercial expediency of these payments has not even been called into question by the Assessing Officer. The case of the revenue is confined to invoking the Explanation to Section 37(1).

The objections to the said commission payments are, therefore, not sustainable in law, so far as deductibility under section 39(1) is concerned."

6. The department has come up in appeal. Mrs. Smita Das De, learned advocate appearing in support of the appeal, could not satisfy us as to why were the findings indicated above as recorded by the CIT(A) and the Tribunal incorrect either on fact or in law. There is, as such, no reason why the appeal should be entertained.

The appeal is, therefore, dismissed."

39. The Hon'ble Kolkata High Court uphold the order of the ITAT, Kolkata Bench " B" in the case of DCIT v. Rajrani Exports (supra) wherein the tribunal after considering the Volcker Committee report, relevant provisions of the Act and other relevant facts and circumstances held that the payments made to Iraqi company for receiving services to facilitate export under " Oil for Food Program" is allowable as business expenditure irrespective of the fact that such payment was passed on by the Iraq company as kick back to Iraqi authorities. The relevant operative part of this order is being reproduced below for the sake of clarity and transparency in our findings :-

"5. To properly appreciate the controversy requiring our adjudication in this appeal, it is necessary to take note of some background facts relating to the issue in appeal. There is no dispute that the assessee had made exports to Iraq under the 'Oil for Food Program', which was meant to mitigate the hardships to ordinary Iraqi citizens as a result of harsh trade sanctions against Iraq, as a result of its invasion of Kuwait. The assessee himself has stated, in the statement of facts, that the exports were made under the Oil for Food Program under the United Nations monitoring. It will, therefore, be useful to understand the manner in which this program worked. The working of this program can be appreciated from the following document on UN website:
Oil-for-Food http://www.un.org/Depts/oip/background/index.html Origins: In August 1990 the Security Council adopted resolution 661, imposing comprehensive sanctions on Iraq following that country's invasion of Kuwait. In the immediate aftermath of the Gulf War in 1991, the Secretary-General dispatched an inter-agency mission to assess the humanitarian needs arising in Iraq and Kuwait. The mission visited Iraq from 10 to 17 March 1991 and reported that "the Iraqi people may soon face a further imminent catastrophe, which could include epidemic and famine, if massive life-supporting needs are not rapidly met." (S/22366, para. 37). Throughout 1991, with growing concern over the humanitarian situation in the country, the United Nations proposed measures to enable Iraq to sell limited quantities of oil to meet its people's needs. The Government of Iraq declined these offers, contained in particular, in

resolutions 706 (1991) and 712 (1991), adopted, respectively, in August and September 1991. Resolution 986: On 14 April 1995, acting under Chapter VII of the United Nations Charter, the Security Council adopted resolution 986, establishing the "oil-for-food" programme, providing Iraq with another opportunity to sell oil to finance the purchase of humanitarian goods, and various mandated United Nations activities concerning Iraq. The programme, as established by the Security Council, is intended to be a "temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfillment by Iraq of the relevant Security Council resolutions, including notably resolution 687 (1991) of 3 April 1991". Agreement: Although established in April 1995, the implementation of the programme started only in December 1996, after the signing of the Memorandum of Understanding (MOU) between the United Nations and the Government of Iraq on 20 May 1996 (S/1996/356). The first Iraqi oil under the Oil-for-Food Programme was exported in December 1996 and the first shipments of food arrived in March 1997. Funding: Until 20 March 2003, when war intervened and oil exports under the programme ended, the Oil-for-Food Programme was funded exclusively from the proceeds of Iraqi oil exports, authorised by the Security Council. In the initial stages of the programme, Iraq was permitted to sell $2 billion worth of oil every six months, with two-thirds of that amount to be used to meet Iraq's humanitarian needs. In 1998, the limit on the level of Iraqi oil exports under the programme was raised to $5.26 billion every six months, again with two-thirds of the oil proceeds earmarked to meet the humanitarian needs of the Iraqi people. In December 1999, the ceiling on Iraqi oil exports under the programme was removed by the Security Council. Seventy two per cent of Iraqi oil export proceeds funded the humanitarian programme, of which 59% was earmarked for the contracting of supplies and equipment by the Government of Iraq for the 15 central and southern governorates and 13% for the three northern governorates, where the United Nations implemented the programme on behalf of the Government of Iraq. The balance included 25% for a Compensation Fund for war reparation payments; 2.2% for United Nations administrative and operational costs; and 0.8% for the weapons inspection programme. Management: The Office of the Iraq Programme is headed by the Executive Director who is responsible for the overall management and coordination of all United Nations humanitarian activities in Iraq under resolutions 661 (1990) and 986 (1995) and the procedures established by the Security Council and its Committee set up by resolution 661 (1990), as well as the Memorandum of Understanding between the United Nations and the Government of Iraq (May 1996). Mandate: The Office of the Iraq Programme administers the programme as an operation

