

Wipro Ltd. Vs. Dy. Cit

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Court : Income Tax Appellate Tribunal ITAT

Decided On : Jun-21-2005

Reported in : (2006)5SOT805(Bang.)

Appellant : Wipro Ltd.

Respondent : Dy. Cit

Advocate for Pet/Ap. : Shri. K.R. Pradeep

Judgement :

The ITA Nos. 881 and 882/Bang./ 2003 have been filed by the revenue and ITA Nos. 895 and 896/Bang./2003 have been filed by the appellant. Since both the appeals arise from the common orders passed by the CIT(A)-V, Bangalore, for assessment year 1998-99 and for assessment year 1999-2000, dated 21-3-2003, all these appeals have been heard together.

During the course of hearing of the appeal, the appellant filed paper books for assessment years 1998-99 and 1999-2000. The appellant-company also filed additional grounds and other computations and calculation statements to buttress its contentions in the appeal.

Firstly, we shall deal with the appeals filed by the appellant-company in ITA Nos. 895 and 896/Bangd/2003 for assessment years 1998-99 and 1999-2000.

Before we proceed with the issues, preliminary objections were raised by the counsel for the Department, Sri E.R. Indrakumar, the relevant portion is extracted

hereunder: In relation to the aforesaid appeal, the appellant has filed the paper book with. the following certificate.

This is to certify that the above documents are the copies of the originals made available to the authorities below during the proceedings and only the relevant portion relating to the appeal before the Tribunal is enclosed.

In this context, it is submitted that the following letters and papers, as detailed herein, have not been filed by the appellant at the time of assessment.

List of documents not filed at the time of assessment (given at Annex.

III to the paper book) Letter No. 15(45)/92-SDA, dated 30-4-1992 regarding setting up of 100 per cent software export unit under STP addressed to Wipro Systems Ltd. Annexure to letter No. STPIB/Wipro Systems/ Expan/99102101/6539, dated 21-10-1999.

STP Hyderabad's letter in No. STPH/IMSC/9495/2664, dated 28-2-1995 permission to start STP unit at Surya Towers, SP Road, Secunderabad, along with annexure.

1. STPI, Bangalore-letter No. STPIB/WIPRO Systems Exp/2000070601/4881, dated 6-7-2000, with annexure.

2. STPI, Hinjawadi-Letter No. STP/P/VIII(A)/ 270/2000/2459, dated 19-9-2000.

3. STPI, Bangalore-Letter No. STPIB/WIPRO Systems /Expan / 2000051901 / 2053 dated 20-5-2000.

6. Letter dated 19-8-1998 of Under Secretary, Government of India permitting M/s. Wipro Infotech Ltd., to convert their EHTP unit granted permission vide No. EHTP :PER : 62 (93)/EOP : 11(93), dated 7-7-1993 to STP Scheme, etc.

Documents dated 25-9-2001, 18-7-2001, 26-11-2002, 8-1-2003, 16-12-2003, 18-2-2003 & 23-1-2004." On the basis of the aforesaid memo filed, Sri E.R. Indrakumar, learned special counsel for the revenue, mentioned that the impugned document should not be relied on in deciding the appeals.

Sri K.R. Pradeep, chartered accountant, appearing for the appellant, strongly resisted the objections filed by the Department. He argued that the documents mentioned in Sl. Nos. 1 to 5 were filed before the assessing officer along with its letter dated 6-3-2001, which is found in the paper book at pp. 160 and 161, consequently, the objection is contrary to facts on record. Further, it was pointed out that these documents were specifically mentioned in para 4.2 at p. 2 of the assessment order. All copies of licenses were supplied and numbered as Vol. 6 found mentioned in the assessment order and further details submitted have also been mentioned in para 5.2 at p. 3 of the assessment order. He also brought to our attention the order of the Commissioner (Appeals), particularly the para 3 at pp. 2 and 3 of his order which is extracted hereunder: "3. Ground Nos. 1 to 3 are general grounds directed at the entire assessment order. Ground Nos. 4 to 8 relate to computation of profits under section 10A. The assessee claimed profits of Rs. 1,02,32,78,192 as exempt under section 10A. The assessing officer recomputed the profits under section 10A at Rs. 87,94,39,076 by holding certain receipts as not profits and gains derived from the individual undertaking eligible under section 10A and by allocating certain corporate expenses to section 10A units. The assessee is engaged in export of software. The assessee has 3 main sub-divisions: (a) Wipro Systems [7 STP units situated at Bangalore (5) and Hyderabad (2)] (c) E-Commerce [part of STP, Lavelle Road, Bangalore,,coming under Wipro Systems] 3.1 As stated by the assessing officer, the assessee had filed detailed P&L a/c. statements for each of the sub-division and in turn for each of the STP unit and consolidated the total claim of exemption under section 10A. The total software exports aggregated to Rs. 3,91,44,28,081. This turnover included miscellaneous income of Rs. 1,47,22,733. The total expenditure accounted is Rs. 289.23 crores. The assessing officer called for and examined the details of group-wise, division-wise and sub-division-wise P&L a/cs. and expenditure details.

He also called for softex forms filed with STPI authorities and examined the same. The assessing officer obtained particulars of sales break-up, country-wise as well as customerwise. He has also verified the details of other income and expenditure." From the above records of the authorities below and particular specific mention made by assessing officer and CIT(A) in their orders, it was not

open for revenue, to contend that the documents, were not available to authorities below. Sri Pradeep argued that all these documents are to be relied on in deciding the appeals.

We have gone through the paper books and objections of the revenue. We find that the Annex. 4 commencing from pp. 177 to 180 extracted hereunder: Koramangala (Each consisting of Ground 1st, 2nd Floor) Block A, B & C, K-312, 5th Block, Koramangala, Bangalore Sri Ganesh Complex (Ground 1st, 2nd, 3rd & 4th-Floors), House List Nos.

271 & 271 A, Madivala Village, Hosur Main Road, Bangalore-560 065 Ground, 1st, 2nd & 3rd Floor, No. 26, Bommanahalli, Hosur Main Road, Bangalore-560 068 Chamundi Indl. Complex, Sub-station & Utility Building No. 26, Bommanahalli, Hosur Main Road, Bangalore-560 068 Chamundi Indl. Complex, Block II, No. 26, Bommanahalli, Hosur, Main Road, Bangalore-560 068 -Electronic City, Block I & VI, Plot Nos. 72 & 73, KEOICS Electronic City, Bangalore-561 229 -Electronic City, Block 2,3 & 4, Plot Nos. 72 & 73, KEONICS Electronics City, Bangalore-561 229 ITPL, 5th & 6th Floors, Information Technology Park, Whitefield Road, Bangalore-560 066 Wipro Ltd., Flat No. 201, Block A STP Complex, Electronic City, Sector 18, Gurgaon, Haryana List of Industrial undertakings in Software Technology Parks/ Electronic Hardware Technology Parks eligible for exemption under section 10A was filed by the appellant along with its letter dated 6-3-2001, addressed to Deputy Commissioner of Income Tax Central Circle-IV. We also find from the perusal of the assessment order that the said letter has been looked into by the assessing officer and also finds a place in the assessment order and appellate order as pointed out by Sri Pradeep. In fact, based on these details the assessing officer had restricted the claim of the assessee under section 10A to Rs. 87.94 crores, whereas the assessee's claim was Rs. 102.30 crores, a disallowance of more than Rs. 14 crores was made after going through the details filed by the assessee. Hence, it is no gainsaying that these documents were not filed at the time of assessment.

We have made an effort to compare the documents found mentioned in Annex. 4 in pp. 177 to 180. We find that the documents found in page Nos. 181 to 265 are

all licences issued by STPI along with certain annexures etc. Many of these are found mentioned in Annex. 4. Further, we also find that the assessing officer has examined several documents which can be broadly described as copies of licences and other documents issued by STPI, customs and other authorities. And most of these documents are dated prior to passing of assessment orders for assessment years 1998-99 and 1999-2000. Hence, we rely on these licences, etc. as has been done by the assessing officer and Commissioner (Appeal) in framing the assessment orders. Only p. 266, as submitted by Mr. Pradeep, has been enclosed by mistake and it was produced in the assessment proceedings for the assessment year 2001-02 and prayed that the same be admitted as additional evidence. We find p.

