

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain , Judicial Member**

ITA No. 1382/Mum/2009
(Assessment Year: 2004-05)

M/s. Forbes & Company Ltd. <i>(formerly Forbes Gokak Ltd.)</i> Forbes Bldg., Charanjit Ran Marg, Fort, Mumbai 400001 PAN – AAACF1765A	Vs.	D C I T – 1(1) Room No. 579 Aayakar Bhavan, M.K. Road Mumbai 400020 PAN – AAACF1765A
Appellant		Respondent

ITA No. 1573/Mum/2009
(Assessment Year: 2004-05)

D C I T – 1(1) Room No. 579 Aayakar Bhavan, M.K. Road Mumbai 400020 PAN – AAACF1765A	Vs.	M/s. Forbes & Company Ltd. <i>(formerly Forbes Gokak Ltd.)</i> Forbes Bldg., Charanjit Ran Marg, Fort, Mumbai 400001 PAN – AAACF1765A
Appellant		Respondent

Assessee by:	Shri Girish Dave & Shri Kadambari Dave
Revenue by:	Shri Pratap Sinh & Shri V.K. Bora

Date of Hearing:	29.09.2016
Date of Pronouncement:	07.10.2016

ORDER

Per Jason P. Boaz, A.M.

These are cross appeals, by Revenue and the assessee, directed against the order of the CIT(A)-1, Mumbai dated 24.12.2008 for A.Y. 2004-05.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in the business of manufacturing of yarn, engineering goods, shipping and a host of other business, filed its return of income for A.Y. 2004-05 on 27.10.2004 declaring NIL income

after claiming set off of brought forward unabsorbed depreciation. 'Book Profits' under section 115JB of the Income Tax Act, 1961 (in short, 'the Act') were declared at ₹4,74,77,483/-. The case was taken up for scrutiny and the assessment was completed under section 143(3) of the Act vide order dated 29.12.2006; wherein the income of the assessee was determined at R. 11,35,58,715/- under the normal provisions of the Act and 'Book Profits' under section 115JB of the Act were computed at Rs.10,94,92,680/- due to certain additions/disallowances.

2.2 Aggrieved by the order of assessment dated 29.12.2006 for ay 2004-05, the assessee preferred an appeal before the CIT(A)-I, Mumbai who disposed off the appeal vide the impugned order dated 24.12.2008 allowing the assessee partial relief.

3. Presently, both Revenue and the assessee being aggrieved by the order of the CIT(A)-1, Mumbai dated 24.12.2008 for A.Y. 2004-05, have preferred appeals which are being disposed off hereunder.

Assessee's appeal in ITA No. 1382/Mum/2009

4. In this appeal, the assessee has raised the following grounds: -

"GROUND I: Application of Rule 80 of the Income Tax Rules, 1962 ("the Rules")

1. *On the facts and circumstances of the case and in law, the Learned CIT(A) erred in directing the AO to compute disallowance of interest and other expenditures u/s. 14A by applying Rule 80 of the Rules.*
2. *The Appellant most humbly prays that it be held that in view of the provisions of the section 295(4) the Rule 8D is applicable only from assessment year 2008-09 and not to the assessment year 2004-05.*

Without Prejudice to Ground I above

GROUND II : Disallowance of interest on borrowings

1. *On the facts and circumstances of the case and in law, the Learned CIT(A) erred in confirming the disallowance made by the AO of interest and other expenditures u/s. 14A of the Act.*
2. *Appellant prays that the aforesaid disallowance be deleted.*
3. *Without prejudice to above, the cost of interest and other expenditures be allowed to be capitalised by adding to the cost of investments and be taken into consideration in the year of sale of shares etc while computing the Capital gains.*

GROUND III: Disallowance of non-compete fees paid to ex-directors.

1. On the facts and in circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO of disallowing non-compete fees paid to the ex-directors of the Appellant on the alleged ground that such expenditure is of capital nature.
2. The Appellant prays that the aforesaid addition be deleted.