separate and distinct from all other United Nations activities within the context of the sanctions regime, which fall within the purview of UNMOVIC, IAEA and the United Nations Compensation Commission. Coordination: The Office of the Humanitarian Coordinator in Iraq (UNOHCI) is an integral part of the Office of the Iraq Programme (OIP). The Humanitarian Coordinator in Iraq reports directly to the Executive Director of OIP, and is responsible for the management and implementation of the programme in the field.
Implementation: There are nine United Nations agencies and organizations involved in the programme. They are: FAO, UNESCO, WHO, ITU, UNICEF, UNDP, WFP, UNOPS, UN-Habitat. Delivery: As of 28 May 2003, some $28 billion worth of humanitarian supplies and equipment had been delivered to Iraq under the Oil-for-Food Programme, including $1.6 billion worth of oil industry spare parts and equipment. An additional $10 billion worth of supplies were in the production and delivery pipeline. Performance: The latest report of the Secretary-General on the Oil-for-Food Programme was issued on 12 November 2002 (S/2002/1239). It focuses on improvements, shortcomings and difficulties in the humanitarian situation in Iraq; a revenue shortfall in the programme; and an assessment of the implementation of the new set of procedures for the processing and review of contracts for humanitarian supplies. The new procedures were introduced under Security Council resolution 1409 (2002), based on the Goods Review List (GRL). It is the first such assessment since the adoption of that resolution. Oil-for-Food Plus: The Programme, as outlined in the latest report of the Secretary-General, was expanded by the Security Council beyond its initial emphasis on food and medicines to include infrastructure rehabilitation and 24 sectors: food, food-handling, health, nutrition, electricity, agriculture and irrigation, education, transport and telecommunications, water and sanitation, housing, settlement rehabilitation (internally displaced persons - IDPs), mine action, special allocation for especially vulnerable groups, and oil industry spare parts and equipment. The Government of Iraq introduced the following 10 new sectors in June 2002: construction, industry, labour and social affairs, Board of Youth and Sports, information, culture, religious affairs, justice, finance, and Central Bank of Iraq. Pre-War and Post-War Developments (2003): On 17 March 2003, the United Nations Secretary-General announced that in view of warnings received from the Governments of the United Kingdom and the United States, regarding the prospect of war and the continued safety and security of UN personnel present in the territory of Iraq, he was no longer in a position to guarantee their safety and security. All remaining UN international staff in Iraq were evacuated on 18 March 2003 and the President of the Security Council asked the Secretary

General to submit proposals to adjust the mandate of the Oil-for-Food Programme so that it would have flexibility to meet new humanitarian challenges presented by the prospect of war in Iraq. On 19 March 2003, the war in Iraq began with the bombing of Baghdad and on 20 March 2003, the Secretary General pledged to do his utmost to ensure that the UN rose to the challenge of shielding the civilian population "from the grim consequences of war." A resolution (1472) was adopted unanimously by the Security Council on 28 March 2003 adjusting the Oil-for-Food Programme and giving the Secretary-General
authority to facilitate the delivery and receipt of goods contracted by the Government of Iraq for the humanitarian needs of its people. On 24 April 2003 those provisions were extended to 3 June. The extension under resolution 1476,(2003) gave the Office of the Iraq Programme and UN agencies, valuable time to identify and ship additional goods and supplies. The Security Council lifted civilian sanctions on Iraq on 22 May with the adoption of resolution 1483 (2003). The resolution also gave the Secretary-General authority to appoint a Special Representative to work with the occupying forces in rebuilding Iraq; opened the way for the resumption of oil exports, with revenues deposited in a Development Fund for Iraq held by the Central Bank; and provided for the termination of the Oil-for-Food Programme within six months, transferring responsibility for the administration of any remaining Programme activities to 'the Authority' representing the occupying powers. The Council has called on the United Nations to assist the Iraqi people, in coordination with 'the Authority', in a wide range of areas, including humanitarian relief, reconstruction, infrastructure rehabilitation, legal and judicial reforms, human rights and the return of refugees, and also to assist with civilian police. In its "phasedown" prior to closure on 21 November 2003, the Office of the Iraq Programme, in coordination with UN agencies and programmes, the Coalition Provisional Authority (CPA) and Iraqi authorities, has continued to identify and ship approved and funded priority items in a pipeline of humanitarian goods and supplies valued at some $10 billion. As of 4 November 2003, consultations between the Coalition Provisional Authority, Iraqi experts and the United Nations, had resulted in the prioritization of 3,168 contracts valued at more than $8.5 billion. (Updated 4 November 2003) (Emphasis by underlining supplied by us)

6. To the extent relevant for our purposes, the FFOP worked like this. The Iraqi Government was allowed to export oil but the sale proceeds were to be deposited in an escrow account, and these sale proceeds were to be partly, though substantially, used for importing goods, on humanitarian grounds, for

