

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**BEFORE SHRI I C SUDHIR, JUDICIAL MEMBER
AND SHRI G S PANNU, ACCOUNTANT MEMBER**

ITA No 426 & 1131/PN/06

(Asstt. Year: 2002-03 & 2003-04)

Patni Computer Systems Ltd., .. Appellant
S.No 1A, Irani Market Compound,
Yerwada, Pune
PAN AABCP6219N

Vs.

Dy. Commissioner of I.T, .. Respondent
Cir.4, Pune

AND

ITA No 687 & 42/PN/07
(Asstt. Year: 2002-03 & 2003-04)

Jt. Commissioner of I.T (OSP), .. Appellant
Cir.4, Pune

Vs.

Patni Computer Systems P Ltd. .. Respondent
Pune

**Assessee by : Shri S N Inamdar
Department by: Shri V Anandraj**

ORDER

PER G.S. PANNU, AM

The captioned four cross-appeals, two by the assessee and two by the Revenue pertaining to same assessee, were heard together and are being disposed off by a consolidated order for the sake of convenience and brevity.

2. In ITA No 426/PN/06 pertaining to the assessment year 2002-03, the assessee has raised the following Grounds of appeal:

“On the facts and in the circumstances of the case and in law:

1. *The Id CIT(A) erred in confirming the disallowance and adding back of following losses of 10A units while computing income as per normal computation:*

<u>Name of the unit</u>	<u>Amount (Rs)</u>
SDF VII	2,22,46,456
Software & conversion	7,00,25,479
Gandhinagar	2,36,94,310
Noida	2,80,87,334
Sigma	2,29,07,934
Millennium Park	3,75,53,361

Total	20,45,14,874
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2. *The Id CIT(A) erred in confirming the addition/disallowance on account of interest of Rs 64,14,387 under Transfer Pricing*
3. *The Id CIT(A) erred in confirming the addition/disallowance on account of consultancy expenses of Rs 1,08,73,008 under Transfer Pricing*
4. *The Id CIT (A) erred in confirming the AO's decision of not netting interest received of Rs 64,71,867/- against interest payment of Rs 4,85,30,301/- while reducing 90% of interest received from business income for the purposes of section 80HHE.*
5. *The Id CIT(A) erred in confirming the AO's decision of reducing expenditure in foreign exchange of Rs 6,83,03,142 for the SEEPZ unit from the total and export turnover while computing deduction u/s 80HHE.*
6. *The Id CIT(A) erred in confirming the AO's decision of reducing the turnover of Japan and Australia Branches only from the report turnover and not from the total turnover.*
7. *The Id CIT(A) erred in concluding that the various ground in respect of computation of book profit and adjustments made thereunder is academic in nature and not entertained dismissed.*
8. *The Id CIT(A) erred in confirming the disallowance and adding back of following losses of 10A unit while computing book profit u/s 115JA:*

<u>Name of the unit</u>	<u>Amount (Rs)</u>
SDF VII	2,22,46,456
Software & conversion	7,00,25,479
Gandhinagar	2,36,94,310
Noida	2,80,87,334
Sigma	2,29,07,934
Millennium Park	3,75,53,361

Total	20,45,14,874”
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3. In the first Ground, dispute relates to the action of the Assessing Officer in adding back losses suffered by the section 10A eligible units

while computing income of the assessee under the normal provisions of the Act.

4. In this connection, it was a common point between the parties that similar issue has been adjudicated by the Pune Bench of the Tribunal in assessee's own case for the immediately preceding assessment year 2001-02 vide ITA No 274/PN/2005 dated 29.5.2009 in favour of the assessee. Apart therefrom, it has been pointed out by the learned representative for the assessee that the issue has also been dealt with by the Hon'ble jurisdictional High Court in the case of Hindustan Unilever Ltd v DCIT 38 DTR 91 (Bom.) affirming the stand of the assessee.

5. In the above background, we find ample merit in the Ground of appeal raised by the assessee. The Assessing Officer, while computing the income did not allow the claim for the loss suffered in the units which were otherwise eligible for benefits of section 10A of the Act. The Assessing officer proceeded on the assumption that section 10A provided for an exemption from taxation and, therefore, the loss of such an entity could not be set off against the normal business income of the assessee. The Hon'ble High Court in the case of Hindustan Unilever Ltd. (supra) was examining a similar proposition, though in the context of section 10B of the Act. The provisions of section 10B of the Act are pari materia to those of section 10A which is the subject matter of controversy before us. It has been noted that subsequent to the amendment with effect from 1.4.2001, the provision provides for a deduction of such profits and gains as are derived by an undertaking from the export of articles or thing or computer software duly established in free trade zones, etc. Consequently, it has to be understood that the provision, as applicable for the assessment year

under consideration, is not in the nature of an exemption. Therefore, the assessee was entitled to set-off of losses sustained by the 10A eligible units against the normal business income. In this view of the matter, we therefore find no reason to uphold the orders of the authorities below on the impugned aspect. As a result, we set aside the order of the Commissioner of Income-tax (Appeals) and direct the Assessing Officer to allow set-off of the losses of the section 10A eligible units against the normal business income of the assessee while computing income as per normal provisions of the Act. As a result thereof, Ground of appeal No .1 raised by the assessee stands allowed.

6. In Ground of appeal No. 2, the assessee has contested an addition of Rs 64,14,387/- sustained by the Commissioner of Income-tax (Appeals) out of a total addition of Rs 3,99,00,000 made by the Assessing Officer in respect of adjustment as per Chapter X viz. Transfer Pricing on account of interest chargeable on excess period of credit allowed to the Associated Enterprises. In this connection, the Commissioner of Income-tax (Appeals) has allowed partial relief of a sum of Rs 3,34,85,613/- , which is being contested by the Revenue by way of Ground of appeal No. 4 in its cross-appeal in ITA No 687/PN06. Since the two cross-Grounds relate to the same issue, they are being dealt with together.

7. In brief, the facts are that the assessee is engaged in the business of providing software services for various entities abroad and such services are provided off-shore as well as on-site. The Assessing Officer noted international transactions with Associated Enterprises on account of software development services provided by the assessee and consultancy services availed, etc. Accordingly, a reference under section 92CA(1) of

the Act was made to the Transfer Pricing Officer (in short “the TPO”) to determine the arm’s length price (ALP) of the international transactions. In determining the ALP certain adjustments were made by the TPO and the specific adjustment which is in dispute before us is on account of interest chargeable on excess period of credit allowed by the assessee to the Associated Enterprises. As per the Revenue, considering the significant cost incurred by the assessee the extension of the credit to the Associated Enterprises beyond the period of credit contracted for, could not be regarded as an action at arm’s length. On this score, Revenue contends that a sum of Rs 3.99 Crores was to be construed as the arm’s length compensation receivable by the assessee on account of interest chargeable on the amounts due from the Associated Enterprises, beyond the stipulated period of credit.