GROUND IV: Disallowance of deduction u/s 80HHC.

1. On the facts and in circumstances of the case CIT(A) erred in confirming the action of the AO in denying the Appellant's claim for deduction u/s. 80HHC on the ground that eligible profit works out to be negative.
2. The Appellant prays that deduction u/s. 80HHC be allowed as claimed by the Appellant.

With out prejudice to Ground IV above:**GROUND V : Setting of losses while computing deduction u/s. 80HHC of the Act**

1. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO of setting off brought forward losses of earlier years from business profits for the purpose of allowing deduction u/s. 80HHC of the Act.
2. The Appellant prays that the deduction u/s 80HHC be allowed from the business profits before setting off brought forward business loss.

GROUND VI Deduction Of Miscellaneous Income And Other Items From The Profits While Computing The Deduction U/S SOHHC

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO of excluding export incentives and other items of miscellaneous income aggregating to Rs.123594369/- while computing deduction u/s. 80HHC of the Act on the ground that they are covered under explanation (baa) as "any other receipt of the similar nature included in such profits".
2. The Appellant prays that it be held that the said items are related to business operations and are not in the nature as envisaged under explanation (baa).

With out prejudice to Ground VI above :**GROUND VII Not allowing to set off the incentives against the profits**

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO of rejecting Appellant's claim of getting deduction u/s. 80HHC in respect of

sale of Duty Entitlement Pass Book ("DEPB") Licence and Duty Draw back amounting to Rs. 48585160/-

2. *The Appellant prays that it be held that the Appellant is entitled to the deduction u/s. 80HHC.*
3. *Without prejudice if the act of CIT(A) is upheld, the AO be directed to exclude only the profit on transfer of DEPB and not the entire DEPB receipts.*

GROUND VIII

The Appellant craves leave to add, to alter and/or to amend all or any of the foregoing grounds of appeal."

5. Ground No. I & II – Disallowance under section 14 r.w. Rule 8D

5.1 In ground No. 1, the assessee contends that the learned CIT(A) erred in directing the AO to compute the disallowance of interest on borrowings and on account of other expenditure under section 14A by applying Rule 8D of the I.T. Rules, 1962 (in short 'the Rules'), when the provisions of Rule 8D are applicable only from A.Y. 2008-09 and not for the year under consideration. In ground No. 2, the assessee submits that without prejudice since the learned CIT(A) had erred in confirming the disallowance under section 14A of the Act, the said disallowance should be deleted. At the outset, the learned D.R. submitted before us that the Coordinate Bench of the Tribunal in its order in the assessee's own case in ITA No. 6720/Mum/2007 dated 12.06.2013 for A.Y. 2002-03 had restricted the disallowance under section 14A of the Act to R. 7,61,476/- and that complete relief was allowed to the assessee by another Coordinate Bench in the assessee's own case of A.Y. 2003-04 in ITA No. 6721/Mum/2007 dated 10.08.2016. The learned A.R., however, fairly submitted that since Rule 8D was not applicable for the year under consideration, viz. A.Y. 2004-05, the matter may be restored to the file of the Assessing Officer (AO) for computing the disallowance under section 14A of the Act. The learned D.R. on his part did not oppose this proposition of the learned A.R.

5.2 We have heard both parties and perused and carefully considered the material on record; including the judicial pronouncements cited. As contended by the assessee, it is settled position of law that the provisions of Rule 8D of the I.T. Rules, 1962 are applicable prospectively for and from

A.Y. 2008-09 and would not operate for the assessment years prior thereto. In this view of the matter, the learned CIT(A)'s directions to the AO to work out/compute the disallowance under section 14A of the Act by applying Rule 8D of the Rules is erroneous and we therefore delete the same and in the fitness of things, we direct the AO to recompute the disallowance under section 14A of the Act afresh, in accordance with the law prevalent for the year under consideration, after affording the assessee adequate opportunity of being heard and to file details/submissions required in this regard. We hold and direct accordingly. Consequently, grounds I and II of the assessee's appeal are treated as allowed for statistical purposes.