Iraq people. The goods so allowed to be imported were foodstuff, medicines and other necessities for day to day life of ordinary people. The manner in which program worked came up for sharp criticism for its functioning, and there were allegations of massive irregularities, kickbacks and corruption in its functioning. It was in this backdrop that an enquiry commission, named as 'Independent Inquiry Committee' headed by Paul A. Volker, a former Chairman of United States Federal Reserve, researched possible corruption in this Iraqi Oil for Food Program. The terms of reference of this inquiry were as follows: ***The independent inquiry shall collect and examine information relating to the administration and management of the Oil-for-Food Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme: (a) to determine whether the procedures established by the Organization, including the Security Council and the Security Council Committee Established by Resolution 661 (1990) Concerning the Situation between Iraq and Kuwait (hereinafter referred to as the "661 Committee") for the processing and approval of contracts under the Programme, and the monitoring of the sale and delivery of petroleum and petroleum products and the purchase and delivery of humanitarian goods, were violated, bearing in mind the respective roles of United Nations officials, personnel and agents, as well as entities that have entered into contracts with the United Nations or with Iraq under the Programme; (b) to determine whether any United Nations officials, personnel, agents or contractors engaged in any illicit or corrupt activities in the carrying out of their respective roles in relation to the Programme, including, for example, bribery in relation to oil sales, abuses in regard to surcharges on oil sales and illicit payments in regard to purchases of humanitarian goods; (c) to determine whether the accounts of the Programme were in order and were maintained in accordance with the relevant Financial Regulations and Rules of the United Nations***

**/7. There were many significant and controversial findings in this report. One very important aspect of this report was about 'non-contractual beneficiaries' of oil allocation by Iraqi regime, and these allocations or quotas granted by the Iraqi regime were perceived as de facto bribe payments by the Iraq regime. That aspect, however, does not touch the issue in appeal before us. There were also findings to the effect that Iraqi regime used several front companies, which entered into agreements with the exporters and collected amounts for 'after sales service', 'inland transportation fees', 'commission' etc, and the amounts so collected by these front companies were passed on as kickbacks to Iraqi*

regime. This is the area which concerns the issue in this appeal before us, as the disallowance before us pertains to the commission payment by the assessee , in the form of 'inland transportation fees' and 'after sales service', to a company by the name of Alia Transportation and General Trading Co. Interestingly, this company, i.e. Alia Transportation and General Trading Co., finds a prominent mention in the final report issued by the IIC. According to the IIC report, which is popularly known as Volker Committee Report, Alia was a key player in the irregularities relating to Oil for Food Program administered by the United Nations. Volker Committee report (www.iic-offp.org) describes Alia as one of the 'Iraqi Front Companies' and states, at page 309, as follows:

"……..

VII: IRAQI FRONT COMPANIES

Three of the major Iraqi front companies were: (1) Alia for Transportation and General Trade ("Alia") of Jordan; (2) Al-Hoda International Trading Co. ("Al-Hoda") of the United Arab Emirates; and (3) Al Wasel & Babel General Trading LLC ("Al Wasel & Babel") of the United Arab Emirates. 495 Each of these companies is discussed in turn.

A: Alia for Transportation and General Trade:

Alia was established in August 1994 as a joint venture between Hussain Al-Khawam, an Iraqi businessman, and the Iraqi Ministry of Transportation. This arrangement developed from a proposal by Mr. Al-Khawam to refurbish Iraqi vessels stranded off the coast of Jordan and to use them for commercial shipping. At the time of Alia's registration, Jordanian law required that at least one owner of a Jordan-registered company be a Jordanian national. As a result, Mr. Al-Khawam nominated a close associate, Mo'tasset Fawzy Qatishat, to hold fifty-one percent of the company's shares on Mr. Al-Khawam's behalf. The Iraqi Ministry of Transportation assigned two of its employees to hold Alia's remaining shares.

In 1999, the Ministry of Transportation arranged with Alia to have it act as ISCWT's (Iraq State Company for Water Transport) collection agent for suppliers' payments for the inland transportation of goods arriving at the port of Umm Qasr. As collection agent, Alia received a small commission on the funds it channeled from suppliers to ISCWT. According to bank records, Alia began receiving fees from suppliers as early as March 2000.

The agent arrangement with Alia was useful to the Government of Iraq. As noted in Section II.B above, Alia violated and assisted in violating the United Nations sanctions regime, which prohibited any third party from engaging in financial transactions with the Government of Iraq except as permitted under the Programme or Security Council resolutions. By arranging for suppliers to make

illicit payments to a Jordanian company such as Alia—instead of directly to ISCWT or another governmental entity of Iraq—the Iraqi regime disguised the illicit nature of such payments. 498

In fact, all transportation services for which Alia received payment from humanitarian suppliers were provided by employees of the Government of Iraq. Transport of goods arriving at Umm Qasr was provided by trucks from the Ministry of Transportation or the Iraqi Grain Board ("IGB"). When asked how much of the fees paid by Alia to ISCWT were used for the true costs of transport, Alia's general manager stated: "There were no actual costs. The driver got maybe $10. This was a payment to the Government of Iraq." Alia's general manager was unaware whether the actual costs for transport had any bearing on the transportation fee charged and collected by Alia.