8. In appeal before the Commissioner of Income-tax (Appeals), assessee, inter alia, challenged the adjustment both on facts and in law. The first plea of the assessee was that providing of favourable credit terms to an Associated Enterprise is outside the purview of adjustment envisaged in Chapter-X since the same could not be construed as an “international transaction” within the meaning of section 92B(1) of the Act. The said plea has been negated by the Commissioner of Income-tax (Appeals) by relying upon the presence of the words “---- *any other transaction having a bearing on the profits, income, losses or assets of such enterprises*----” in section 92B(1) of the Act. The second plea set up by the assessee was that the adjustment has been made by calculating a notional interest, which was impermissible in the scheme of Chapter-X of the Act. This aspect has also been negated by the Commissioner of Income-tax (Appeals) on the plea that the concept of real income theory is not applicable in the context of the

Scheme of assessment contained in Chapter-X of the Act. On facts, assessee had contended that it was not charging interest from non-related parties also in case of delay in recoveries and, therefore, the non-charging of interest from Associated Enterprises on recoveries beyond the stipulated period of credit would also not justify the impugned adjustment. The Commissioner of Income-tax (Appeals), however, differed with the assessee on this aspect also and held that considering the significant costs incurred by the assessee the extension of credit to the Associated Enterprises beyond the contracted period of credit could not be construed as an action at arm's length. However, the Commissioner of Income-tax (Appeals) partially agreed with the assessee and concluded that the adjustment was merited only with regard to the interest in respect of post shipment loans beyond 90 days because according to him that was the only real cost suffered by the assessee in providing credit facility beyond 90 days to the Associated Enterprises. In this view of the matter, an amount of Rs 64,14,387/- was ascertained and the same was held as an amount which the assessee was obliged to recover from the Associated Enterprises as cost of funds, on an arm's length principle. As a result, out of the total addition of Rs 3.99,00,000/- made by the Assessing Officer, an addition of Rs 64,14,387/- has been sustained and the balance of Rs 3,34,85,613/- has been deleted by the Commissioner of Income-tax (Appeals)

9. In this background, the rival submissions have been heard. As per the learned Counsel for the assessee, the lower authorities have mis-directed themselves in considering the terms of credit as an "international transaction" within the meaning of section 92B(1) of the Act. It has been pointed out that non-charging of interest on balances outstanding for

services provided cannot constitute an international transaction and in this regard, reliance was placed on the decision of the Mumbai Bench of the Tribunal in the case of Nimbus Communications Ltd. v. ACIT. ITA No 6597/Mum/09 for assessment year 2004-05 dated 5.1.2011, a copy of which has been placed on record. It has also been submitted that element of interest comes in only with respect to an indebtedness created out of a loan transaction and in the instant case the indebtedness in question has arisen against provision of sales and services. It is pointed out that the Hon'ble Supreme Court in the case of Bombay Steam Navigation Co (1953) P. Ltd v CIT 56 ITR 52 (SC) has appreciated that every indebtedness cannot be construed to have arisen out of a loan transaction and interest is involved only in relation to a debt created out of a loan transaction. Therefore, according to the learned counsel there was no justification for making the impugned adjustment. Factually speaking, it has also been submitted that the profit margin with respect to the "international transaction" with the Associated Enterprises are much higher than those of the comparable cases and, therefore, if the element of cost relatable to the extended credit period allowed to the Associated Enterprises is considered, even then the profit margins of the assessee remain higher in comparison to other cases and, therefore, no adjustment is called for. For all the above reasons, it has been submitted that the Commissioner of Income-tax (Appeals) ought to have deleted the entire addition instead of allowing a partial relief.

10. On the other hand, the learned Departmental Representative, appearing for the Revenue, has defended the order of the Assessing Officer by placing reliance on the same. According to him, the Commissioner of Income-tax (Appeals) made no mistake in treating the

element of extended credit period to the Associated Enterprises as a factor justifying adjustment for benchmarking the “international transaction”. The reasoning taken by the Commissioner of Income-tax (Appeals) in this regard was reiterated before us, which we have already noted in para 8 above and, is therefore not being repeated for the sake of brevity. Even with regard to the relief allowed by the Commissioner of Income-tax (Appeals), it is submitted by the learned Departmental Representative that the benefit of the credit period of 90 days allowed by the Commissioner of Income-tax (Appeals) and also limiting the adjustment to the interest cost of post shipment loan alone is not justified, inasmuch as the assessee has incurred significant costs for extending the credit to the Associated Enterprises as brought out by the TPO.

11. In reply, the learned Counsel for the assessee submitted that in so far as the relief allowed by the Commissioner of Income-tax (Appeals) is concerned the same is factually in order; and, there is no interest cost relatable to the credit period other than that identified by the Commissioner of Income-tax (Appeals). It was reiterated that this aspect of the matter would be relevant only in case, the action of allowing extended credit period to the Associated Enterprises is considered as falling within the meaning of the expression “international transaction” as contained in section 92B(1) of the Act.

12. We have carefully considered the rival submissions. As the aforesaid discussion would show the dispute before us is limited to the determination of arm’s length price with respect to a single element, i.e. the interest relatable to the extended credit period allowed to the Associated Enterprises. Notably during the year under consideration, assessee had

international transactions with Associated Enterprises and on this count, the Associated Enterprises had some outstandings due to the assessee. Such outstandings were overdue and no interest was charged by the assessee on such amounts. The TPO has considered non-charging of interest as a transaction requiring adjustment to determine the arm's length price, because according to him, the normal period of credit allowed to the Associated Enterprises was 90 days, and to the other similarly placed customers the credit period allowed was 30 to 45 days. The fundamental question raised by the assessee is as to whether such an arrangement is amenable to be considered as falling within the meaning of the expression "international transaction" contained in section 92B(1) of the Act. Before us, the learned Counsel for the assessee has relied upon the decision of the Mumbai bench of the Tribunal in the case of Nimbus Communications Ltd. (supra) wherein an identical issue has been considered. The following discussion made by our co-ordinate Bench is worthy of notice:

"5. A continuing debit balance, in our humble understanding, is not an international transaction per se, but is a result of international transaction. In plain words, a continuing debit balance only reflects that the payment, even though due, has not been made by the debtor. It is not, however, necessary that a payment is to be made as soon as it becomes due. Many factors, including terms of payment and normal business practices, influence the fact of payment in independent transaction which can be viewed on standalone basis. What can be examined on the touchstone of arm's length principles is the commercial transaction itself, as a result of which the debit balance has come into existence, and the terms and conditions, including terms of payment, on which the said commercial transaction has been entered into. The payment terms are an integral part of any commercial transaction, and the transaction value takes into account the terms of payment, such as permissible credit period, as well. The residuary clause in the definition of 'international transaction' i.e. any other transaction having a bearing on the profits, incomes, losses or assets of such enterprises, does not apply to a continuing debit balance, on the given facts of the case, for the elementary reason that there is nothing on record to show that as a result of not realizing the debts from associated enterprises, there has been any impact on profits, incomes, losses or assets of the assessee. In view of these discussions, in our considered view, a continuing debit balance per se, in the account of the associated enterprises, does not amount to an international transaction under section 92B in respect of which ALP adjustments can be made. The factum of payment has to be considered vis-à-vis terms of payment set out in the transaction arrangement, and not in isolation with the commercial terms on which transaction in respect of which payment is, according to the revenue authorities, delayed. In any event, even when an ALP is made in respect