266 is of no consequence for any claim made by the assessee or the Department. Hence, we rely on the paper. book submitted by the appellant excepting p. 266 to decide the issues. Accordingly, we proceed with the appeal on merits.

The assessee for assessment year 1998-99 has raised the following ground: "8. The learned Commissioner (Appeals) erred in not issuing a direction for the elimination of corporate and group overheads of Rs. 10,06,66,668 allocated to the software business in the books of account in order to arrive at the profits exempt under section 10A of the Act." The Commissioner (Appeals) has granted full relief by deleting the addition by the assessing officer. We are unable to understand the reasons for the ground before us. The Department is also in appeal on this issue in their grounds of appeal which has been separately dealt in ITA Nos. 881 and 882/Bang./2003, the findings therein apply here also. Accordingly, the ground is dismissed.

Before we proceed to deal with the issues it is necessary to deal with the facts as found from the assessment records, appeal proceedings and during the course of hearing before us. The assessing officer had called for details from the assessee for verifying the eligibility of deduction under section 10A. After going through the copies of documents, replies filed, he as noted the facts in para 5 of the assessment order for the assessment year 1998-99 which is extracted below: "5.1 The assessee- company is engaged in software exports in a big way.

For the financial year 1997-98, presently under consideration, the assessee-company claimed business income totally exempt under section 10A at Rs. 1,02,32,78,192. This claim is now examined.

5.2 The assessee-company has three main sub-divisions through which it carries out software exports. The STP and EHTP units are under these sub-divisions. They are- (I) Wipro Systems [7 STP units situated at Bangalore (5) and Hyderabad (2)] (III) E-Commerce (part of STP, Lavelle Road, Bangalore, coming under Wipro Systems) 5.3 Vide Annex. 11 to the tax return, the assessee filed detailed P&L a/c. statements for each of the sub-divisions (in turn detailing for each of the STP units) and thereafter consolidated the total claim of profits exempt under section 10A to the tune of Rs. 1,02,32,78,192.

5.4 The three sub-divisions narrated supra comprise the total software exports made by the company to the tune of Rs. 3,91,44,28,081. This turnover also includes miscellaneous income of Rs. 1,47,22,733. The expenditure booked is Rs. 289.23 crores leaving a profit of Rs. 102.21 crores claimed as exempt under section 10A. On making further adjustments to this profit, an amount of 102.32 crores was claimed as exempt in the tax return vide Annex. 111, referred supra.

5.5 The software exports narrated supra are in turn part and parcel of the turnover of Infotech group'. The assessee-company, Ms. Wipro Ltd., comprises of five such groups and the final statements of accounts are consolidation of accounts of all these groups. Group-wise, division-wise and sub-division-wise P&L a/c. and expenditure details and income details were called for and examined. The softex forms filed with STPI authorities were also called for and were examined. The sales break-up was obtained country-wise as well as customer-wise. The details of other income as well as expenditure were obtained. On perusal of all such details, the exempted income under section 10A is now assessed as under:" Similarly, facts are found by the Commissioner (Appeals) while disposing of the appeal is narrated in pp. 2 and 3, para 3, in the appellate order for assessment year 1998-99 is extracted below : "I Ground Nos. 1 to 3 are general grounds directed at the entire assessment order. Ground Nos. 4 to 8 relate to computation of profits under section 10A. The assessee claimed profits of Rs. 1,02,32,78,192 as exempt under

section 10A. The assessing officer recomputed the profits under section 10A at Rs. 87,94,39,076 by holding certain receipts as not profits and gains derived from the individual undertaking eligible under section 10A and by allocating certain corporate expenses to the section 10A, units. The assessee is engaged in, export of software. The assessee has 3 main subdivisions (a) Wipro Systems [7 STP units situated at Bangalore (5) and Hyderabad (2)] (c) E-Commerce (part of STP, Lavelle Road, Bangalore, coming under WIPRO Systems) 3.1 As stated by the assessing officer, the assessee had filed detailed P&L a/c. statements for each of the sub-divisions and in turn for each of the STP units and consolidated the total claim of exemption under section 10A. The total software exports aggregated to Rs. 3,91,44,28,081. This turnover included miscellaneous income of Rs. 1,47,22,733. The total expenditure accounted is Rs. 289.23 crores. The assessing officer called for and examined the details of group-wise, division-wise and subdivision-wise P&L a/c. and expenditure details. He also called for softex forms filed with STPI authorities and examined the same. The assessing officer obtained particulars of sales break-up, country-wise as well as customer-wise. He has also verified the details of other income and expenditure." Similarly, for assessment year 1999-2000, the facts noted by the assessing officer are in paras 4 to 4.5 which are extracted below: "4.1 On verification of the computation of income filed along with the return, it is seen that the assessee-company has claimed exemption under section 10A of the IT Act in respect of income from Software Technology Parks (STPs), Electronic Hardware Technology Parks (EHTPs), etc. to the extent of Rs. 1,53,19,87,507. The details of income and expenditure relating to the claim of exemption under section 10A of the IT Act have been filed vide Annex. 5 (along with Enclosures 1, 2 and 3) of the computation of income.

4.2 As indicated earlier, the assessee-company is carrying on its software businesses through three sub-divisions, namely, Enterprise Solutions Division (ESD), Technology Solutions Division (TSD) and Electronic Commerce Division (ECD). These divisions have several STP units in Bangalore, Whitefield and Hyderabad. These three sub-divisions along with Wipro Systems and Services Divisions together form the Wipro (Infotech) Group. The organisation set-up of the Wipro (Infotech) Group is depicted as under: During the course of assessment proceedings, it was submitted that the assessee-company runs each business unit

as an independent profit centre. Accordingly, separate accounts are maintained for each business unit. The separate accounts of the business unit are later consolidated to arrive at the accounting statements of the company.

4.3 The three sub-divisions, i.e., ESD TSD and ECD have disclosed total software expenditure claimed under section 10A at Rs. 5,90,71,20,209.

This turnover is inclusive of the miscellaneous income disclosed by ESD (Encl. 1, Annex. 5) of Rs. 1,22,18,309, TSD of Rs. 1,26,90,564 (Annex.

5, Encl. 1) and ECD of Rs. 3,60,884. Thus, the total miscellaneous income included in the software turnover aggregates to Rs. 2,52,69,757. On the analysis of the above, it is seen that on the turnover of Rs. 590.71 crores, a profit of Rs. 153.19 crores has been claimed as exempt in the computation of income. Thus, on the above turnover the expenditure of Rs. 437.52 crores has been booked.

4.4 As stated above, the assessee-company prepares financial accounts on the consolidation of the accounts of various divisions /sub-divisions. During the course of the hearing the group-wise, division-wise and sub-division-wise P&L a/c., income and expenditure details, balance sheets, trial balances, etc., as applicable were called for and examined. It is seen from the records that the assessee-company made its first claim under section 10A for assessment year 1997-98. Software Technology Park of India (STPI) is the appointed agency, which gives the status of the STP/ EHTP to the industrial undertaking and also regulates its functioning. During the course of hearing the relevant letters of approval issued by the STPI were called and copies of the same are placed on the record.

4.5 On examination of the various details filed by the assessee -company and taking into consideration the interpretation of the CIT(A) on the issue and the various judicial pronouncements relevant to the facts and consideration of the case, the issue of exemption under section 10A of the Income Tax Act is assessed hereunder:" The assessee has claimed deduction under section 10A for assessment year 1998-99 of Rs. 1,02,32,78,192 and for assessment year 1999-2000 of Rs. 1,53,19,87,507. The details submitted by the assessee before the assessing officer as found from the records are complied as under : List of

separate newly established undertakings in Software Technology Parks/ Electronic Hardware Technology Parks considered for exemption under section 10A by the Assessing Officer Koramangala I (Each Consisting of Ground 1st, 2nd Floor) Block A, B & C K-312 5th Block, Koramangala, Bangalore Sri Ganesh Complex (Ground 1st, 2nd, 3rd & 4th Floors), House List Nos.