Following the conclusion of contract negotiations between an Iraqi purchasing body and a supplier, ISCWT contacted Alia by fax, letter, or telephone and informed Alia of the amount that was to be received from the supplier. On some occasions, ISCWT contacted the supplier directly to advise the supplier that it should send payment to Alia or sent the same invoice to the supplier that it sent to Alia. On other occasions, Alia sent invoices to suppliers indicating the amounts levied by ISCWT. Representatives of ISCWT came to Alia's office every month to inspect the company's records, and ISCWT also sent an employee to work at Alia.

Suppliers paid their fees in various foreign currencies (not Iraqi dinars) to Alia's accounts at Jordan National Bank and the Egyptian Arab Land Bank. Upon receipt of the funds, Alia informed ISCWT of the amount of the transfer and the corresponding supplier, contract, ship, and letter of credit. Below is one such example of a letter from Alia to ISCWT, advising ISCWT of its receipt of payment on ISCWT's behalf:

(Translated from Arabic- Page 1 of 1)

Alia Company for Transportation and General Trade

No. F8/5087/2002

Date : 20/11/2002

To : State Company of Water Transport, Basra

Attn : Ms Elham, Marine Agencies

Sub : MV Makram

Greetings !

We would like to inform you that the amounts below have been received from Jawala Company for internal transportation and after sales service fees for 2329.1897 m3 of wood ; LC No. V734538, bill of lading no PK/Iraq/001, based on the following:

$ 60,225.31 for internal transportation fees
€236,477.40 for after sales service
We thank you for your cooperation with us.
With utmost respect and appreciation,
Financial/ Haitham El- Zobi
Copy to : State Water Transport Co, Baghdad
Baghdad Ships, Shipping Department
Shortly after sending such communications, Alia transferred the full payment amount (less a commission between one-quarter percent and one percent) to ISCWT's account at Rafidain Bank in Amman. For these transfers, Alia used accounts in various foreign exchange currencies. In total, between March 2000 and December 2003, the payments passing through Alia's bank accounts in Jordan National Bank amounted to a USD equivalent of more than $788 million.
Apart from acting as a collection agent, Alia also engaged in five sales contracts under the Programme. During Phase VIII of the Programme, Alia contracted to supply Toyota vehicles and spare parts. For these two contracts, Alia paid a total of $1,246,072 in after-sales-service fees (in cash and in kind) and $90,900 in inland transportation fees, totaling $1,336,972. With respect to one of these contracts, COMM no. 800929, Alia disputed the characterization of its payment as an "after-sales-service" fee, referring to the payment merely as an "extra fee." Additionally, Alia advised that it inflated the price of this contract by more than $4,000 per vehicle at the Government of Iraq's request and then used the extra revenue to purchase fifty more vehicles that it shipped without inspection to Iraq. 503
In summary, based on the available evidence, Alia knowingly acted as a front company, serving as a conduit for collecting hundreds of millions of dollars in illicit fees paid by suppliers to the Iraqi regime. Alia further made illicit payments totaling $1,336,972 in connection with its own contracts under the Programme."
8. There is thus reasonable material, by way of Volker Committee report, to indicate that no services were actually rendered by Alia which actually worked as a conduit for Iraqi regime on a wafer thin margin of 0.25% to 1.00%. The balance amount, ranging from 99% to 99.75% of the amounts paid to Alia, was transferred to Iraqi regime as an illegal kickback. The assessee has all along laid a lot of emphasis on the claim that a copy of the Volker Committee report has never been supplied to the assessee which is, to quote the words of the assessee, 'in clear violation of the well settled principles of natural justice, equity and fair play' but this plea is too naïve to be accepted. The Volker

Committee is freely available on the internet, is fully in public domain and anyone can access it. Having said that, we must quickly add that merely because this report states that the amounts paid to Alia were actually kickbacks to Iraqi regime, that fact per se would not render the expenditure so incurred, if otherwise deductible, as non-deductible in computation of business income, unless these payments are hit by some other disabling provisions of the Income Tax Act. What is to be examined first is whether the amounts so paid are deductible business expenditure in the first place, and if so, whether these amounts are hit by any disabling provisions under the Act. Let us, therefore, take a quick look at the scheme of the Act from this perspective to deal with this aspect of the matter. Section 37(1) of the Act provides that ***"any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*** *Explanation to Section 37(1), which qualifies this general deduction, provides that, "****For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure****". It follows that any payment, which is prohibited by law, is not an admissible deduction under the scheme of the Act. That takes us to the question whether payment to Alia, on the facts of this case, could be said to be prohibited by law."*

40. After considering the report of the Volcker Committee the coordinate bench of the Kolkata Tribunal in the case of Rajrani Exports (Supra) finally granted relief to the assessee dismissing appeal of the revenue with following conclusion :-