excessive credit period allowed under the CUP method, stated by the TPO, the comparable has to be dues recoverable from a debtor and not a borrower. It appears that the TPO has adopted interest @ 2.19% LIBOR on balances which exceed 30 days, but LIBOR rate is relevant only in the case of lending or borrowing of funds, and not in the case of commercial overdues. Even assuming that the continuing debit balances of associated enterprises can be treated as 'international transactions' under section 92B, the right course of applying the CUP method, in the case of non charging of interest on overdue balances, would have been by comparing this not charging of interest with other cases in which he assessee has charged interest on overuse with independent enterprises (internal CUP) or with the cases in which other enterprises have charged interest, in respect of overdues in respect of similar business transactions, with independent enterprises (external CUP). No such exercise has been carried out in this case, nor is it shown, as is the condition precedent for bringing this continuing debit balance in the ambit of 'international transaction', that as a result of not realizing the debts from associated enterprises, there has been any impact on profits, incomes, losses or assets of the assessee."

13. Following the afore-stated reasoning stated by our co-ordinate Bench, as the facts and circumstances are similar in the instant case, we hold that the extension of credit to the Associated Enterprises beyond the stipulated credit period cannot be construed as an "international transaction" for the purposes of section 92B(1) of the Act so as to require adjustment for ascertaining the ALP. Therefore, the consequential addition by the Assessing Officer is untenable. As a result thereof, the assessee succeeds in its Ground of appeal and the addition partially sustained by the Commissioner of Income-tax (Appeals) is liable to be deleted in toto, albeit on a different ground. In the result, the order of the Commissioner of Income-tax (Appeals) is set aside and the Assessing Officer is directed to delete the entire addition on this count.

14. Resultantly, Ground No. 2 in the appeal of the assessee is allowed, whereas Ground No. 4 in the cross appeal of the Revenue in ITA No 687/PN/06 is hereby dismissed.

15. In Ground No.3 the dispute relates to the adjustment made by the TPO on account of allocation of the cost of consultancy expenses amounting to Rs 1,33,31,520/- while determining the ALP of the international transaction. In this connection, the relevant facts are that the

assessee had paid a sum of Rs 6.03 crores to McKinsey & Co for undertaking a study for the purpose of restructuring the assessee's organizational structure. The TPO noted that the said concern had carried out three assignments and such reports were examined by him. Firstly, with regard to the report relating to strengthening the assessee's business development and sales processes, as per the TPO, the same also related to the functioning of the subsidiary companies, namely, the foreign Associated Enterprises also. Secondly, with regard to the report relating to growth of assessee's practices in the Embedded Technology Services (ETS) the object was to develop the growth strategy and business model for the assessee's Embedded software business. As per the TPO, this assignment also extended over the working of the Associated Enterprises. Thirdly, with regard to the report relating to Developing robust business unit strategies, as per TPO, the said report did not cover the Associated Enterprises. As per the TPO, the business of the assessee and the Associated Enterprises was closely linked; while the assessee performed the software development in the offshore centres, the Associated Enterprises took care of the on-site services. Thus, as per the TPO, the growth of the assessee could not be divorced from the growth of the Associated Enterprises and vice-versa. According to the TPO, changes proposed in the study conducted by McKinsey & Co would also give benefits to the Associated Enterprises and thus an arm's length allocation of cost of consultancy expenses paid to McKinsey & Co was required to be made. For the above reasons, 30% of the cost relating to the first and second assignment amounting to Rs 1,33,31,525/- was allocated towards the benefits accruing to the Associated Enterprises. According to the Revenue, it was imperative for the assessee to have recovered such costs

from the Associated Enterprises as the benefits of the studies also extended to them and since the assessee had not done so, certain expenditure was allocated by the TPO on this score. Initially, in its order dated 21.2.2005 passed under section 92CA(3) of the Act, the TPO made an adjustment of Rs 1,33,31,590/- on this point which was subsequently reduced to Rs 1,08,73,008/- by the TPO vide his order dated 8.2.2006 passed under section 154 of the Act. The addition on this point was carried in appeal before the Commissioner of Income-tax (Appeals).

16. In appeal before the Commissioner of Income-tax (Appeals) assessee contended that it had adopted the Transactional Net Margin Method (TNMM) for the purpose of Transfer Pricing in terms of which all the operating costs have been considered. The expenditure on consultancy charges paid to McKinsey & Co was a part of operating costs to arrive at the net margins and therefore, no separate adjustment on this expenditure was required to be made. It was also contended that McKinsey & Co have not provided any direct service to the Associated Enterprises; and, that any effort to improve the sales activity would necessarily involve Associated Enterprises also but since no specific service had been provided by M/s McKinsey & Co for the Associated Enterprises, no adjustment on account of consultancy expenses was required to be made. It was also pointed out that assessee sells directly to end consumers also and such sales have increased in the succeeding years. It was also contended that allocating the cost of such studies to Associated Enterprises is also not required in view of the responsibilities shared and the roles performed by the assessee and the Associated Enterprises. In the alternative, it was contended that though there is no direct benefit to the Associated Enterprises, yet if one is to consider the

indirect benefit, the same would not exceed 25% to 30% of the cost of the study. It was further argued that the net margin of the assessee was 40% as against the average net margin of 25% of the comparable cases covered in the review report. While calculating this net profit margin of 40%, all operating costs including the consultancy charges paid to M/s McKinsey & Co has been considered and yet the net margin was higher than the comparable cases, and therefore, no separate adjustment was required to be made on account of consultancy charges paid to M/s Mc Kinsey & Co.

17. The Commissioner of Income-tax (Appeals) dis-agreed with the submissions put-forth by the assessee as, according to him, the studies conducted by M/s McKinsey & Co. were in relation to business processes and business activities common to the assessee and the Associated Enterprises and, therefore, it was in fitness of things that a part of the expenditure was allocated. Since the same had not been done by the assessee, the Commissioner of Income-tax (Appeals) upheld the inference of the TPO and thereby sustained the addition of Rs 1,08,78,008/- on this count. Not being satisfied with the order of the Commissioner of Income-tax (Appeals), assessee is in further appeal before us.

18. Before us, the first and the foremost plea set-up by the assessee is that the impugned transaction does not fall within the definition of “international transaction” as per section 92B(1) of the Act and, therefore, the entire case built up by the TPO is legally untenable. Apart therefrom, the arguments taken before the lower authorities have been reiterated. It is submitted that while comparing the net margin of the assessee with comparable entities, all operating costs including the cost on account of

consultancy charges paid to M/s McKinsey & Co. has been considered and therefore, no separate adjustment is required to be made on this point.