271 & 211A, Madivala Village, Hosur Main Road, Bangalore-560 065 Ground 1st, 2nd & 3rd Floor, No. 26, Bommanahalli, Hosur Main Road, Bangalore-560 068 Chamundi Indl. Complex, Sub-station & Utility Building, No. 26, Bommanahalli, Hosur Main Road, Bangalore-560 068 Chamundi Indl. Complex, Block II, No. 26, Bommanahalli, Hosur Main Road, Bangalore - 560 068 Electronic City, Blocks I & VI, Plot Nos. 72 & 73. KEOICS Electronic City, Bangalore-561 229 Electronic City, Blocks 2, 3 & 4, Plot Nos. 77 & 73, KEONICS Electronics City, Bangalore-561 229 ITPL, ITPL, 5th & 6th Floors, Information Technology Park, Whitefield Road, Bangalore- 560 066 M.G. Road, 5th Floor, Church Street Side, 88 M.G. Road, Bangalore-560 001 LAXMI BUILDING Laxmi Building, 1-8-446, S.P. Road, Begumpet, Hyderabad-500 016 Wipro Ltd., Flat No. 201, Block A STP Complex, Electronic City, Sector 18, Gurgaon, Haryana The units in Sl. Nos. 13, 14 and 15 are not relevant for the issues under appeal.

The above list of newly established undertakings which have been claimed as separate by the assessee and accepted by assessing officer after verification of the details such as licences, etc. has allowed the claim of the assessee. On verification of the details of expansion, it is noticed that where substantial expansion has resulted in a new undertaking the same has been shown separately by the assessee and accepted by the assessing officer. The assessee has also obtained licences which have been issued by STPI authorities, some titled as expansion and others as new licences. However, each industrial undertaking bears a new licence as listed in col. No. 3 above.

There have been many instances where the existing undertakings have undertaken organic expansion by adding certain equipments /manpower which have been shown as part of pre-existing unit and these have been treated as part of the existing unit by the assessing officer. The assessee has maintained

separate books of account for each of the undertaking which fact the assessing officer has stated has been verified before quantifying the allowable relief under section 10A. The claim in respect of each unit has been separately filed by the assessee, however, for the purpose of assessment total claim from all units under section 10A has been dealt by the assessing officer, perhaps for the sake of convenience. The turnover/gross revenue and P&L for each of the undertaking for assessment year 1998-99 and assessment year 1999-2000 is complied hereunder : The total claim made by assessee for these years as dealt by assessing officer is extracted hereunder: The above factual matrix and the view of the assessing officer on the issue and that of Commissioner (Appeals) as extracted will be helpful in dealing with each of the disallowance /confirmation of addition by authorities below.

The above table gives a bird eye view of the issues involved in the assessment appeal and in dispute before us. Column 2 shows the disallowances made by the assessing officer in the assessment. Column 3 are the issues on which relief was allowed by the Commissioner (Appeals) in favour of the assessee, on which the Department is in appeal before us in ITA Nos. 881 and 882/Bang./2003 for both the assessment years, Column 4 are the issues which were confirmed by the Commissionerr (Appeals) for which the assessee is in appeal before us.

The facts in relation to claim under section 10A for both these appeals are as given above. For the sake of brevity, we have not reproduced these facts in the department appeals. The grounds taken by the assessee are dealt hereunder whereas the grounds of the department are dealt separately in the order passed this day in ITA Nos. 881 and 882/Bang./ 2003.

The appellant had shown income from sale of scrap, newspapers, stationery, batteries, etc. under the head 'Miscellaneous income' from section 10A units of Rs. 62,797 for assessment year 1998-99 and Rs. 9,42,643 for the assessment year 1999-2000 which incomes have been excluded by the assessing officer as not derived from the business of exports relating to section 10A and that the source of a particular income on which exemption is sought must directly emerge from the running of the industrial undertaking yielding profits and in doing so has relied on

the decision of the Karnataka High Court in the case of Sterling Foods Ltd. v. CIT [1984] 150 ITR 292 (Kar.) . Aggrieved with the exclusion done by the assessing officer, the assessee appealed before the Commissioner (Appeals), who has confirmed the exclusion done by the Assessing Officer. The findings on the issue as appearing in the order of Commissioner (Appeals) for assessment year 1998-99 in p. 4 at para 4.1 are extracted hereunder: "4.1 The Authorised Representative has contended that the receipt of Rs. 62,797 on sale of newspapers, stationery, batteries, etc. merely represents the recovery of scrap value against the expenditure incurred. It is argued that since the expenditure goes to reduce the profits exempt under section 10A, the realization from sale of such scrap should be regarded as a recovery of the expenditure incurred. The argument of the Authroised Representative is not tenable. The amount received from sale of newspapers, etc. cannot be construed as profits derived from industrial undertaking eligible under section 10A, since it is only a receipt of miscellaneous income assessing officer has rightly considered it as income not derived from 10A units." The findings on this issue in the order of Commissioner (Appeals) for assessment year 1999-2000 as appearing in p. 4 at para 6.1 are extracted hereunder: '6.1 Issue of scrap sales is covered by the findings given in para 4.1 of the appellate order for assessment year 1998-99, dated 21-3-2003, passed by me. As the facts are identical the findings given in that order hold good. Action of the assessing officer in excluding the scrap sales of Rs. 9,43,643 from the income of 10A units is confirmed." Being aggrieved by the order of the Commissioner (Appeals) on this issue, the assessee is in appeal before us for both the years. Sri.

K.R. Pradeep reiterated his arguments made before the Commissioner (Appeals) for assessment year 1998-99 and also submitted that a similar issue has been considered and decided by the Tribunal for assessment year 1997-98 in ITA No. 651/B/1994 in favour of the appellant and since the issue involved in the present case is identical and similar to that decided by the Tribunal, prayed for reversing the decision of the authorities below.

We have gone through the records and the submissions made by both sides. We find that the issue involved in this year is identical and similar to the issue decided by the Tribunal in its order mentioned supra for the earlier year which is found in

paras 22.1 and 22.2 which are extracted hereunder: 22. 1. The next ground of appeal relates to Wipro Ltd. for assessment year 1997-98. The issue relates to deduction of claim in respect of income derived from an export-oriented unit under section 10A of the Act. The assessing officer held that the income from sale of old newspaper, diesel drum, wooden racks, etc., aggregating to Rs. 21,144, is not in the nature of income derived from the eligible unit. The Commissioner (Appeals) held that the assessee does not require the above items to manufacture or produce the electronics or software items, the income on account of which is claimed to be exempt under section 10A. The assessee has not explained how the newspaper, diesel drum, wooden racks, etc. are connected with the industrial activity.

22.2 We have considered the facts of the case. It is not in dispute that the very nature of expenses in the form of newspaper, diesel drum and certain packing materials have formed part of the expenses incurred in the course of carrying on export-oriented units. The expenses of such nature have reduced the eligible profit of the export-oriented unit. When the same items of expenses are reduced while calculating the eligible profit, the income which actually reduces such type of expenses should not be treated as other income not forming part of profit of eligible business. While calculating the profit of the eligible business, the expenses and the income of the same unit are required to be netted out. The expenses and the income are relatable to the same nature. We direct that the computation should be made after netting out the expenditure by reducing the income of the nature in dispute. In other words, though it cannot be held that the income of the nature in dispute is income arising out of the activity of an export-oriented unit, however, the expenses are to be calculated on net of income basis. In the result, the income of the eligible business of a unit as prescribed under section 10A will go up by an amount of Rs. 21,142. The ground is, therefore, accordingly allowed.' Therefore, following the said decision, we reverse the orders of the authorities below on this issue and direct the assessing officer to follow our decision in relation to sale of scrap in the income of section 10A units as held in appeal for assessment year 1997-98. The appellant succeeds on this issue.

The next issue on which the assessee is in appeal before us is on the following issues and as all the issues are common and arising on account of exclusion

made from profits of the section 10A units, while computing the deduction under section 10A by the assessing officer, we are disposing them of together, though separate grounds have been taken by the assessee: The appellant had shown the above receipts/income as falling under the provisions of section 10A as it is related to the industrial undertakings coming under section 10A. In the assessment, the assessing officer has considered it as income not derived from software:export business and that the source of a particular income on which exemption is sought must directly emerge from the running of the industrial undertaking yielding profits and in doing so, has relied on the decision of the Supreme Court in the case of Sterling Foods Ltd. (supra). Assessee appealed before the Commissioner (Appeals), who has confirmed the exclusion done by the assessing officer. Being aggrieved with the orders of authorities below, the assessee is in appeal before us on the above issues.