6. **Ground No. III – Disallowance of non-compete fee paid to ex-Directors**

6.1 In this ground, the assessee challenges the impugned order of the learned CIT(A) in confirming the AO's action in disallowing non-compete fee paid to ex-directors.

6.2 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. We find that this issue has been held in favour of Revenue and against the assessee in the decisions of the Coordinate Bench of the Tribunal in the assessee's own case for A.Y. 2003-04 in ITA No. 6721/Mum/2007 dated 10.08.2016, following the decision of another Coordinate Bench in the assessee's own case for A.Y. 2002-03 in ITA No. 6720/Mum/2007 dated 12.06.2013. In its order for A.Y. 2003-04 (supra), to which both of us are party, at para 6 thereof it was held us under: -

“6. We have heard the rival submissions, perused the materials on record and carefully gone through the orders of the Revenue authorities. On perusal of the records, it is found that this issue has been decided against the assessee by the Co-ordinate ‘F’ Bench of ITAT Mumbai vide order dated 12th June, 2013 for assessment year 2002-03, the relevant portion of which reads as under:-

“9. Ground No.2 is about disallowance of non-compete fees paid to EX-Directors amounting to Rs.6,41,600/-. Before us, AR fairly conceded that the issue had been decided against the assessee by the Tribunal vide its order dated 25-09-2006, while deciding the appeal for AY 2000-01. Respectfully following the said order of the Mumbai Bench of the Tribunal we decide Ground No.2 against the assessee.”

While at the time of hearing of the present appeal of the assessee for assessment year 2003-04, both the sides conceded to the aforementioned fact, we respectfully following the above mentioned order of the Co-ordinate Bench and with a view of maintenance of judicial consistency, uphold the orders of the authorities below. As a result, this ground of assessee's appeal stands dismissed."

Following the decision of the Coordinate Bench of the Tribunal in the assessee's own case for assessment years 2002-03 (supra) and 2003-04 (supra), we uphold the orders of the authorities below and against the assessee. Consequently, ground III of assessee's appeal is disallowed.

7. Ground No. IV – Disallowance of deduction under section 80HHC

7.1 Before us, the learned counsel for the assessee submitted that this ground is not being pressed in this appeal by the assessee. Since this ground is not pressed, it is rendered infructuous and is accordingly dismissed.

8. Ground No. V – Setting off of losses while computing deduction under section 80HHC

8.1 At the outset itself, the learned counsel for the assessee fairly conceded that this issue is to be held against the assessee in view of the settled position of law laid down by the Hon'ble Apex Court in the case of CIT vs. Shirke Construction Equipment Ltd. (2007) 291 ITR 380 (SC) and the Hon'ble Karnataka High Court in the case of J.K. Industries vs. ACIT (2013) 351 ITR 434 (Kar).

8.2 After hearing both parties in the matter, we hold this issue against the assessee, and uphold the orders of the authorities below following, inter alia, the decisions of the Hon'ble Apex Court in the case of CIT vs. Shirke Construction Equipment Ltd. (2007) 291 ITR 380 (SC) and of the Hon'ble Karnataka High Court in the case of J.K. Industries vs. ACIT (2013) 351 ITR 434 (Kar). Consequently, ground No. V of the assessee's appeal is dismissed.

9. Ground No. VI – Deduction of Miscellaneous income while computing deduction under section 80HHC

9.1 In this ground, the assessee assails the impugned order of the learned CIT(A) in confirming the action of the AO of excluding incentives and other

items of miscellaneous income while computing the disallowance under section 80HHC on the ground that they are covered under Explanation (baa) to section 80HHC of the Act. The learned counsel for the assessee submitted that the very same issue raised by the assessee before a Coordinate Bench of the Tribunal for A.Y. 2003-04 was set aside and restored to the file of the AO in its order in ITA No. 6721/Mum/2007 dated 10.08.2016.