19. On the other hand, the learned Departmental Representative appearing for the Revenue relied upon the orders of the authorities below in support of the case of the Revenue. It is also pointed out that due to the studies carried out by M/s McKinsey & Co., certain benefits accruing to the Associated Enterprises cannot be ruled out and therefore a portion of the cost has been rightly allocated by the TPO.

20. We have carefully considered the rival submissions. The case set-up by the Revenue is that a part of the cost incurred on charges paid to McKinsey & Co was required to be apportioned between the assessee company and foreign entities, who are Associated Enterprises in terms of section 92A, because the benefits of the expenditure accrued to the assessee as well as the Associated Enterprises. Quite clearly, in such a situation, the transaction needs to be based on Arm's Length price in terms of section 92C of the Act. The Revenue has sought to justify the inclusion of such a transaction within the purview of Chapter-X on the strength of words "*..... shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.....*" present in section 92B(1) of the Act, which explains the meaning of an "international transaction". Of-course, the learned Counsel for the assessee has submitted that the impugned transaction does not fall within the meaning of "international transaction" as contained in section 92B(1) of the Act. This aspect argued by the assessee is not being dealt with by us at this stage

and shall be taken up a little later. Continuing further with the justification made out by the Revenue to include such transaction within the purview of Chapter-X, it is to be noted that the apportionment of impugned cost is permissible only in a situation where there exists a “*mutual agreement or arrangement*” between two or more Associated Enterprises for apportionment of cost incurred in connection with a benefit, service or facility provided to any one or more of such Enterprises. The aforesaid position is amply clear on a bare reading of section 92B(1) of the Act. Notably, in this context we have carefully perused the order of the TPO and do not find any assertion therein that there existed any agreement or arrangement between the assessee and its Associated Enterprises to incur the cost on the studies conducted by McKinsey & Co. In fact, there is nothing to suggest that the assignments by McKinsey & Co. were carried out on the basis of any arrangement or agreement between the assessee and the Associated Enterprises. In this context, we also find that other than asserting that the benefits received by the Associated Enterprises “*are specific and identifiable benefits*”, the TPO has not given any basis to infer the same. There is no material or evidence to support the aforesaid assertion by the TPO and, therefore, the same is based on a mere presumption. Even otherwise, in our view, the study reports furnished by McKinsey & Co. may have a potential use for the Associated Enterprises but same has to be viewed in the context that any study conducted on the business strategies by a specialized agency may bring certain intangible benefits in the form of enhanced productivity to the businesses of the Associated Enterprises, however, this would not ipso facto justify the apportionment of the cost incurred on the conduct of the studies, where the use of such studies by the Associated Enterprises is not obligated in terms

of any mutual agreement or arrangement between the assessee and the Associated Enterprises, but the use is only discretionary on the part of the foreign Associated Enterprises. Moreover, there would not be any justification for apportioning the expenditure unless it is shown that the expenses incurred on such activities was dis-proportionate and the benefit which accrued to the Associated Enterprises in the form of increased business productivity was not merely incidental, but was tangible and concrete. In the present case, there is no material to show that any tangible and concrete benefit has accrued to the Associated Enterprises as a result of the expenditure incurred by the assessee in obtaining consultancy from McKinsey & Co. Therefore, under these facts and circumstances, in our opinion, the order passed by the TPO on this aspect is based on no evidence and the same is liable to be set aside qua the impugned adjustment.

21. Apart therefrom, even if we go along with the Revenue and accept the proposition that certain benefits accrued to the Associated Enterprises and, therefore, the Associated Enterprises were liable to compensate the assessee in terms of the above transaction, it was indeed imperative for the TPO to determine the ALP in respect of such “international transaction” made by the assessee company, by taking into consideration all the rights obtained and obligations incurred by the two entities, including the advantages obtained by the foreign Associated Enterprises. It goes without saying that in order to ascertain whether the expenses incurred by the assessee company, which is an Associated Enterprise of the foreign subsidiaries, on the consultancy charges paid to McKinsey & Co. are more than what a similarly situated and comparable independent domestic entity would have incurred or not, it would be necessary to identify the

appropriate comparables for the purpose of comparison of their expenditure with the expenditure incurred by the assessee company in this regard. If such a comparison would justify an adjustment in the impugned “international transaction”, only then the TPO’s action can be upheld. In the present case, no such exercise has been carried out and, therefore, on this count also we find the approach of the TPO untenable.

22. For all the above reasons, we hold that the action of the TPO in making adjustment to the income of the assessee on account of consultancy charges paid to McKinsey & Co is based on no evidence and is untenable and is, therefore, set aside. Accordingly, the order of the Commissioner of Income-tax (Appeals) is set aside and the Assessing Officer is directed to delete the impugned addition. Thus, Ground No. 3 of the assessee is allowed.

23. In so far as Ground Nos 4 & 5 regarding computation of deduction under section 80HHE of the Act with respect to netting of interest and reduction of expenditure in foreign exchange from total turnover and export turnover, are concerned the same have not been pressed before us and are, accordingly, dismissed as withdrawn.

24. In so far as Ground No 6 is concerned, the same relates to the manner of computation of deduction under section 80HHE of the Act. While examining the computation of deduction under section 80HHE of the Act done by the assessee, the Assessing Officer made certain changes which inter-alia included inclusion of the turnover of the Japan and Australia branches as a part of the ‘total turnover’. The assessee challenged this aspect before the Commissioner of Income-tax (Appeals) pointing out that reduction of turnover of Japan and Australia branches only from the export

turnover and not from the total turnover for the purposes of computing deduction u/s 80HHE of the Act was not justified. The Commissioner of Income-tax (Appeals) referred to Explanation d(2) to section 80HHE of the Act to observe that it only excludes foreign branch profits from the purview of “profits of the business” for the purposes of computing deduction and no such exclusion is provided as per the definition of “total turnover” contained in the section. In this manner, the action of the Assessing Officer has been upheld.

25. Before us, the learned Counsel for the assessee relied upon the decision of the Chennai Bench of the Tribunal in the case of ITO v Servion Global Solutions Ltd. 308 ITR (AT) 375 (Chennai) for the proposition that an element which is excludible from the “export turnover” should also be excluded from the “total turnover” for the purposes of computing deduction under section 80HHE of the Act. It is contended that following the said proposition the turnover of Japan and Australia branches should also be excluded from the “total turnover” for the purposes of computing deduction u/s 80HHE of the Act.

26. On the other hand, the learned CIT-Departmental Representative appearing for the Revenue has defended the action of the lower authorities by adopting the same reasoning which has been taken note of by us in para 22 above and is therefore not repeated for the sake of brevity.