Shri K.R. Pradeep submitted that all the above receipts/income are directly and inextricably linked to the business of export of software.

That write back of credit balances, retention money, reversal of employees' credit balances, sundry creditors and sales-tax recoveries were allowed as expenses in the earlier years which had the effect of reducing the profits of section 10A units in the earlier years. He further submitted that the amounts written back are in respect of trading transactions and hence, the amounts written off or claimed so went on to reduce the profit of the industrial undertaking and, hence, when the same amount is written back, it should be considered as profit derived from the undertaking. Further, these are includible under section 41(1) in computing the business income from any particular source. It was, therefore, argued that the claim of the assessee is tenable. He further submitted that the issue stands covered by the decision of the Tribunal in ITA No. 651/B/ 1994, dated 31-7-2002, wherein while dealing with the computation of eligible profits of undertakings claiming deduction under sections 80HH, 80-I, etc., the Tribunal has considered similar exclusions made in the earlier years from the eligible profits of industrial undertakings claiming deduction under sections 80HH and 80-I and has held as under in para 34.4, the relevant portion is extracted hereunder: "We have, therefore, no hesitation in holding that the miscellaneous income which is in the nature of

trading receipt, like discount received from suppliers for earlier payment and the amount written back in respect of sundry credit balances would form part of the profit derived from the industrial undertaking eligible for deduction under sections 80HH and 80-I of the Act. The assessing officer is directed to include the sum of Rs. 11,41,949 being the miscellaneous income while computing the profit derived from industrial undertaking for the purpose of deduction under sections 80HH and 80-I of the Act." In view of the above findings of the Tribunal, though the findings are in relation to similar issue under sections 80HH and 80-A, the findings are applicable to the issue on hand as the provisions of section 10A and sections 80HH and 80-I are *pari inateria*. He submitted that the issues involved in the present appeals are similar in nature to that decided by the Tribunal and prayed for issuing directions to the assessing officer, not to exclude the above receipts/income while determining the profits of industrial undertakings coming under section 10A. Shri Indrakumar, in reply, has filed written submissions on the above issues, for sake of convenience, the submission are extracted hereunder

"(2.2) It is submitted that the appellant is claiming that the foregoing receipts /income fall within the purview of the provisions of section 10A of the IT Act. As such, at the outset, it is extremely relevant to refer to the contours of the provisions of section 10A of the IT Act. The provisions of section 10A of the IT Act provide for exemption in respect of profit and gain derived from an industrial undertaking. The thrust of the provisions of section 10A of the IT Act providing for exemption relates to 'income derived from the source referred to therein'. It is, therefore, an essential ingredient of the provisions of section 10A of the Act that to be in the nature of eligible profit/gain, the income must be one 'derived' from the particular source. The meaning of the expression 'derived' so referred to and employed in a legislative provision like section 10A of the IT Act is no longer *res integra*. In the case of *Sterling Foods (supra)* a Division Bench of the Hon'ble jurisdictional High Court of the Karnataka had considered the scope and ambit of the expression 'profits and gains derived from an industrial undertaking' in section 80HH of the Income Tax Act. In that context, tracing the meaning of the expression 'derived' the Division Bench has held that the expression 'derived' has a definite but narrow meaning and it can receive a flexible or wider concept. It is held that it is not sufficient if a commercial connection is established between the profits earned and

the industrial undertaking, but the requirement of the law is that such profits must have been derived from the industrial undertaking, which must itself be the source of profit being a direct source thereto. The Division Bench has analysed the legal position thus.

From these observations, it becomes clear that the expression 'derived from' has a definite, but narrow meaning and it cannot receive flexible or wider concept. If a word or expression has received judicial interpretation by the highest Court or the Tribunal and thereafter it is found to have been used in the legislative enactments, it must be presumed that the Legislature must have used that word or expression with the same meaning as judicially determined unless the context apparently requires any other meaning.

As we have earlier seen, the assessee has an industrial undertaking mainly for the purpose of exporting sea-food. In that business assessee has earned import entitlements under scheme approved by the Government of India. The scheme was not as such connected with the export of seafood. It was generally for encouraging exports. The assessee has sold those import licences and realized some profits. The question is whether that profit could be said to have been derived from the industrial undertaking of the assessee. Section 80HH was meant to give a tax rebate to certain categories of assessees and one who wants to claim such relief must strictly satisfy the requirements prescribed thereunder. He must establish that his profits and gains were derived from his industrial undertakings or the business of a hotel. It is just not sufficient if a commercial connection is established between the profits earned and the industrial undertaking. The law requires that such profits must have been derived from the industrial undertaking. The industrial undertaking must itself be the source of that profit. The business of that industrial undertaking must directly yield that profit. It must be direct source of that profit and not a means to earn any other profit.

'Source' means not a legal concept but something which a practical man would regard as a real source of income. The assessee may have separate sources of income-section 3(3) of the Act. All taxable income must necessarily have a definite source (see the Law and Practice of Income-tax by Kanga and Palkhivala, p. 162).

If that is the concept of the 'source', can we legitimately say that the profits and gains derived by the sale proceeds of the import entitlements must be held to have been derived from the industrial undertaking of the assessee. Far from it, the import entitlements were awarded by the Central Government under a scheme to encourage exports.

The source referable to the profits and gains arising out of the sale proceeds of the import entitlements would, therefore, be the scheme of the Central Government and not the industrial undertaking of the assessee.

The Hon'ble Supreme Court has approved the aforesaid decision of the Division Bench of the High Court in the case of CIT v. Sterling Foods [1999] 237 ITR 579 (SC) IT 584, wherein the Apex Court has affirmed the legal position by holding that the word 'derived' is usually followed by the word 'from' and it means : 'get to trace from a source : arise from, originate in, show the origin or formation of' and it is held that the source of import entitlement would not be said to be the industrial undertaking. The Supreme Court has explained the legal position thus (at p. 584): '10. The dictionaries state that the word 'derive' is usually followed by the word 'from', and it means: get or trace from a source; arise from, originate in; show the origin or formation of.' 'We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in the circumstances, only be said to be the export promotion scheme of the Central Government whereunder the export entitlement become available. There must be, for the application for the words "derived from", a direct nexus between the profits and gains and the industrial undertaking. In the instant case, the nexus is not direct but only incidental. The industrial undertaking exports processed sea-food by reason of such export, the export promotion scheme applies. Thereunder, the assessee is entitled to import entitlements, which it can sell. The sale consideration therefrom cannot, in our view, be held to constitute a profit and gain derived from the assessee's industrial undertaking.' (2.3) The appellant has assailed the assessment order passed by the assessing authority as well as the appellate order passed thereto relating to the foregoing receipts and income.

(2.4) Adverting to the plea so urged by the appellant, it is submitted that while concluding the assessment, the assessing authority has comprehensively dealt with the issue as to whether such amounts can be considered to be falling within the ambit of section 10A of the IT Act.

In relation to liquidated damages recovered from suppliers, write back of retention money and sales-tax recoveries, apart from the finding of the assessing authority, the appellate Commissioner of Income Tax has also pointed out that the appellant has failed to provide specific information and particulars. The assessing authority as well as the appellate CIT have assigned cogent and valid reasons as to why such amounts cannot be considered as eligible profit and gain derived from such source as envisaged under section 10A of the IT Act. Also, having regard to the rulings of the Hon'ble jurisdictional High Court as well as the Supreme Court in the case of Sterling Foods (supra), referred to earlier, the said amounts in question cannot be considered to be falling under section 10A of the IT Act." We have gone through the records, submissions and the decisions relied on by both sides. We find that the issues involved in the present appeal are similar in nature to that decided by the Tribunal in ITA No.1651 /B/ 1994 for the earlier years. Though the findings are in relation to similar issue under sections 80-HH and 80-I, the said findings are applicable to the issue on hand as the provisions of section 10A and sections 80HH and 80-I are *pari materia* on such issues and following the said decision we hold that the receipts/income mentioned supra are eligible for exemption under section 10A. It may be noted that we are dealing with appeals pertaining to assessment years 1998-99 and 1999-2000. Section 10A, as it then stood, provided for exclusion of any profit derived by assessee from industrial undertaking to which this section applies. It is not the case of revenue that section 10A is not applicable. What is to be seen is whether provision of sub-section (2) is applicable or not. Having found that the section applies to the various undertakings, which have fulfilled the conditions laid down in sub-section (2), any profit derived by such undertaking is to be excluded while computing the total income of the assessee. After the amendment of section 10A with effect from 1-4-2001, only such profit derived by the undertaking from the export of articles or, things or computer software is to be excluded. However, prior to the amendment, the entire profit of such undertaking is to be excluded.