> *"11. As a matter of fact, this Volker Committee report goes on to acknowledge the fact that while many companies freely went along with Iraq's demand for kickbacks, many companies ignored the probable use of these payments, there were also the companies which were not aware about the end use of these payments and made these payments unwittingly. There were thus three categories of persons*

who paid the kickbacks (a) first, the persons who were all along aware that the payments as after sales service fee and inland transportation fees are in the nature of kickbacks and they were thus willing parties to these illegal gratifications; (b) second, the persons who had suspicion that the amounts paid as after sales service fees and inland transportation fees to may be used as kickbacks but they ignored these doubts; and (c) third, the persons who paid the amounts as after sales service fees and inland transportation fees under the bonafide belief that these payments are being made for the stated purposes. In our humble understanding, so far as category (a) is concerned, Explanation to Section 37(1) may hit the deductibility of impugned payments, but so far as categories (b) and (c) are concerned, Explanation to Section 37(1) cannot come into play. The onus of demonstrating that the case of an assessee falls in category (a), in our humble understanding, is on the Assessing Officer. That onus has not been discharged at all. The reasoning of our above approach is this. Explanation to Section 37(1) prohibits deductibility of any payment for any purpose which is an offence or which is prohibited by law. Even if we assume that a payment for kickback to Iraqi regime, which is prohibited by UN sanctions, could indeed be viewed as prohibited by law, would not render all payments towards after sales service and inland transportation fees as hit by Explanation to Section 37(1). The most significant aspect of the matter is the 'purpose' for which the assessee has made the payment. No doubt, when the payment is made for the purposes of illegal kickbacks, these payments invite disqualification under Explanation to Section 37(1), but when the assessee makes the payments for bonafide business purposes and such payments end up being used as illegal kickbacks, in our considered view, Explanation to Section 37(1) will not be attracted. As far as the cases in category (a) are concerned, i.e. in a situation in which the assessee is a willing party to the illegal kickbacks, the onus is on the Assessing Officer to demonstrate so because an assessee cannot be asked to prove a negative i.e. that he is not a willing party to the illegal kickbacks. There must be some material to indicate that the assessee was aware that the payments by the assessee were to be used as kickbacks; a mere suspicion to that effect cannot suffice.

12. It is also important to bear in mind that the fact that the services were indeed rendered to the assessee. The fact that services were

actually rendered to the exporters supplying goods under Oil for Food Program, in consideration for these payments is evident from the Volker Committee report itself. The services were rendered to the exporters but these services were rendered by the Iraqi regime and the money was passed by the front companies to the Iraqi regime. Even the Volker Committee report, which constitutes foundation of the impugned disallowances, has made following observations in support of this proposition:

In fact, all transportation services for which Alia received payment from humanitarian suppliers were provided by employees of the Government of Iraq. Transport of goods arriving at Umm Qasr was provided by trucks from the Ministry of Transportation or the Iraqi Grain Board ("IGB").

(Page 304 of the report)

Vessels berthing at Umm Qasr required the approval of the Iraqi State Company for Water Transport ("ISCWT") before being permitted to discharge. ISCWT was one of over a dozen SOEs overseen by the Ministry of Transportation and Communication ("Ministry of Transportation"). Under Iraqi law, ISCWT had exclusive authority for all activity at Iraqi ports. Its official function was to arrange and authorize the unloading of cargo and to act as a marine agent for ships carrying procured goods. In addition, it represented to the United Nations that it coordinated transport to internal warehouses and informed Iraqi end-users of inbound goods. However, ISCWT employees did not themselves actually participate in the discharge and handling of cargoes. The Iraqi State Company for Ports, another SOE within the Ministry of Transportation, assumed that responsibility.

(Page 264 of the report)

If ISCWT had not received confirmation of a supplier having paid into an Iraqi-controlled bank account, it generally would not permit discharge of the supplier's cargoes. In such circumstances, the supplier or vessel chartering company incurred demurrage of thousands of dollars a day. One supplier interviewed by the Committee recalled that a supplier's failure to pay fees, even on just one contract, resulted in large demurrage and prevented the vessel's entire contents from being offloaded

(Page 272 of the report)

(Emphasis by underlining supplied by us)

13. It would thus seem that, even as per Volker Committee report, the services were indeed rendered for the commission payments paid by the exporters under the OFFP, but the services were rendered by the Iraqi regime itself, rather than the commission agent to whom commission payment was made, and the charges for these services were quite disproportionately high vis-à-vis the local costs.

14. None of the above reasons, even if be valid and correct, affect the deductibility of commission payments in the hands of the assessee.

15. The assessee has made payment for commission and has been rendered services in consideration of the same. As a matter of fact, it is not even revenue's case that no services have been rendered at all. The fact that services have been rendered by a party other than the agent to whom commission is paid is wholly immaterial so far as deductibility in the hands of the assessee is concerned.