27. We have carefully considered the rival submissions and also perused the decision of the Chennai Bench of the Tribunal in the case of Servion Global Solutions Ltd. (supra) relied upon by the assessee before us. In the case of Servion Global Solutions Ltd. (supra), the Tribunal has noted the definition of the expressions “export turnover” and “total turnover” as

contained in section 80HHE of the Act. Further the Tribunal referred to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of CIT v. v Laxmi Works 290 ITR 667 (SC) and opined that for the purposes of section 10A of the Act, the expenditure incurred in foreign currency was liable to be excluded from the figure of "export turnover" as well as from the figure of "total turnover" although the exclusion from the total turnover was not specifically contained in section 10A of the Act. In coming to such conclusion, it took into consideration the definitions of "export turnover" and "total turnover" contained in section 80HHE and explained that the same provided that what is excluded from the export turnover is also liable to be excluded from the total turnover. The said findings of our co-ordinate Bench have not been controverted before us on the basis of any other judicial authority. In the absence of any decision to the contrary, following the principles of consistency, we hold that the assessee is justified in contending that if the turnover of Japan and Australia branches has been reduced from the "export turnover" by the Revenue, the same is also excludible from the figure of "total turnover" for the purposes of computing deduction under section 80HHE of the Act. As a result thereof, the order of the Commissioner of Income-tax (Appeals) is set aside to the above extent and the Assessing Officer is directed to re-compute the deduction u/s 80HHE accordingly. Thus, on this Ground, assessee succeeds.

28. In Ground of Appeal No. 7, dispute relates to the computation of book profits for the purposes of section 115JB and adjustments made thereunder. The brief background to the impugned dispute is that the assessee filed a return originally declaring total income of Rs 2,10,82,440/- under the normal provisions of the Act and the income as per section 115JB was returned at Rs 2,73,70,864/-. Subsequently, a revised return

was filed on 30.3.2004 wherein the total income under the normal provisions was declared at Rs 2,49,32,048/- and the income as per section 115JB was revised to Rs 1,07,00,265/-. The assessment was finalized whereby the total income as per the normal provisions of the Act was computed at Rs 17,66,62,260/- and even the income as per section 115JB was re-worked at Rs 13,59,89,629/-. Since the income as per the normal provisions was higher, the final assessment was made at Rs 17,66,62,260/-. Apart from challenging various additions/disallowances made in the course of computing income as per the normal provisions, the assessee also challenged the determination of the income under section 115JB at a figure higher than that returned. The adjustments made in computing book profits under section 115JB were challenged before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) has elaborately noted the submissions put-forth by the assessee in this regard. However, the said disputes have not been determined by the Commissioner of Income-tax (Appeals) on the ground that the same were academic in nature since assessee has been ultimately taxed as per the normal provisions of the Act. For this reason, the Commissioner of Income-tax (Appeals) proceeded to hold that the said Ground raised by the assessee was not liable to be entertained and was accordingly dismissed.

29. Before us, it was a common point between the parties that the impugned Ground be remitted back to the file of the Commissioner of Income-tax (Appeals) for adjudication on merits. In our opinion, the Commissioner of Income-tax (Appeals) erred in not adjudicating the Ground, inasmuch as to ensure completeness and finality of proceedings it is imperative that the stated Grounds raised by the assessee ought to have been adjudicated on merits also. Therefore, we set aside the order of the

Commissioner of Income-tax (Appeals) on this aspect and restore the matter back to his file to adjudicate the Grounds raised by the assessee regarding computation of book profits u/s 115JB and adjustments made thereunder in accordance with law, of-course after allowing a reasonable opportunity of being heard to the assessee. Thus, on Ground No. 7 assessee succeeds for statistical purposes.

30. The last Ground in this appeal relates to the disallowance and adding back of the losses of section 10A eligible units while computing book profits for the purposes of section 115JB of the Act.

31. On this aspect, the learned Counsel for the assessee submitted that the Tribunal in the assessee's own case for the assessment year 2001-02 vide its order in ITA No 274/PN/05 (supra) has remitted the issue back to the file of the Commissioner of Income-tax (Appeals) for adjudication on merits. It is submitted that on similar consideration, the matter be remitted back to the Commissioner of Income-tax (Appeals) for an adjudication afresh. The aforesaid prayer of the assessee has not been seriously disputed by the learned Departmental Representative. In view of the precedent, we deem it fit and proper to set aside the order of the Commissioner of Income-tax (Appeals) on this aspect and remit the matter back to his file for adjudication on merits, of-course after allowing an opportunity of being heard to the assessee, in accordance with law. Thus, this Ground is allowed for statistical purposes.

32. Resultantly, appeal of the assessee in ITA No 426/PN/06 is partly allowed.

33. Now we may take up remaining Grounds in the cross appeal of Revenue in ITA No 687/PN/06 pertaining to the assessment year 2002-03.

34. In this appeal of the Revenue, Ground No. 1 relates to the action of the Commissioner of Income-tax (Appeals) in holding that the three units at Chinchwad, Akruti and Millennium Business Park were new Units and not expansion of the existing units and, therefore, the period of eligibility of deduction under section 10A of the Act is liable to be considered from the year of setting up of such units and not from the point of time when the original unit were set up.

35. Briefly stated the facts are that during the course of assessment proceedings, the Assessing Officer held that the three section 10A eligible units at Chinchwad, Akruti and Millennium Business Park were not new units but only expansion of the existing units. As per the Assessing Officer, Chinchwad Unit was an expansion of Software and Conversion Unit; Akruti unit was considered as expansion of Sigma Unit and Millennium Business Park unit was considered as expansion of TTC unit. The Assessing Officer treated the aforesaid units as mere expansions of the existing units on the basis of the approval letters received from the Software Technology Park of India (in short "STPI"). Accordingly, the Assessing Officer noted that the profitability of the aforesaid three units was liable to be combined with that of the corresponding old units. Similarly, the Assessing Officer also concluded that the eligible period for deduction under section 10A of the Act with respect to the said three units would also be reckoned from the first year of the eligibility of the corresponding old units. Aggrieved with the aforesaid stand of the Assessing Officer, assessee carried the matter in appeal before the Commissioner of Income-tax (Appeals).

36. In appeal, assessee contended that the action of the Assessing Officer was bad in law and on facts. It was pointed out that all the three

undertakings have been established in Software Technology Park and are registered with the STPI; it was asserted that all the three units satisfied the prescribed conditions under section 10A(2) of the Act. In respect of all the three units, it was submitted that they were separate and distinct from the existing undertakings. It was pointed out that the new units are located at locations different from their corresponding old units; that there are substantial investments in land, building and machinery in all the three units as distinct from the old units. It was also submitted that there are separate permission for Custom Bonded Warehouses and also separate Shop & Establishment Licenses for the three units. The Commissioner of Income-tax (Appeals) has since considered the submissions of the assessee. As per the Commissioner of Income-tax (Appeals), the assessee fulfilled all the conditions prescribed under section 10A(2) of the Act. According to him, merely because the approval letter received from STPI stated the setting up of the three units as an expansion of the corresponding units, cannot be fatal to the plea set up by the assessee that the three units in question are independent and distinct units liable for an independent claim of deduction under section 10A, since all the prescribed conditions have been fulfilled. The following discussion of the Commissioner of Income-tax (Appeals) in para 3.2 of the order is worthy of notice:

“3.2 (c) Section 10A(2) requires the appellant to fulfill three conditions. The conditions contained under sub-clause (i) & (ia) of section 10A(2) are positive relating to manufacturing or production of article or thing and sub-clause (ii) & (iii) of section 10A(2) say that such undertaking is not formed by splitting up or reconstruction of a business already in existence or it is not formed by the transfer to a new business or machinery or plant previously used for any purpose. As is clear from the details submitted by the appellant, the three units which are subject matter of appeal, are not formed by the transfer of machinery or plant previously used for any purpose. In fact all the three units are having their own plant and machinery having substantial investment and substantial turnover and are located in different premises, as is clear from the material on record. The only point to be seen in the present case is whether the three units can be said to be formed by splitting up or reconstruction of business already in

existence and in this regard respectfully following the ratio decidendi of Hon'ble Supreme Court decision in the case of Textile Machinery Corporation Ltd v CIT quoted supra, I am of the considered view that it cannot be said that the three units are formed by the splitting up or reconstruction of business already in existence. It may also be mentioned that the Hon'ble Supreme Court held that benefit of section 15C shall be applicable even in case of expansion of business and the relevant portion of decision of Hon'ble Supreme Court in the case of Textile Machinery Corporation as contained in page 203 & 204 in 107 ITR is reproduced as under:

"There is great scope of expansion of trade & industry. The fact that an assessee by establishment of new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit u/s 15C. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business."

Since the provisions of law as contained in section 15C(2)(i) and 10A(2)(ii) & (iii) are in effect and in substance in pari materia as regards the point in issue involved in this appeal, I am of the considered view that the ratio of Hon'ble Supreme Court decision in case of Textile Machinery Corporation Ltd. quoted supra which has been followed with respect in several decisions, applies to the law as contained in section 10A(2)(ii) and (iii) of the Income-tax Act, 1961.

In view of the foregoing discussion, taking into account the submission of the appellant and material on record, it is held that the three units at Chinchwad, Akruti and Millennium Business Park fulfill the condition laid down u/s 10A(2) of the Income-tax Act, 1961 and, therefore, the AO's conclusion to the contrary in this regard, are held to be unjustified on facts and not in accordance with law."

37. Before us, the learned Departmental Representative has primarily reiterated the stand of the Assessing Officer in support of the case of the Revenue. As per the learned Departmental Representative, the approval for setting up of the three units clearly bring out the fact that the new units are mere expansion of the existing units and they cannot be treated as independent units. In this manner, the order of the Commissioner of Income-tax (Appeals) is sought to be assailed.

38. On the other hand, the learned Counsel for the assessee has vehemently pointed out that the Commissioner of Income-tax (Appeals) has factually appreciated that all the three units are physically located at different locations and that they are independent with substantial

investments. It has also been pointed out that merely because the Government approval refers to the new units as an expansion of the existing units cannot be construed as non-fulfillment of the conditions prescribed under section 10A(2) of the Act. It is pointed out that it is not a case of expansion of an existing unit, but certainly a case of expansion of the business of the company and the same cannot lead to denial of deduction under section 10A, especially when the three units otherwise fulfill the conditions prescribed under section 10A of the Act. The learned Counsel has also referred to the decision of the Mumbai Bench of the Tribunal in the case of Jayant Agro Organics Ltd Akhandanad, Mumbai v Jt.CIT in ITA No 5439/Mum/01 dated 3.3.2006 wherein similar argument set up by the Revenue was not found cogent to deny the claim of deduction under section 10A of the Act.

39. In the above background, we have carefully considered the rival submissions. Notably, the assessee is a company engaged in the business of development and export of computer software. It has been explained before the lower authorities that the business of the assessee is on an increasing scale. It has expanded its business by establishing new undertakings at different locations. It is explained that the turnover of the company has substantially increased over a period of time with the increase in the number of employees, etc. as also number of locations at which it operates through different units. In this context, the Assessing Officer noted that the assessee had treated three units, namely, Chinchwad Unit, Akruti Unit and Millennium Business Park unit as separate independent units for the purposes of deduction under section 10A of the Act. The Assessing Officer noted that approval received from STPL for Chinchwad unit reflected it as an expansion of Software Conversion unit.

Similarly, approval for Akruti unit and Millennium Business Park unit reflected them as expansions of Sigma unit and TTC unit respectively. On this singular basis, the Assessing Officer treated the three units as mere expansions and not independent units. As a result thereof, the eligibility period for claim of deduction under section 10A was also reckoned from the first year of the eligibility of the corresponding old units. The Commissioner of Income-tax (Appeals) has, however, appreciated the plea of the assessee and has held that the three units fulfilled the conditions laid down under section 10A(2) of the Act and are accordingly eligible for the claim of benefits under section 10A independent of the old units.

40. Section 10A of the Act provides for a deduction in respect of profits and gains as are derived by an undertaking from export of computer software, etc. for a period of 10 consecutive assessment years, subject of-course to fulfillment of the conditions specified by sub-section (2) of section 10A of the Act. The conditions prescribed in sub-section (2) of section 10 have been noticed by the Commissioner of Income-tax (Appeals), namely, that the undertaking has to begin manufacture or produce computer software during the previous year relevant to the assessment year commencing on or after the first day of April, 1994 in any software technology park; and that the undertaking is not formed by splitting up or reconstruction of the business already in existence; and, that the undertaking is not formed by transfer to a new business of machinery or plant previously used for any purpose. We have carefully perused the relevant conditions and find that the Commissioner of Income-tax (Appeals) has rightly concluded that all the three aspects are fulfilled by the three units in question. The Commissioner of Income-tax (Appeals) has discussed the physical location of each unit, the investment in fixed assets

of each unit as well as the turnover of each unit and on such factual analysis, it has been concluded that the three units are separate and distinct from the existing units referred by the Assessing Officer. On these factual aspects, we find that there is no cogent material brought out by the Revenue to negate the findings of the Commissioner of Income-tax (Appeals).

41. The only plea of the Revenue is that in the approvals granted by the STPI, the three units have been referred to as an expansion of the corresponding old units. The moot question is as to whether such a plea of the Revenue is potent to effect the assessee's entitlement for deduction under section 10A of the Act. Similar plea of the Revenue in the context of section 10B of the Act was a subject matter of consideration by our co-ordinate Bench in the case of Jayant Agro Organics Ltd. Akhandanad, (supra) wherein following discussion is worthy of notice:

"8. Revenue has vehemently contended that there is no independent Government approval of the new unit and all that the Government has permitted is enhancement in capacity of the existing unit. As evident from the land allotment letter dated 19th July, 1995 issued by the Gujarat Industrial Development Corp. Ltd. it is clear that the land allotted for the new unit is plot #624/1 and 2, and 625 to 627 whereas the existing plant was in plot 3 602. The production of 12 Hydroxy Stearic Acid is authorized by the letter dt 27th January 1995 which states that the Government has taken note of assessee's wish to manufacture Hydroxy Stearic Acid also by way of forward integration and amended the letter of permission to include 12 Hydroxy Stearic Acid of 12,000 MT in the very next sentence. It is observed that "Govt also approves of your request for the import of additional capital goods worth Rs 550 lakhs for the project". That clearly demonstrates that the production of Hydroxy Stearic Acid of 12,000 MT was viewed by the Government as an independent project. It was not a case for purchase of addition capital goods for the existing project. The assessee is irrespective of the number of units, is one of artificial juridical person. Therefore, a combined permission, which involves setting up for different units, is quite in order. The fact of amendment of earlier permission or of grant of separate permissions, is not really relevant. What is really to be examined is whether the units are independent of unit and whether the units are covered by the permission or not. In our humble understanding it meets both the tests. We have also noted that it is not an statutory requirement that there has to be separate permission for each unit and therefore just because the permission is

granted by the Government by way of amending the original permission letter does not affect the eligibility for deduction u/s 10B in any manner.”