Admittedly, all these items related to the industrial undertaking to which section 10A applies. Accordingly, these items are not to be excluded at least for assessment years 1998-99 and 1999-2000. The appellant succeeds on the above issues and accordingly, we reverse the orders of the authorities below and direct the assessing officer to include the above receipts/income in the profits of business of industrial undertakings under section 10A. The appellant has raised the following ground No. 3 for the assessment year 1999-2000.

"3. The learned CIT(A) erred in confirming the addition and in giving a direction that the aggregate of miscellaneous income disputed by the assessing officer in determining the profits eligible for exemption under section 10A is Rs. 2,56,74,224 and not Rs. 2,52,69,757. The learned CIT(A) ought to have noted that the assessing officer was duly apprised of the fact that the difference of Rs. 4,04,467 did not relate to the units eligible for exemption of profits under section 10A and the appellant had not claimed an exemption in respect of the said Rs. 4,04,467." The appellant has made a claim for only Rs. 2,52,69,757 whereas the assessing officer while addressing the claim has considered Rs. 2,56,74,224, thereby the disallowance to the extent of Rs. 4,04,467 has been made in excess. The mistake appears to be genuine. When the appellant has not even claimed relief under section 10A to the extent of Rs. 4,04,467 the same could not be added by the assessing officer.

For these reasons we direct the assessing officer to grant relief of Rs. 4,04,467 arising on account of casting error. Appellant succeeds on this issue.

The appellant has raised the following ground as No. 10 in the appeal for the assessment year 1999-2000 which is extracted hereunder: "The learned CIT(A) erred in confirming the addition and in stating that other income of Rs. 7,53,366 was essentially miscellaneous income and hence cannot be held as income derived from software exports. The learned CIT(A) failed to appreciate that such income were directly relatable to the business of software exports." The details of miscellaneous income of Rs. 7,53,366 apparently have not been furnished by the assessee. On perusal of the records indicates that these details also have not been furnished before the assessing officer or Commissioner (Appeals). No

plausible reason has been given by the appellant even before us. Hence, the action of Assessing Officer is confirmed and the addition as made by the assessing officer stands and the assessee's ground is dismissed.

The next issue raised by the appellant in its grounds of appeal for assessment year 1999-2006 as ground No. 12 which is extracted hereunder : "12. The learned CIT(A) erred in confirming the addition and in not considering royalty income of Rs. 47,35,446 as profit derived from section 10A units." The assessee has earned a sum of Rs. 47,35,446 as royalty from the software products it has developed and licensed during the course of its carrying on of business. The assessing officer is of the view that royalty earned cannot be income from export of software.

Shri K.R. Pradeep, before us submitted that the software product development is part of software business and royalty has been earned by licensing the product developed. The definition of computer software as explained under section 10A and the notification issued (extracted herein below) : (a) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (b) any customized electronic data or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means :. . . ." 'In exercise of the powers conferred by clause (b) of item (i) Explanation 2 to section 10A clause (b) of item (i) of Explanation 2 to section 10B and clause (b) of Explanation to section 80HHE of the Income-Tax Act, 1961 (43 of 1961), the CBDT hereby specifies the following information technology enabled products or services, as the case may be, for the purpose of said clauses, namely :- includes income earned in the form of royalty which is exploitation of software developed by the assessee. He, therefore, prayed for reversal of the orders of the authorities below on this issue and for issuing directions to the assessing officer to include the royalty income in the profits of business of computer software coming under section 10A. We have gone through the records and the submissions made by both sides. On perusal of the Explanation 2 to section 10A which defines computer software, particularly sub-section (b) makes a reference to any product or service of similar nature to that of what is contended in sub-section (a). Further, Notification No. 890(E), dated 26-9-2000, issued also lists of 15 different nature of products and services. From this, it

is clear that rendering of any technical service, development of product, enabling the use of product, licensing of products, deputing engineers for rendering services from India to outside India for export of products or services specifically mentioned in sub-section (a) or in sub-section (b) of Explanation mentioned supra and as listed in notification, all of which fall into the export of computer software for which deduction under section 10A must be given.

Thus, royalty received the clearly falls into earning from software product from export. As noted by us earlier in para 5.5 what is to be seen while computing deduction under section 10A is whether the profit is derived from the undertaking to which section applies. Unlike the amended provision with effect from 1-4-2001, there is no requirement that the profit has to be derived from export of articles or things or computer softwares. The royalty is received from the products earlier developed by the eligible undertaking to which section 10A applies.

Accordingly, we hold that income from royalty is part of the export turnover of the undertaking and is entitled to relief under section 10A. Accordingly, the assessee is entitled to succeed on this issue and we direct the assessing officer to grant relief of Rs. 47,35,446.

The assessee has raised the following ground No. 11 for the assessment year 1999-2000 which is extracted hereunder: "11. The learned CIT(A) erred in confirming the addition and in not considering lease rental income of Rs. 29,71,181 as profit eligible for exemption under section 10A. On perusal of the records we find that no details have been furnished to the authorities below or before us. Hence, we refuse to interfere with (this) issue and dismiss the ground of the assessee.

Ground No. 9 filed by the appellant before us is on the issue of disallowance of loss pertaining to a segment of business carried on by the assessee. The ground is extracted hereunder: "9. Issue of allowing loss of discontinued business segment- The authorities below erred in not allowing the loss incurred during the year of discontinuance of a business segment, The authorities below ought to have noted that the loss from the business of Apple Products, which was discontinued, was on the basis of mandatory accounting standards and a loss so

computed cannot be disallowed." The facts as appearing in the assessment order in p. 24 are extracted hereunder "Discontinuance of business -Apple products - Loss thereof- The assessee-company claimed total loss from discontinuance of Apple products business at Rs. 4,23,71,186 under the category of extraordinary items during the year. The assessee-company was distributor of computers and related products of Apple Products, USA. In February, 1998, the assessee-company discontinued the distributorship. The loss on account of Apple Products business arose consequently, This claim is now examined." Aggrieved by the disallowance of Rs. 3,74,39,089, the appellant filed an appeal before Commissioner (Appeals) who confirmed the disallowance by the assessing officer after discussing the issue in para 13 extracted hereunder: "Ground No. 13 relates to deduction, on account of loss arising out of discontinuance of a business segment during the year. The assessee claimed total loss from discontinuance of the business of Apple Products at Rs. 4,23,71,186. The assessee was a distributor of computers and related products of M/s. Apple Products, USA. In the month of February, 1998, the assessee discontinued the distributorship.

Assessing Officer has observed that the stock worth Rs. 2,04,95,641 has been revalued at Rs. 25,00,000 which is lesser than 1/9th of the original cost. The stock has to be valued at cost or market price. The assessing officer asked the assessee to furnish the item-wise break-up of stock resulting in valuation at Rs. 25,00,000. The assessee explained that the entire stock was valued at lump sum price. There was no justification to value the stock at Rs. 25,00,000. Hence, the assessing officer rightly disallowed the claim of loss arising out of valuation of stock against the principles of accounting, amounting to Rs. 1,75,95,641. Even during the appellate proceedings no break-up of stock inventory to substantiate the valuation of Rs. 25,00,000 was furnished. I find no reason to interfere with the order of the assessing officer. The disallowance of Rs. 1,75,95,641 is confirmed." Before us, Sri K.R. Pradeep, arguing for the assessee, submitted that the facts in relation to claim of loss from discontinuance have been erroneously appreciated by the authorities. He also submitted the following chart explaining and quantifying the loss claimed by him as appearing in the books of account.