9.2 After hearing both parties in the matter, we have carefully considered the material on record; including the judicial decision cited. We find that as contended by the assessee, the very same issue was raised before a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 (supra). It is seen from a perusal of the orders of the authorities below that the AO, as in A.Y. 2003-04, in this year also, has not examined the issue in detail before disallowing the assessee's claim. On appeal also, the learned CIT(A) has rejected the assessee's claim and confirmed the AO's action holding that there was no direct nexus between the nature of income clubbed under the head 'miscellaneous income' and the export business of the assessee, without considering the breakup of the aforesaid income brought on record by the assessee (pages 86 to 89 and 119 of paper book). Following the decision of the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 in ITA No. 6721/Mum/2007 dated 10.08.2016, to which both of us are party, we set aside the finding of the authorities below on this issue and restore this issue to the file of the AO with respect to examination of assessee's claim of inclusion of 'miscellaneous income' and other items while computing the eligible deduction under section 80HHC of the Act. Needless to add, the assessee is to be afforded adequate opportunity of being heard and to file submissions/details in this regard by the AO before adjudicating this issue. Consequently, ground No. VI of assessee's appeal is treated as allowed for statistical purposes.

10. **Ground No. VII – Not allowing set off of incentives against the profits ('DEPB'/ 'DDB')**

10.1 In this ground, the assessee assails the impugned order of the learned CIT(A), confirming the action of the AO in rejecting the assessee's

claim for bring allowed deduction under section 80HHC of the Act in respect of sale of DEPB licence and Duty Draw Back amounting to R. 4,85,85,169/-. The learned counsel for the assessee submitted that the very same issue has been considered and held in favour of the assessee by a Coordinate Bench in the assessee's own case for A.Y. 2003-04, following the decision of the Hon'ble Apex Court in the case of CIT vs. Avani Exports (2015) 58 taxmann.com 100 (SC) and the Hon'ble Bombay High Court in the case of Vijaya Silk House (Bangalore Ltd. Vs GOI (2013) 349 ITR 566 (Bom).

10.2 Per contra, the learned D.R. supported the orders of the authorities below.

10.3 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. We find that the very same issue has been considered and held in favour of the assessee by a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 in its order in ITA No. 6721/Mum/2007 dated 16.08.2016. At paras 12 and 13 thereof, the Coordinate Bench has observed and held as under: -

"12. Ground No.VII of the appeal relates to not allowing set off of incentives against profits. The assessee claimed set off of miscellaneous income for an amount of Rs.8,39,51,299/-. However, the AO treated the above amount as sundry creditors and hence are not eligible for deduction u/s 80 HHC and has to be reduced to 90%. Further, the AO also held that this amount includes the sale of DEPB licence of Rs.2,68,47,494/- and duty draw back of Rs.1,32,91,296/- and as such these have no direct nexus with the export activity of the assessee company and is not eligible for deduction. While the assessee carried the matter in appeal, the learned CIT (A) has also held that the turnover of the appellant is more than Rs.10 crores and hence, the assessee is not eligible for deduction as claimed by the assessee in view of the amended provisions of the Act and accordingly, the learned CIT (A) rejected the claim of the assessee. Hence, the assessee is in appeal before the Tribunal.

13. At the time of hearing, the learned AR for the assessee drew our out attention to page 94 of the paper book wherein the details of working of deduction u/s 80 HHC of the Act have been given. Further, the learned AR by relying on the decisions in the case of (i) Avani Exports Vs. CIT, Rajkot [2012] 348 ITR 391 (Guj. HC), (ii) Vijaya Silk

House (Bangalore) Ltd. Vs. UOI [2013] 349 ITR 566 (Bom. HC) and (iii) CIT Vs Avani Exports [2015] 58 taxmann.com 100 (SC) submitted that amendment to section 80HHC by way of adding third and fourth provisos is ultra vires Article 14 of the Constitution. On careful perusal of the aforesaid decisions it is noticed that the Hon'ble Apex Court in the case of CIT Vs Avani Exports has however, to make the position crystal clear, substituted the direction of the Hon'ble High Court with the following direction:

"Having seen the twin conditions and since 80HHC benefit is not available after 1.4.05, we are satisfied that cases of exporters having a turn over below and those above 10 cr. should be treated similarly. This order is in substitution of the judgment in Appeal."