16. As for the position that the payment was highly excessive vis-à-vis the local costs, even if that be so, that aspect of the matter does not affect the deductibility in the hands of the assessee either. The assessee is concerned with commercial expediency of the said payment and not with what are the actual costs incurred in rendering the services for which the payment is made. As we have seen earlier in this order, from the extracts of the Volker Committee report itself, it was absolutely necessary for the assessee to make the impugned payments and, in any event, the commercial expediency of these payments has not even been called into question by the Assessing Officer. The case of the revenue is confined to invoking the Explanation to Section 37(1).

17. The objections to the said commission payments donot, therefore, are not therefore sustainable in law, so far as deductibility under section 37(1) is concerned.

18. A lot of emphasis has been placed by the CIT(A) on this Tribunal's decision in the case of TIL Ltd (supra). However, as we have decided the matter on merits and on the first principles, we see no need to deal with the said judicial precedent. Our reasoning could be different than the reasoning adopted by the CIT(A) and that adopted by the coordinate bench in TIL's case (supra), but then our conclusion is the same as arrived by the CIT(A) and by the coordinate bench. It is this aspect of the matter which is material for the present purposes.

19. In view of the above discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.
20. As we part with the matter, we must make it clear that our references to the Volker Committee report were only with a view to analyse as to whether even if everything stated in the Volker Committee report is taken as correct and this report is taken as an admissible evidence, will the deductibility of expenses in the hands of the assessee will be hit by Explanation to Section 37(1). However, to what extent this report can be relied upon in income tax proceedings is still an open question. We leave it at that."

41. In view of above, we observe that the Kolkata Tribunal considered the Volcker Committee report which acknowledged the fact that while many companies freely went along with the demand for kick backs and they ignored the probable use of these payments, there were also the companies which were not aware about the use of these payments and made kick back payments unwittingly. The Volker Committee, thus, segregated the persons/ companies who paid the kick backs in three categories viz., firstly, the persons who were all along aware that the payments as after sale service fee and inland transportation fee are in the nature of kick backs and they were thus willing parties to these illegal gratification ; secondly , the person who had suspicion that the amounts paid as after sale service fee and inland transportation fee may be used as kick backs but they ignore these doubts and thirdly, the persons who paid the amounts as after sale services fee and inland transportation fees under bona fide belief that these payments are made for stated purposes. After thread bare analysis of the Volcker Committee report and relevant provisions for the act including explanation to section 37 of the Act the Kolkata ITAT co-ordinate bench explicitly held that if every contents of the Volker Committee report is

taken as correct and the some is taken as basis for adjudication of controversy regarding payments to Iraq, the main question to be answered is that whether the allowability of expenses in the hands of assessee will hit by explanation to section 37(i) of the Act ? .

42. In the present case, we note that the AO has made disallowance of entire commission and disputed the identity of the recipients by observing that the agents to whom commission has been claimed to be paid by the assessee remains unverifiable. The AO also alleged that the assessee has failed to establish with any reliable evidence that the parties to whom alleged commission was paid had rendered any such services so as to receive the commission and in absence of evidence in support of claim of commission entire amount of commission paid was disallowed. From the first appellate order of the CIT(A) we observe that the CIT(A) granted part relief of the assessee regarding commission paid for affecting export sales to various countries. However, the CIT(A) uphold part disallowance and addition on account of ASSF by observing that the assessee has not been able to co-relate the sales of earlier years which such fees as it is seem that the assessee has claimed that no sales have been made to Iraq during the year as per affidavit of the Managing Director. As we have already observed and discussed above the CIT(A) dismiss the claim of the assessee on wrong promise and by making factually incorrect and perverse observations as in the affidavit of Shri V.K.Dhawan, Managing Director available at assessee's paper book page no. 76, as reproduced above, on behalf of the assessee it has been stated that during the financial year relevant to AY 2002-03 the company has Exported Oil Drilling Equipment to Economic and Finance Department, Ministry of Oil, Bagdad, Republic of Iraq after Government of India and Reserve Bank of India approvals and the impugned amount of

commission was paid towards ASSF to AL Wasel & Babel General Company in the account of Ministry of Oil, Iraq Drilling Company which was paid through wire transfer from the assessee's account with Punjab National Bank, Dehradun.

43. Hence, we have no hesitation to hold that the CIT(A) dismissed claim of the assessee upholding the part disallowance on account of ASSF on incorrect assumption of facts and on the basis of perverse and contradicting finding and the same are not sustainable we may also pointed out that the facts narrated by the Managing Director of the assessee company in his affidavit remained uncontroverted and un-rebuted, therefore in view of dicta laid down by Hon'ble Supreme Court in the case of Mehta Parikh & Co. v. CIT (supra) and Hon'ble Gujarat High Court in the case of Hanutram Ram Prasad v. CIT (supra) the contents and facts narrated in the affidavit can be acted upon by the assessing officer as well as first appellate authority but the CIT(A) miserably fail to properly consider the contents of the affidavit and other relevant evidence which was produced before the lower authorities during the assessment and first appellate proceedings. Thus, conclusion of the CIT(A) cannot be held as sustainable and tenable and hence, we diminiss and demolish the same.