Loss on stock transferred to support at net Realizable value (2,04,95,641-25,00,000) First of all, the business of dealing in Apple Products was part of larger hardware and hardware component business carried on by the assessee. The dealing of the Apple Products, USA, was not an independent business, Secondly, the analysis of the loss claimed by the assessee as per the breakup given above indicates that the appellant has incurred an operational loss of Rs. 2,55,84,099 from Apple Products and Rs. 1,65,60,602 from the product support segment. The operational loss was incurred by the appellant during the previous year in the course of carrying on of regular business and such a incurring of loss was part of business and cannot be disallowed. It is nobody's case that expenditure incurred by assessee was not genuine. Once it is established that the expenditure is towards business of assessee, then the same should be allowed subject to the provisions of the Act.

In this case, neither the assessing officer nor CIT(A) has given any cogent reasons as to why loss should be disallowed. In fact, the assessing officer gives a finding that until February, 1998, the business was carried on by dealing in this business. However, service segment, i.e., Apple Products Support continued to carry on even after February, 1998. Consequently, it was submitted that there was no justification for disallowing the operational loss by the authorities below. It was further submitted that the same business carried on in the earlier years has been brought to tax by the authorities below.

Insofar as valuation of stock whose purchase cost of Rs. 1,79,95,641 transferred to support business at Rs. 25,00,000, Shri K.R. Pradeep submitted that the leftover stock could only be used as spare parts for pending service obligation. The Apple Products had to be cannibalised into spare parts in view of discontinuance of supply from Apple Products; technological obsolescence were also reasons for valuing stock at Rs. 25,00,000.

He submitted that the valuation of stock at Rs. 25,00,000 has been disputed by the Department out of suspicion, surmise and disbelief and not for any cogent reason. The valuation of stock is in line with the method of valuation followed by the assessee and is also a prescribed method as per accounting standards by the

Institute of Chartered Accountants of India, i.e., cost or market value whichever is less.

Such a method accepted by the Department in earlier years cannot be disputed without a valid reason.

Similarly, the debtors' written off of Rs. 1,94,43,448 is in line with the condition prescribed under section 36(1)(vii) of the IT Act and the same cannot be rejected by the assessing officer.

Objecting to this argument, Shri Indrakumar relied on the orders of the authorities below in support of his arguments and further filed written submissions on this issue which are in para 4 and are extracted hereunder : "(4) Issue relating to disallowance of loss in respect of discontinuance of business regarding Apple Product. The appellant had claimed total loss from discontinuance of Apple Product business in the sum of Rs. 4,23,71,186 consisting of various components as referred to by the assessing authority in the course of assessment order at paras 64 and 65. The first component of a sum of Rs. 49,32,097 was held to be in the course of trade and was allowed in the assessment order. The second component related to question of valuation of stock. The appellant contended that stock worth Rs. 2,04,95,641 is to be valued at Rs. 25,00,000 which is less than 1/9th of the original cost/worth. The assessing authority on noticing the position that stock valuation principles stipulate that stock has to be valued either at cost or market value and going by the assessee's contention, though the cost is at Rs. 2,04,95,651, the market value is claimed to be Rs. 25,00,000. In that behalf, the appellant was asked to furnish complete details like the break-up of stock, description of items, the dates of purchase, the cost of each item, invoice number dates of import and copies of bills of entry. The appellant was also asked by the assessing authority, to give the basis on which each of such items was valued so as to arrive at a closing stock of only Rs. 25,00,000. In that context, the assessing authority recorded the findings as under: '67. The assessee stated that the entire stock was valued a lump sum basis at Rs. 25 lakhs, Individual break-up and other details were not available/ furnished. The assessee, as said earlier, was only a distributor for the computers and other products manufactured by the American

company. The actual break-up of the stock totalling Rs. 2.04 crores was not filed by the assessee. However, as the items are all imported, they are presumably of high value if one were to go by the name and product profit of M/s. Apple Products. Secondly, the business was discontinued only in February, 1998. Therefore, the assessee's claim that the value plummeted to nearly 1/9th by 31st March is not only improbable but is also unsubstantiated. The claim 'loss' arising out of valuation of stock at net realizable value amounting to Rs. 1,75,95,641 is disallowed.' It is submitted that the appellate commissioner of Income Tax has confirmed the foregoing disallowance by holding that on the relevant fact noticeable in respect of the said stock valuation, the assessing authority has rightly disallowed the claim of loss arising out of valuation of stock which is against the principles of accounting and it is also observed that even during the appellate proceedings, no break-up of stock inventory, was furnished by the appellant. It is submitted that the disallowance so made by the assessing authority and confirmed by the first appellate authority cannot be said to be untenable.

(4.1) The other component of the said loss was on account of debtor for Apple Product. The appellant is the distributor for computers and other products made by the reputed manufacturers in the world. The related facts as noticed by the assessing authority and the findings thereto are at pp. 68 and 69 of the assessment order which are reproduced below: '68. The third component leading to the loss is on account of debtors for Apple Products and which were written off in full. The assessee was not dealing in some 'use and throw' items. The assessee is stated to be the distributor for computers and other products made by one of the reputed manufacturers in the world. Further, any sale of computers or related products are accompanied by warranties and service contracts.

In the instant case, the assessee was asked to clarify as to who provided the warranty services and whether these customers /purchasers of Apple Products were continued to be served by the assessee-company.

In course of the discussions, it was also stated that M/s. Apple Products was now continuing its own distribution in India. The assessee was, therefore, asked to clarify whether M/s. Apple products has taken over the servicing job from the

assessee-company and whether there was any provision for transfer of debtors as well. The assessee was also asked to furnish the copy of distribution agreement which was originally entered into and also an agreement executed at the time of exit from the dealership to examine whether these aspects were covered /discussed. These details could not be filed.

69. The assessee was also asked to furnish the details of debtors written of with complete names and addresses and account copies so as to check whether the write off was actually made in the accounts of the individual debtors or was only a provision on an estimate basis. The details of debtors were also not furnished. However, the assessee in course of discussion, stated that this item is in the nature of provision for debtors. Apart from the unanswered queries referred above, this aspect also has a bearing on the claim. In fact, like any other provision, this does not, therefore, represent the actual write off. Under the circumstances, the claim of loss on account of 'write off' of debtors for Apple products to the tune of Rs. 1,94,43,448 is also allowable.' The appellate commissioner of income tax has confirmed the disallowance by observing that the assessing authority has comprehensively dealt with the issues by discussing in detail the inability of the assessee to produce any kind of information in respect of the said debtors. It is also noticed by the appellate commissioner of Income Tax that the appellant has also admitted that they are only in nature of provision for debtors and that the assessing authority has rightly held such claim of write off is not admissible. It is held that the action of the appellant in writing off the entire debtors without ascertaining the actual bad debt is unsustainable in law and the disallowance is, therefore, upheld. It is submitted that both the assessing authority and the appellate CIT have rightly addressed themselves to issue regarding the disallowance of the said claim." We have considered the issue carefully. We find that the details submitted by the assessee were not properly looked into or appreciated by the assessing officer whose order has been extracted above.

Consequently, we do not feel handicapped to decide the issue on merits.

Analysis of loss of stock from Apple Products activity indicates the loss to be operational loss incurred during the course of carrying on of business. The

expenditure incurred by the assessee, is also genuine which is not doubted. Consequently, there appears no reason for the expenditure to be disallowed. Further, discontinuance of one or more products cannot lead to conclusion that the business itself has been discontinued. The authorities below seem to have fallen into such an error. Further, even if a business is discontinued during a year, loss cannot be disallowed. There is no such prohibitive condition under section 70 of the IT Act. Consequently the assessee is entitled to seek set off of operating loss as business loss of the year.

On the issue of transfer of stock purchased at Rs. 1,79,95,641 to the support division at Rs. 25,00,000, it seems that the assessee has followed this method of stock valuation regularly in the earlier years.