The learned DR could not controvert the aforesaid decision of the Hon'ble Apex Court by placing on record any relevant material. We have even noticed that the assessee's claim of deduction u/s 80HHC relates to assessment year 2003-04 i.e. prior to the date of amendment of the provisions with effect from 1st April, 2005. In view of the above, we respectfully following the decision of the Hon'ble Apex Court in the case of CIT Vs Avani Exports cited supra, hold that the order of the learned CIT (A) is not sustainable and accordingly we reverse the same. Resultantly, this ground of appeal of the assessee stands allowed."

Respectfully following the decision of the Hon'ble Apex Court in the case Avani Exports (supra) and the decision of the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 (supra), to which both of us are party, we hold that the impugned order of the learned CIT(A) on this issue is unsustainable and reverse the same. Accordingly, we hold this issue in favour of the assessee and consequently allow ground No. VII of assessee's appeal.

11. **Ground No. VIII** – bring general in nature, no adjudication is called for thereon.

12. In the result, assessee's appeal for A.Y. 2004-05 is partly allowed.

Revenue's Appeal in ITA No. 1573/Mum/2009

13. In this appeal, Revenue has raised the following grounds: -

1. *Whether on the facts and circumstances of the case and in law, the CIT(A) erred in deleting the addition of Rs. 59,31,4771- made by the Assessing Officer to the closing stock being unutilized MODVAT credit.*
2. *Whether on the facts and circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to adopt the net interest for the purpose of deduction u/s 80HHC.*

3. *Whether on the facts and circumstances of the case and in law, the CIT(A) erred in directing the Assessing Officer to deduct 90% of the net service income only after adjustment of expenses, if any for the purpose of deduction u/s 80HHC.*
4. *Whether on the facts and circumstances of the case and in law, the CIT(A) erred in allowing the assessee's ground of appeal relating to addition of provisions for doubtful debts and advances and provisions for diminution in the value of investment while computing the tax liability u/s.115JB of the Act.*
5. *The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal.”*

14. **Ground No. 1 – Addition of unutilized Modvat Credit to closing stock**

14.1 In this ground, Revenue contends that the learned CIT(A) erred in deleting the addition of Rs.59,31,477/- made by the AO to the closing stock on account of unutilized MODVAT credit.

14.2 The learned A.R. submits that the same issue has been considered and held in favour of the assessee and against Revenue by a Coordinate Bench of this Tribunal in its order in ITA No. 745/Mum/2005 dated 25.09.2006 in the assessee's own case for A.Y. 2001-02.

14.3 We have heard the rival contentions and perused and carefully considered the material on record. We find that, as submitted by the learned counsel for the assessee, the very same issue was considered and held in favour of the assessee and against Revenue by a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2001-02 in its order in ITA No. 745/Mum/2005 dated 25.09.2006; wherein at paras 36 and 37 thereof it was held as under: -

“36. With regard to ground no. 3, the learned D.R. contended that after introduction of section 145A, the element of un-utilized modvat has to be added to the value of the closing stock and therefore, it is argued that the learned CIT(A) was not justified in deleting the addition. The learned counsel for assessee contended that the valuation of closing stock is already in consonance with section 145A. He invited our attention to page 15 of the PB, which contains the working of the opening stock and closing stock. It is pointed out that section 145A was introduced with effect from assessment year 99-00 and the assessment year under appeal is 2001-02. In the earlier years, section 145A was already complied with and the element of excise duty/movatwere added to the closing stock and the same has

been brought forward as opening stock in the present assessment year. Some adjustments have also been made in the value of the closing stock. It is argued that disputed sum of Rs.8,38,262/- is only in the nature of deposit with the excise department and is not in the nature of un-utilised modvat credit. He relied on the order of learned CIT(A), who has recorded a clear finding in this regard.