44. When we analysis the conclusion of the AO, we note that the AO has not brought out any allegation to demonstrate that the payments of ASSF are in the nature of kick backs and the assessee was willing party to pay these kind of illegal gratifications as per first limb of Volcker Committee Report as noted by the ITAT Kolkata Tribunal in para 11 of the order DCIT v. Rajrani Exports (P.) Ltd. (supra). Per contra, as per conclusion and observations of the CIT(A) we clearly note that the assessee filed all relevant documents before the AO as well as before the First Appellate Authority to demonstrate the payment of ASSF was

made to AL Wasel & Babel General Trading in the account of Minister of Oil, Iraq Drilling Company to which the assessee company exported Oil Drilling Equipments during AY 2002-03. Copies of the supply contact entered between assessee economics and finance department, Ministry of Oil, Bagdad, Republic of Iraq, copy of the ledger account of Ministry of Oil in the assesse's books of accounts, copy of the ledger account of commission paid to foreign agents in assessee's books of accounts, copies of bank advice for remittance of commission, copies of confirmation of receipts from agents and copy of the affidavit of Shri V.K.Dhawan, Managing director of the assessee company as discussed have been placed by the assessee before the authorities below as well as before this tribunal in assessee's paper book at pages 41-76 and lower authorities have not doubted these documents in any manner.

45. In this situation, the allegation of the AO cannot be held as sustainable that the identity of the recipients, service rendered by them is not verifiable. At the cost of repetition, we may again point out that assessing officer has not made any allegation against the assessee that the payment of ASSF in question was made by the assessee voluntarily in the nature of kick backs and the assessee was willing party to make these payments in the garb of ASSF as illegal gratifications. On the basis of foregoing discussion, we reach the logical conclusion that the assessing officer ignore vital evidence filed by the assessee and wrongly rejected the documentary evidence and explanation of the assessee and the CIT(A) dismissed claim of the assessee on factually incorrect, perverse and unjustified reasoning and thus we are inclined to hold that the assesse's claim on account of ASSF was wrongly denied by the AO and the CIT(A) upholding conclusion on factually incorrect observations.

46. On the other hand, we are inclined to hold that the assessee made payments of ASSF to AL Wasel & Babel General company in the account of Ministry of Oil, Iraq Drilling Company to which the assessee company had exported oil drilling equipments during the relevant financial period. We may also point out that the assessee is also placed copy of the United Nations letter dated 05.04.2001 place that paper book page no. 54 wherein the assessee was allowed establishment of supplies of Oil Drilling Equipments etc. through the border crossing point/ port of UMM QASR to Iraq from the report available at pages 56-57 of the assessee's paper book concerning request to especially spare parts for the Oil Industry to Iraq in course of resolution no. 986 (1995), 1175 (1998) and 1284(1999) which demonstrate that the assessee exported spare parts for the Oil Industry of Iraq inaccordance with valid resolution towards which the amount payment of ASSF was made to the identify recipients name as AL Wasel & Babel General company which provided after sale services to the assessee against the commission paid to them.

47. At this juncture, we may point out that in thecase of DCIT v. Rajrani Pvt. Ltd. (supra) it was held that payment made to Iraqi Company for receiving services to facilitate to export under " Oil for Food Program" is allowable as business expenditure irrespective of the fact that such payment was further passed by Iraqi Company as kick back to Iraqi authorities. This judgment of ITAT Kolkata(supra) has been upheld by Hon'ble High Court of Kolkata wherein their lordship held that where the assessee had paid commission on exports through banking channel in pursuant to an agreement approved by the Government of India and United Nations the Same could not be disallowed in absence of evidence of its illegality. In the present case, lower authorities have not brought out any allegation of illegal gratification or kick back payment or

allegation of bogus payment by the assessee and as per proposition laid down by ITAT, Kolkata in the case of Rajrani Exports (Supra) payment made to Iraqi Company for receiving services to facilitate export is allowable business expenditure and this fact is not relevant for making disallowance of such payment on the premise that such payment was passed on by Iraqi Company as kick back or illegal gratification to Iraqi authorities or any other entity or person. In the present case, there is no such allegation of the revenue, therefore, the present assessee before us has a better case and does nothit by explanation to section 37(i) if the Act. Finally, we are inclined to hold that the payment of ASSF made by the assessee during the relevant financial period towards export of oil drilling equipments etc. does not fall in the first category payments as per Volker Committee report and thus the same is allowable business expenditure and therefore, we direct the AO to allow the same. Accordingly, ground no. 2 of the assessee in AY 2002-03 is allowed.

Ground no. 2 of the assessee for AY 2003-04

48. We have heard argument of both the sides and carefully perused the relevant material placed on record, the ld. Counsel of the assessee pointed out that ground no. 2 of the assesee for AY 2003-04 is similar to the ground no. 2 of the assessee for AY 2004-05 (ITA no. 408.Del.2010). Ld Counsel further pointed out that ground no. 2 for AY 2003-04 may be decided in accordance with the ground no. 2 of the assessee for AY 2004-05. The ld. DR fairly submitted that ground no. 2 of the assessee in AY 2003-04 and 2004-05 are quite similar bearing similar facts and circumstances, therefore, the conclusion for ground no. 2 for AY 2004-05 is applicable to AY 2003-04 also.