The method followed is cost or net realizable value, whichever is less, is a universally accepted method and cannot be found fault with. That the valuation was substantially lower than cost cannot be reason for disallowing inventory loss. The reason given by the assessee that due to discontinuance of product business and technological obsolescence and cannibalization of equipment to spare parts due to non-supply from Apple Products appears plausible in the realm of business and such occurrence is not rare. We have not been able to find any reason for the assessing officer disallowing this loss except that he wanted certain details. Such a reason by the assessing officer appears to be flimsy as the purchases from Apple Products has been allowed as an expenditure having found that they seem to be genuine. In the same breath to say that for the valuation of inventory loss details not furnished by the assessee appears to be incorrect. Hence, the loss claimed by the assessee is allowable.

Adverting to the issue of claim of bad debts, the same is allowable in compliance of conditions prescribed in section 36(1)(vii) of the IT Act. The assessee has also written off the same in books of account.

What is claimed by the assessee is bad debts and not provision of debtors. Hence, the assessee is entitled to succeed on this issue also.

Consequently, the entire loss claimed of Rs. 4,21,44,701 and the bad debts of Rs. 1,94,43,448 should be allowed. Accordingly, we direct the assessing officer to allow the same.

The next issue raised by the appellant relates to correcting mistake apparent from record which ground is extracted hereunder : "10. Issue of correcting mistake apparent from record- The learned commissioner (Appeals) erred in dismissing ground No. 38 of grounds of appeal as redundant. The learned Commissioner (Appeals) erred in not directing the assessing officer to correct the mistake taken note of by him in the assessment order but which was not given effect in the computation of total income." Since the same pertains to mistake of calculation, we direct the assessing officer to look into the same and correct the mistake, if any, while giving effect to this order.

The next issue pertains disallowance under section 43B of the Income Tax Act.

A sum of Rs. 2,52,738 has been disallowed by the authorities below under section 43B of the IT Act and the details of expenditure claimed by the assessee are Rs. 12,50,000 towards payment of gratuity and Rs. 2,738 on account of payment of provident fund. The reason given by the assessing officer for disallowance is that there was a delay in payment of impugned sums during the year and consequently, the same is liable to be disallowed under section 36(1)(va) though the claim may be allowable under section 43B. Section 36(1)(va) is extracted hereunder : "any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employees' account in the relevant fund or funds on or before the due date.

:For the purpose of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise." "any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the

welfare of such employees." Perusal of these two sections clearly indicates that payment of gratuity is not covered under aforesaid clauses. Consequently, section 36(1)(va) is not concerned with payment of gratuity. Since the payment is otherwise allowable under section 43B, we find no other reason to disallow the claim. Insofar as the payment of provident fund of Rs. 2,538 is concerned, Shri K.R. Pradeep chose not to press the issue and accordingly, it is dismissed. The assessing officer is directed to allow Rs. 12,50,000.

The next issue in dispute pertains to invoking section 40(a)(1) by the assessing officer to disallow payment of royalty for the assessment year 1998-99. This ground of the appellant is extracted hereunder : "12. Issue of invoking section 40(a)(i) - The authorities below erred in incorrectly applying section 40(i)(t) and disallowing royalty of Rs. 25,37,876 even though tax was deducted at source and remitted in accordance with Chapter XVII-B read with the Income Tax Rules." On the issue of allowing of royalty paid to Toshiba Lighting, Japan, Shri K.R. Pradeep submitted that since the claim has been allowed in the subsequent year, he would not press the issue, though legally he is entitled to seek allowance of payment made and accordingly, sought for withdrawal of the issue. In view of this, the ground is dismissed as withdrawn.

The next issue raised by the appellant for assessment year 1999-2000 is ground No. 15 which is extracted hereunder: "15. The learned CIT(A) failed to appreciate that even after the introduction of section 145A with effect from 1-4-1999, inclusion of Modvat credit in the cost of purchases, consumption and stock valuation does not affect the profit computed for the year. The direction of the learned CIT(A) to recast the trading and P&L a/cs. by including Modvat credit in opening stock, purchases, consumption and closing stock is accordingly erroneous. Further, the learned CIT(A) ought to have noted that the introduction of section 145A in no way altered the force of the decision of the Hon'ble Supreme Court in Chainrup Sampatram v. CIT [1953] 24 ITR 481 (SC) relied upon by the appellant." On going through the orders of the authorities below on the above issue we do not find anything wrong in the directions given by the Commissioner (Appeals) and, therefore, we refuse to interfere with the order of the Commissioner (Appeals). Assessee cannot be aggrieved by the direction given in the order of the

Commissioner (Appeals).

Accordingly, this ground is dismissed.

The next grounds of appeal raised by the appellant for the assessment year 1998J99 are extracted hereunder : "13. The learned Commissioner (Appeals) erred in setting aside and issuing directions that are not relevant for computing profits of the peripherals unit in respect of which the appellant had claimed a deduction under section 80-IA.14. The authorities below ought to have appreciated that excise duty on finished goods cannot alter the profits derived from industrial undertakings eligible for deduction under section 80-IA." The reasons for taking the above grounds by assessee are on the action of the CIT(A) in setting aside the issue. Sri K.R. Pradeep's main grievance was that the Commissioner (Appeals) ought to have allowed the claim of assessee instead of setting aside the issue. We refuse to interfere with the order of Commissioner (Appeals) and we find that the course adopted by the CIT(A) is perfectly justifiable under the law.

Assessee cannot be aggrieved by the direction given in the order of the CIT(A). Accordingly, these grounds are dismissed.

The next issue in dispute in appeal before us relates to assessment year 1999-2000 which is extracted hereunder: "20. The authorities below, while considering the claim for deduction under section 80-IA in respect of the computer factory at Pondicherry erred in stating that the appellant could not substantiate the contribution credit of Rs. 85,00,000 as profits and gains derived from the industrial undertaking. The authorities below having noted that the contribution credit of Rs. 85,00,000 was in the nature of supplier's discount and the same had been considered as a reduction in the raw material cost of the company, ought to have allowed the claim of the appellant. , 21. Without prejudice, the authorities below having held that contribution credit in the nature of supplier's discount of Rs. 85,00,000 is not to be considered for arriving at the profit derived from the eligible industrial undertaking should have also excluded the same for the determination of the total income of the appellant." In the assessment, the assessing officer has not considered the sum of Rs. 85,00,000 received by the appellant from Wipro Acer towards contribution credit which is in the nature of suppliers discount in arriving at

the profit from eligible industrial undertaking under section 80-IA for the reasons that no firm basis was furnished by the appellant for receipt of such huge amount from Wipro Acer.

The CIT(A) in appeal has confirmed the action of the assessing officer in not considering the contribution credit of Rs. 85 lakhs, in the eligible profits of the industrial undertakings, his findings as found at page Nos. 15 and 16 in para 23 are extracted hereunder: "Ground Nos. 49 to 52 are directed against enhancing the raw material cost in computing the deduction under section 80-IA in respect of the computer factory at Pondicherry. The assessee had made claim under section 80-IA of Rs. 1,73,48,390. In the course of assessment proceedings, the Assessing Officer noticed that the factory had reported gross sales of Rs. 36,06,99,922. An amount of Rs. 85 lakhs was credited to P&L a/c. under the head 'Contribution of credit from Wipro Acer Limited'. Wipro Acer Limited is one of the subsidiary companies of the assessee. The assessee submitted before the Assessing Officer that the factory at Pondicherry sources some of its components from M/s.

Wipro Acer Limited. Assessing officer further noticed that the total sales made by the factory to M/s. Wipro Acer Limited was Rs. 13,05,15,870. The assessee submitted before the Assessing Officer that the contribution credit was not made on any particular basis and that it was rather in the nature of an ad hoc discount. As the assessee could not substantiate the claim, the Assessing Officer has held that the contribution credit of Rs. 85,00,000 cannot be considered as the profits and gains derived from the business of industrial undertaking.