37. We have considered rival submissions and in our view, the order learned CIT(A) on this issue deserves to be upheld. The learned CIT(A) has recorded the following finding on page 14 of his order: -

“At the time of hearing of this appeal, the learned counsel for the appellant have submitted that the appellant has already added Modvat credit in the closing stock of finished goods of Rs.1,18,860/- and added Modvat credit on raw materials of Rs.51,49,495/- and therefore no further addition is required to be made.

In assessment year 2000-01, on this issue, it was held that the appellant had added back Rs.53,38,796 as per provisions of section 145A of the Act and this amount as added by the assessing officer is not of unutilised Modvat but it was the amount of deposit made by the appellant with the excise authorities. Therefore, there was no reason for making this disallowance by the assessing officer hence this addition is deleted.”

38. In our view, the issue has been rightly decided by the learned CIT(A) and the valuation of closing stock is already in consonance with section 145A. His order is, therefore, confirmed on this issue.”

Following the aforesaid decision of Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2001-02, we uphold the decision of the learned CIT(A) in directing the AO to delete the addition made in the closing stock towards unutilized Modvat credit. Consequently, ground No. 1 of Revenue's appeal is dismissed.

15. **Ground No. 2 – Deduction under section 80HHC and net interest**

15.1 In this ground, Revenue assails the order of the learned CIT(A) in directing the AO to adopt the net interest for the purpose of computation of deduction under section 80HHC of the Act. The learned D.R. was heard in support of the ground raised.

15.2 Per contra, the learned counsel for the assessee submitted that the order of the learned CIT(A) is to be upheld as this issue is well settled by various judicial pronouncements, the for the purpose of computing the deduction under section 80HHC of the Act, it is the net interest expenses that is to be considered. In this regard reliance was placed on the following judicial pronouncements: -

- (i) ACG Associated Capsules (P) Ltd. vs. CIT (2012) 343 ITR 89 (SC)
- (ii) Lalsons Enterprises vs. DCIT (2004) 89 ITD 25 (Del. SB)
- (iii) Shri Ram Honda Power Equipment (2007) 289 ITR 475 (Del)

15.3 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. In our view, this issue is well settled by the judicial pronouncements cited (supra); by the decisions of the Hon'ble Apex Court in the case of ACG Associated Capsules (P) Ltd. vs. CIT (2012) 343 ITR 89 (SC); of the Hon'ble Delhi High Court in the case of Shri Ram Honda Power Equipments (2007) 289 ITR 475 (Del) and of the ITAT Delhi (Special Bench) in the case of Lalsons Enterprises (2004) 89 ITD 25 (Del SB). Respectfully following these decisions (supra), we confirm the decision of the learned CIT(A) in holding and directing the AO, that for the purpose of computing the deduction under section 80HHC if the Act, the net interest is to be considered. Consequently, Revenue's ground No. 2 is dismissed.

16. Ground No. 3 – Deduction under section 80HHC and treatment of income from services

16.1 In this ground, the Revenue assails the impugned order of the learned CIT(A) for directing the AO to deduct 90% of the net service income only after adjustment of expenses, if any, for the purposes of computing the deduction under section 80HHC of the Act. The learned D.R. was heard in support of this ground.