42. From the aforesaid, it is quite clear that the manner in which the approval has been granted is not relevant to examine the assessee's case for claim of deduction under section 10A of the Act with respect to the three units. What is really to be examined is as to whether the three units are independent units and that they fulfill the conditions prescribed under section 10A(2) of the Act. There is no prohibition that an expansion in the same line of business achieved by setting up a new independent unit would lead to denial of deduction under section 10A of the Act. In this background, in the earlier part of this order we have already noted with approval the factual findings of the Commissioner of Income-tax (Appeals) that the three units are separate and independent production units and the same cannot be treated as mere expansions of the existing undertakings. Therefore, the mere fact that the requisite permissions from STPI refer them as expansions of the existing units, would not dis-entitle the assessee from the claim of deduction under section 10A of the Act. In this view of the matter, we find no error in the approach of the Commissioner of Income-tax (Appeals) in having allowed the claim of assessee for the benefits under section 10A of the Act on the three units treating the same as independent units. Thus, Ground Nos 1 & 2 of the appeal of the Revenue are dismissed.

43. In the appeal of the Revenue, Ground No. 3 is in respect of the losses of Sweden Branch office which has been disallowed and added back while computing the income of the assessee. In this regard, the brief facts are that the assessee company has a branch office at Sweden which incurred a loss for the assessment year under consideration. The said loss

was not allowed to be set off against other business income by the Assessing Officer. The plea of the assessee was that in terms of para 1 of Article 7 of Double Taxation Avoidance Agreement between India and Sweden the entire profit of the Sweden branch office was liable to be taxed in India as well as in Sweden. If the assessee was to pay any income-tax in Sweden it would be entitled to claim credit as per the DTAA for such taxes paid in Sweden. As per the assessee, it was resident in India and hence the profit of Sweden branch was taxable in India and, therefore, the loss of the branch was also liable to be considered for set off against the other business income. The Commissioner of Income-tax (Appeals) has considered this aspect and held that assessee was entitled to set off the loss arising out of its Sweden branch against other business income declared. In coming to such conclusion, apart from other reasons, the Commissioner of Income-tax (Appeals) followed the decision of his predecessor for the immediately preceding assessment year in respect of the losses of the Japan Branch on similar facts. Against the aforesaid decision, Revenue is in appeal before us.

44. Before us, it was a common point between the parties that the order of the Commissioner of Income-tax (Appeals) on a similar aspect in the immediately preceding assessment year 2001-02 has been affirmed by the Tribunal vide its order dated 29.6.2007 in ITA No 726/PN/05. In view of this admitted position, following the aforesaid order of the Tribunal on identical facts for the preceding assessment year 2001-02, we affirm the order of the Commissioner of Income-tax (Appeals) on this issue and thus, the Revenue fails on this Ground of Appeal.

45. Ground No 4 has already been dealt with while dealing with Ground No 2 in assessee's cross-appeal in ITA No 426/PN/06 and is accordingly dismissed.

46. Resultantly, appeal of the Revenue in ITA No 687/PN/06 is dismissed.

47. We shall now take up assessee's appeal in ITA No 1131/PN/06 relating to the assessment year 2003-04.

48. In the first Ground, dispute relates to the action of the Assessing Officer in adding back losses suffered by the section 10A eligible units while computing income of the assessee under the normal provisions of the Act. Similar issue has been considered by us in assessee's appeal for the immediately preceding assessment year 2002-03, wherein we have set aside the order of the Commissioner of Income-tax (Appeals) with directions to the Assessing Officer to allow set-off of the losses of the section 10A eligible units against the normal business income of the assessee while computing income as per normal provisions of the Act. On the parity of reasoning, we hereby set aside the order of the Commissioner of Income-tax (Appeals) with similar directions to the Assessing Officer. As a result, Ground of Appeal No 1 raised by the assessee is allowed.

49. Ground No. 2 relating to disallowance of loss of new Vashi IIP unit was not pressed by the learned Counsel for the assessee at the time of hearing and, therefore, the same stands dismissed.

50. Ground No. 3 relates to an addition of Rs 62,81,020/- sustained by the Commissioner of Income-tax (Appeals) out of the addition made by the Assessing Officer in respect of adjustment as per Chapter-X, viz. Transfer

Pricing on account of interest chargeable on excess period of credit allowed to the Associated Enterprises. Similar Ground has been considered by us in assessee's appeal for the assessment year 2002-03 and for the detailed reasons given therein, we hereby delete the addition partially sustained by the Commissioner of Income-tax (Appeals). Resultantly, assessee succeeds on this Ground of Appeal.

51. Ground No. 4 relating to addition/disallowance of professional fees under Transfer Pricing is similar to Ground No. 3 raised by the assessee in its appeal for the assessment year 2002-03. Therefore, for the detailed reasoning given therein, we hereby set aside the order of the Commissioner of Income-tax (Appeals) and direct the TPO to delete the addition made on account of consultancy charges. The assessee thus succeeds on this Ground of appeal.

52. In Ground No 5, the dispute relates to manner of computation of deduction under section 80HHE of the Act. The Assessing Officer noted that in the computation of deduction under section 80HHE, the assessee had considered 10% of the profit of the business of the undertakings covered under section 10A of the Act as eligible for the claim of deduction under section 80HHE of the Act. The Assessing Officer has denied such a claim of the assessee. It was explained that for the assessment year 2003-04 as per the proviso inserted by Finance Act 2002 deduction under section 10A of the Act was restricted to 90% of the profits and gains derived by an undertaking from export of computer software. In other words, 10% of such profits and gains of the undertaking eligible for deduction under section 10A of the Act were taxable. This element of profit was included by the assessee in its claim of deduction under section

80HHE of the Act. The Assessing Officer denied the same on the ground that section 10A units are entitled for a tax exemption and that section 80HHE prescribed for a deduction for profits in respect of export of computer software. As per the Assessing Officer, the assessee was taking benefit of both the sections in relation to same unit which was not permissible. The Commissioner of Income-tax (Appeals) has also since denied the claim of the assessee. As per the Commissioner of Income-tax (Appeals), once the assessee had opted for claim of deduction under section 10A, no further benefit could be allowed under any other provision of the Act. Against the aforesaid, assessee is in further appeal before us.