49. Since in ITA no. 408/Del/2010 ground no. 2 of the assessee has been restored to the file of AO for afresh adjudication in the line of tribunal

order dated 19.09.2008 passed for AY 2004-05. Therefore, we are of the considered opinion that our conclusion on ground no. 2 of the assessee for AY 2004-05 in ITA no. 408/Del/2010 will apply *mutatus mutandis* to ground no. 2 of the assessee for AY 2003-04. Accordingly, ground no. 2 of the assessee is deemed to be allowed for statistical purposes in the line of our order for AY 2004-05.

Ground no. 1 of the revenue for AY 2003-04

50. Since ground no. 1 of the revenue for AY 2002-03 has been decided by the earlier part of this order against the revenue and in favour of the assessee and facts and circumstances are quite similar therefore, we order that our conclusion for ground no. 1 of revenue's appeal for AY 2002-03 would apply *mutatis mutandis* to ground no. 1 of the revenue for AY 2003-04 and thus the same is disallowed as we are unable to any valid reason to interfere with the impugned order on this issue.

Ground no. 2 of the revenue for AY 2002-03 and 2003-04

51. The ld. Departmental Representative supporting the action of the AO submitted that the CIT(A) has erred in law and all the facts and in the peculiar circumstances of the case, in directing the AO to consider only the profit element for the purpose of computing the adjusted profit u/s 80HHC of the Act. The Ld. DR submitted that the impugned order may be set aside by restoring that of the AO.

52. Replying to the above the ld. Counsel of the assessee vehemently supported the conclusion of the first appellate authority and submitted that the CIT(A) has discussed the issue at paras 24 to 27 at pages 52 to 54 of the impugned order and the assessee to support this conclusion rely on the written submission filed before the CIT(A) and reproduced in the impugned order at

pages 14 – 17 and 22 of the first appellate order. The ld. Counsel strenuously contended that the issue as to what would constitute profit on transfer of DEPP license is fully covered in favour of the assessee by the judgement of Hon'ble Supreme Court in the case of M/s Topman Export vs. CIT, Mumbai reported as (2012) 342 ITR 49 (SC) and submitted that the entire sale proceeds of the DEPB realized on the transfer of DEPB is not to be considered for the purpose of computing the adjusted profit u/s 80HHC of the Act but only the difference between the sale value and the face value of DEPB represent profit on transfer of DEPB.

53. On carefully consideration on above submission of both the sides at the very outset we note that the issue of adjustment of profit on account of sale of DEPB is not as Hon'ble Apex Court in the case of M/s Topman Export v. CIT had explicitely held that the difference between the sole value and the Face Value of DEPB represent profit on transfer of DEPB and required adjustment in this regard for computing profit u/s 80HHC of the Act should be made on the basis of difference only. The relevant operative part of M/s Topman Export v. CIT, in the para 12, 13 and 14 of this decision is being respectfully reproduced as follows :-

> *12. It will be clear from the aforesaid provisions of Section 28 that under clause (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 clause (iiib) of Section 28 and is chargeable to income tax under the head "Profits and Gains of*

Business or Profession" even before it is transferred by theassessee. 13. Under clause (iiid) of Section 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 clause (iiib). The word "profit" means the gross proceeds of a business transaction less the costs of the transaction. To quote from Black'sLawDictionary(FifthEdition):

"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 overandaboveexpenditures."

This Court in E.D. Sassoon & Company Ltd. and Others v. Commissioner of Income-Tax, Bombay City (1954) 26 ITR 27 (SC) has quoted the following observations of Lord Justice Fletcher Moulton in The Spanish Prospecting Company Limited [(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 clause (iiib) of Section 28 of the Act, the difference between the sale value and the face value of the DEPB will fall under clause (iiid) of Section 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."

54. In view of the above, conclusion of the CIT(A) in directing the AO to consider the only profit for the purpose of computing the adjusted profit u/s 80HHC of the Act is upheld and ground no. 2 of the revenue in both the appeals are dismissed being devoid of merits.

55. In the results appeal of the assessee is partly disallowed on ground no. 1 for both the years and appeal of the assessee is partly allowed on ground no. 2 for both the assessment years. The appeal of the revenue for both the assessment years are dismissed being devoid of merits.

Order Pronounced in the Court on 18/01/2016.

Sd/-	Sd/-
(L.P.Sahu)	**(C.M.Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 18 / 01/2016
Binita
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

		Date	Initial	
1.	Draft dictated on	11.01.2016		
2.	Draft placed before author	11.01.2016		
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			PS/PS
6.	Kept for pronouncement on			PS
7.	File sent to the Bench Clerk			PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			