16.2 Per contra, the learned counsel for the assessee submitted that the order of the learned CIT(A) is to be upheld as this issue is well settled by various judicial pronouncements, that for the purpose of computing deduction under section 80HHC of the Act, 90% of net income from services is to be deducted after adjustment for expenses, if any. In this regard, reliance was placed on the following judicial pronouncements: -

- (i) ACG Associated Capsules (P) Ltd. vs. CIT (2012) 343 ITR 89 (SC)
- (ii) Lalsons Enterprises vs. DCIT (2004) 89 ITD 25 (Del. SB)
- (iii) Shri Ram Honda Power Equipment (2007) 289 ITR 475 (Del)

16.3 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. In our view, this issue is settled by judicial pronouncements cited above by the decisions of the Hon'ble Apex Court in the case of ACG Associated Capsules (P) Ltd. vs. CIT (supra), of the Hon'ble Delhi High Court in the case of Shri Ram Honda Power Equipment (supra) and of the ITAT – Delhi (Special Bench) in the case of Lalson Enterprises (2004) 89 IGD 25 (Del SB). Respectfully following these decisions (supra), we uphold the decision of the learned CIT(A) in directing the AO to deduct only 90% of the net income after adjustment of expenses, if any, from the business profits while computing the eligible deduction under section 80HHC of the Act. Consequently, Revenue's ground No. 3 is dismissed.

17. **Ground No. 4 – 'Book Profits' under section 115JB - Adjustment for provisions**

17.1 In this ground, Revenue contends that the learned CIT(A) erred in allowing the assessee's ground relating to the addition of provisions for doubtful debts and advances and provisions for diminution in the value of investments while computing the 'Book Profits' under section 115JB of the Act. The learned D.R. was heard in support of the ground raised and submitted that the same issue was came up for consideration before a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 and in its order in ITA No. 6580/Mum/2007 dated 10.08.2016, the Tribunal decided this issue in favour of Revenue and against the assessee. It was argued that facts being similar in this year also, the learned CIT(A)'s order on this issue be reversed and that of the AO be restored.

17.2 Per contra, the learned A.R. supported the impugned order of the learned CIT(A), but fairly conceded that this issue has been held against the assessee by the order of the Coordinate Bench of this Tribunal in the assessee's on case for A.Y. 2003-04 (supra) referred to by the learned D.R.

17.3 We have heard the rival contentions and perused and carefully considered the material on record. We find, as submitted by the learned

D.R., that this issue was considered and adjudicated in favour of the Revenue, by Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 in ITA No. 6580/Mum/2007 dated 10.08.2016 (supra), wherein at para 26 thereof it has been held as under: -

***“Ground No.4** relates to re-computation of book profits without making adjustment in respective provisions. The AO had adjusted the provisions on the ground that these were mere provisions and that the assessee had been writing back these provisions in various years which implies that these were unascertainable provisions and therefore required to be adjusted for computation of book profits. The assessee argued before the AO relying upon the decision of the Special Bench of ITAT Calcutta in the case of Usha Martin Industries, 105 TTJ 543 and the decision in the case of SCL Connect System reported in 292 ITR 294 that section 115JB of the Act envisages adjustment for provisions for liability whereas in the case of the assessee the provisions were not for liability but for the assets and in such a situation adjustment was not called for. The learned CIT (A) considering the facts of the case and the submissions of the assessee directed the AO to recompute the book profits without making adjustment in the respective provisions which are on assets of the assessee including provisions for doubtful and advances and provisions for diminution in the value of investments. In view of the amendment of the provisions of section 115JB of the Act being retrospective, we find no reason to sustain the findings of the learned CIT(A). Hence, we uphold the order of AO and while setting aside the order of CIT this ground of appeal of the Revenue is allowed.”*

Following the decision of the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2003-04 in ITA No. 6580/Mum/2007 dated 10.08.2016 (supra), in view of the amendments to the provisions of section 115JB of the Act being operational retrospectively, we are unable to sustain the impugned order of the learned CIT(A) on this issue and therefore set aside/reverse his finding in the matter and restore that of the AO. Consequently, Revenue's ground No. 4 is allowed.

18. **Ground No. 5** – being general in nature, no adjudication is called for thereon.

19. In the result, Revenue's appeal for A.Y. 2003-04 is partly allowed.

20. To sum up, both cross appeals of the assessee and Revenue for A.Y. 2003-04 are partly allowed.

Order pronounced in the open court on 7th October, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 7th October, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -1, Mumbai*
4. *The CIT - 1, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.