53. Before us, the learned Counsel for the assessee referred to the judgment of the Hon'ble Madras High Court in the case of CIT v Ambatture Clothing Ltd. 194 Taxman 79 (Mad), wherein it has been held that there is no prohibition for claiming deduction under section 80HHC while availing the benefits provided under section 10A of the Act. On the same parity of reasoning, it is submitted that the plea of the assessee be allowed.

54. On the other hand, the learned Departmental Representative has reiterated that the lower authorities made no mistake in denying the claim because the assessee had opted for the claim of deduction under section 10A of the Act and in relation to such profits and gains no further benefit could be allowed under any provisions of the Act.

55. We have carefully considered the rival submissions. We have also carefully perused the judgment of the Hon'ble Madras High Court in the case of Ambatture Clothing Ltd (supra). In the case before the Hon'ble High Court, assessee had claimed the benefits under section 10A/10B of the Act, apart from claiming deduction under section 80HHC of the Act for the

remaining 10% of the profits, which were to suffer tax applying the provisions of section 10A/10B of the Act. According to the Revenue, claim made under section 80HHC of the Act in respect of the remaining 10% of the profits amounted to double deduction, which was impermissible. The Hon'ble High Court examined the said aspect and held that there was no statutory prescription to support the case of the Revenue. Following discussion in the order of the Hon'ble High Court is relevant:

“5. The very statutory provision prescribing a prohibition in respect of the deductions in relation to the profits and gains itself, has not specifically included section 80HHC. Apparently, it therefore would only mean that there was no prohibition for claiming any deduction u/s 80HHC while applying the benefits provided u/s 10A of the Act. If that is the statutory prescription, by which the assessee was entitled to claim a benefit u/s 80HHC in relation to the profits and gains while invoking section 10A, it will have to be concluded that the assessment order in having allowed such a deduction of the remaining 10 per cent of the profits earned by the assessee, was not erroneous. In any event, having regard to such a statutory prescription available for the assessee to claim the benefit u/s 80HHC in respect of the profits earned from section 10A of the Act, there is absolutely no scope for the Assessing Authority to have invoked section 154 of the Act, in order to state that, that can be considered as an error apparent, inasmuch as, there was no error at all, much less, apparent error to be rectified by the Assessing Authority.”

Following the aforesaid parity of reasoning, which is squarely applicable to section 80HHE of the Act, we hereby allow the plea of the assessee. Accordingly, assessee succeeds on this Ground.

56. Ground No. 6 relating to computation of deduction under section 80HHE reducing expenditure in foreign exchange from the total and export turnover was not pressed by the learned Counsel at the time of hearing and, therefore, the said Ground stands dismissed.

57. Ground No 7 relates to the manner of computation of deduction under section 80HHE. This Ground is similar to Ground No. 6 raised in assessee's appeal for the assessment year 2002-03, wherein we have upheld the assessee's contention that if the turnover of Japan and

Australia branches has been reduced from the “export turnover” by the Revenue, the same is also excludible from the figure of ‘total turnover’ for the purposes of computing deduction under section 80HHE of the Act. Therefore, following the said reasoning, the order of the Commissioner of Income-tax (Appeals) is set aside to the above extent and the Assessing Officer is directed to re-compute the deduction under section 80HHE of the Act accordingly. Thus, on this Ground, assessee succeeds.

58. Ground No 8 relates to the computation of book profits for the purposes of section 115JB and adjustments made thereunder. This Ground is similar to Ground No. 7 raised in assessee’s appeal for the assessment year 2002-03, wherein we have restored the issue to the file of the Commissioner of Income-tax (Appeals) to adjudicate the same in accordance with law after allowing a reasonable opportunity of being heard to the assessee. For the reasons given therein, we hold so and restore this Ground to the file of the Commissioner of Income-tax (Appeals) with similar directions. Thus, on this Ground assessee succeed for statistical purposes.

59. Ground No. 9 relates to the disallowance and adding back of the losses of section 10A eligible units while computing books profits for the purposes of section 115JB of the Act. This Ground is similar to Ground No. 8 raised in assessee’s appeal for the assessment year 2002-03, wherein we have restored the issue to the file of the Commissioner of Income-tax (Appeals) to adjudicate the same in accordance with law after allowing a reasonable opportunity of being heard to the assessee. For the reasons given therein, we hold so and restore this Ground to the file of the Commissioner of Income-tax (Appeals) with similar directions. Thus, on this Ground assessee succeed for statistical purposes.

60. The last Ground in the appeal of the assessee is with regard to the manner of charging interest under section 234B of the Act. The grievance of the assessee is that interest under section 234B of the Act has been charged without allowing credit available under DTAA of taxes paid in USA, Australia and New Zealand.

61. On this aspect, we find that the insertion of Explanation 1 below section 234B(1) by the Finance Act, 2006 with effect from 1.4.2007 is relevant to adjudicate the claim of the assessee. As per the amended provisions, credit is allowable in relation to the taxes paid in country outside India while computing “assessed tax” for the purposes of section 234B(1) of the Act. The Hon’ble Bombay High Court in the case of CIT v Apar Industries Ltd. 323 ITR 411 (Bom) has interpreted the said amendment as clarificatory in nature so as to have a retrospective application even for assessment years prior to 1.4.2007. In view of the aforesaid, we, therefore, set aside the order of the Commissioner of Income-tax (Appeals) on this aspect and direct the Assessing Officer to re-compute the interest chargeable under section 234B of the Act in accordance with aforesaid discussion and as per law. Thus, on this Ground, assessee succeeds for statistical purposes.

62. In the result, appeal of the assessee in ITA No 1131/PN/06 is partly allowed.

63. We shall now take up Revenue’s appeal for assessment year 2003-04 in ITA No 42/PN/2007.

64. Ground Nos.1 & 2 raised in this appeal are identical to that raised by the Revenue in its appeal for the assessment year 2002-03, wherein we have dismissed the Ground of appeal raised by the Revenue. For the

detailed reasons given therein, we dismiss these Grounds of appeal of the Revenue.

65. Ground No. 3 is in respect of the losses of Sweden Branch office which has been disallowed and added back while computing the income of the assessee. Similar issue has been considered by us in the Revenue's appeal for the assessment year 2002-03, wherein for detailed reasons given above, we have affirmed the order of the Commissioner of income-tax (Appeals). Accordingly, following the same, we decide the issue against the assessee. The assessee thus fails on this Ground.

66. Ground No 4 has already been dealt with while dealing with Ground No 2 in assessee's cross-appeal in ITA No 426/PN/06 for the assessment year 2002-03 and is accordingly dismissed.

67. In the result, Revenue's appeal in ITA No 42/PN/07 is dismissed.

Decision was pronounced in the open Court on 30th Day of June, 2011.

Sd/-

(I.C. SUDHIR)

JUDICIAL MEMBER

Sd/-

(G.S. PANNU)

ACCOUNTANT MEMBER

Pune: Dated: 30th June, 2011

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Copy of the order is forwarded to :

1. Assessee
2. Department
3. The CIT(A),
4. The CIT,
4. The D.R, 'B' Bench,Pune
5. Guard File

"True copy"

By order

Assistant Registrar , ITAT, Pune