He has rightly deleted Rs. 85,00,000 from the profit of the undertaking of Rs. 1,74,99,806 and further reduced depreciation of Rs. 7,04,993.

assessing officer has reworked the profits of the undertaking at Rs. 82,94,814 and allowed 100 per cent exemption under section 80-IA in respect of this amount. Action of the Assessing Officer is in order and is upheld." Before us, Sri K.R. Pradeep submitted that authorities below have not appreciated the issue in the right spirit, rather on surmise and suspicion have excluded the sum of Rs. 85 lakhs from the profits of the industrial undertakings only for the reason that no firm basis has been furnished for receipt of such sum ignoring the fact that the contribution

credit which is in the nature of suppliers discount, goes to reduce the cost of the raw material and thereby enhances the profit of the industrial undertakings. He further submitted that both the assessing officer and CIT(A) have factually erred on the issue inasmuch the contribution credit is received from Wipro Acer Ltd. on the purchases made by the assessee and not on the sales made to them. He further submitted that a similar, issue has already been considered by the Tribunal in its order in ITA No. 651 /B/ 1994 for earlier year which findings are at pp. 100 to 102 in paras 34.1 to 34.4, hence prayed for issuing directions to the assessing officer for including the above sum in the profits of the industrial undertaking and for allowing deduction under section 80-IA as claimed.

Sri Indrakumar has submitted written submissions on the issue reiterating the stand of the authorities below and no fresh arguments have been advanced other than the findings of the authorities below.

We have considered the arguments of both sides and perused the records.

We find that the assessee has received a sum of Rs. 85 lakhs as contribution credit from Wipro Acer Ltd. which is in the nature of supplier's discount and goes to reduce the total cost of raw materials of the industrial undertaking. Further, we find that a similar issue of supplier's discount for earlier year has been considered by the Tribunal in its order mentioned supra and, therefore, we follow the said decision in deciding the issue in favour of the appellant.

Accordingly, we reverse the ,orders of the authorities below on this issue and direct the assessing officer to consider the above sum of Rs. 85 lakhs as profits and gains derived from the industrial undertaking eligible for deduction under section 80-IA. The appellant succeeds on this issue.

The assessee has raised the following ground No. 16 for the assessment year 1998-99 '16. The authorities below erred in considering interest under section 244A as an income liable to tax even though the interest had not accrued irrevocably and, therefore, was not assessable." The appellant is aggrieved by the addition of Rs. 84,34,064 towards the interest under section 244A purportedly received by the appellant during the year. The issue as discussed by the

assessing officer in support of the addition made by him as found in para 15 is extracted hereunder : "15.1 On verification of the records of the assessee-company, it is seen that the assessee-company had been granted the following amounts as interest under section 244A of the Income Tax Act during the financial year 1998-99 relevant to the present assessment year : 15.2 During the course of the assessment proceedings the assessee-company was asked to clarify whether interest under section 244A has been included in the return of income. In response, the assessee-company stated that the interest as above has not been offered for tax in the present assessment year. It was further stated that based on the letter issued from this office on the accrued interest under section 244A during the year, the same had been offered for tax during the current financial year, i.e., assessment year 2002-03.

15.3.1 In view of the fact that the interest under section 244A of the IT Act amounting to Rs. 84,34,064 has been received during the previous year relevant to the current assessment year, the same is considered here for addition under the head 'Income from other sources'." The Commissioner (Appeals) in para 16 of his order has rejected the submissions of the appellant in a summary fashion without alluding to the facts or legal decisions. The findings of the Commissioner (Appeals) on this are extracted hereunder: "39th ground of appeal is against assessing interest under section 244A of Rs. 84,34,064. The Authorised Representative argued that the income has not irrevocably accrued and, therefore, not assessable. The argument made by the Authorised Representative is not acceptable, for any interest received under section 244A is an income liable to tax.

Action of the assessing officer is confirmed. This ground of appeal is dismissed." Sri K.R. Pradeep submitted that the assessee has not received the said sum during the year and further submitted that the so-called interest granted to the assessee under section 244A has been withdrawn subsequently by the Assessing Officer. Many of the grounds on which relief was granted by appellate authorities which resulted in refund have not attained finality inasmuch as the Department is in appeal before High Court. In the event the higher authorities were to reverse the decision, the Department is bound to withdraw the interest granted under section 244A. Thus, his argument, based on the decision of the Supreme Court in Indian

Molasses, Co. Ltd. v. CIT (1959) 37 ITR 66 (SC) is that until an irrevocable right to receive and retain the interest, no income can be said to have arisen to the appellant. Moreover, from the order, it is not clear when the interest was due and which assessment year the interest is liable to tax. No details have been mentioned by the Assessing Officer and the assessee is handicapped in this regard. Consequently, he sought for deletion of the addition. He further submitted that inclusion of interest is premature inasmuch as if it is taxed in this assessment year and subsequent withdrawal, if any, the same would not be allowed as a deduction in the absence of any specific provision in the IT Act.

Sri Indrakumar, appearing for the Department, has filed his written submissions on the issue which are extracted hereunder as found in paras 12 to 12.1 of his written submissions "(12) Issue of accrual of interest under section 244A (vide item No. 9) of the summary chart of grounds. The appellant has urged that the authorities below erred in considering interest under section 244A as an income liable to tax even though the interest has not accrued irrevocably and, therefore, was not assessable.

(12.1) It is submitted that while concluding the assessment, the assessing authority on verification of records of the assessee-company had noticed that the assessee-company was granted the amount to the tune of Rs. 84,34,064 as detailed in the order. In the proceedings, the company was asked to clarify as to whether the interest under section 244A had been included in the return of income. It was stated by the company that such interest has not been offered for tax in the assessment year. Thereupon, the assessing authority noticing the position that the interest under section 244A of the IT Act received during the previous year is to be considered for computation of income and the addition was made in respect of the said amount. On appeal, the appellate Commissioner of Income Tax had upheld the addition by rightly holding that any interest received under section 244A is an income liable to tax. It is submitted that the ground urged herein is devoid of any merit." We have gone through the issue and find that even basic details such as the details of the interest, when it was due, the number of years for which interest has been paid are not discernible from the records.

Hence, it is not possible to give any finding on the liability to tax in a conclusive manner. Suffice to say that unless interest accrues to the assessee irrevocably in the sense, the same would not be withdrawn by the Department subsequently, the liability to include the interest in the income does not arise. The very concept of accrual supports this finding and also Supreme Court in *Indian Molasses Co. Ltd.* case (supra), though explained the term accrual in the context of expenditure, nevertheless applicable for recognition of income even more forcefully. The liability to tax interest as and when it becomes irrevocably due and not when the refund is actually given to the assessee. Further, there are number of cases which bring to tax the liability for various years depending, whether the refund is on account of excess payment of advance tax or payment under section 140A, etc.

Unless these aspects are brought on record and considered appropriately, finding on merits is not possible. Hence, we remit the matter back to the Assessing Officer for fresh consideration and to pass order in the light of the observations and directions given above.

Accordingly, the issue is remitted to the Assessing Officer and the assessee succeeds on this issue. We may add that when the issue has not become final the same shall not be brought to tax, as the receipt of interest is subject to outcome of pending legal process and cannot be brought to tax.

The appellant had made a claim for a deduction under section 80HHE of Rs. 3,89,15,811 on the profits it earned from export of software from the business segment not covered by the exemption under section 10A of the IT Act. The assessing officer rejected the claim of the assessee and the same was confirmed by the Commissioner (Appeals). The discussion on the issue as found in p. 46 of the assessment order is extracted hereunder: In a written submission filed on 15-3-2002, the assessee submitted Form No. 10CCAF certified by the accountant and made a claim of Rs. 3,89,15,811 under section 80HHE of the IT Act. In a submission filed along with the computation of deduction under section 80HHE, it was stated : (b) In respect of software expenditure not covered by section 10A, we are entitled to deduction under section 8011HE of the IT Act. As the deduction under Chapter VI-A even without the deduction under section 80HHE, exceeds the

gross total income a claim was not made in the return of income.

(c) If the return of income is altered for any reason, our claim for deduction under section 80HHE may kindly be considered and allowed.

20.3 In view of the claim made by the assessee during the course of assessment proceedings, it would be worthwhile to refer to the provision of section 80HHE (4) of the IT Act, wherein it is stated: '(4) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form along with return of income, the report of the accountant as defined in the Explanation below subsection (sic)' 20.4 As can be seen, the qualifying criteria for admissibility of deduction under section 80HHE of the Income Tax Act is the requirement that the claim should be furnished in the prescribed form signed by the accountant along with the return of income. However, in the present case, the requirement of sub-section (4) of section 80HHE has not been met since the claim is not furnished along with the return of income.

in view of the same, deduction under section 80HHE of the IT Act is not allowable. Therefore, the claim under section 80HHE of Rs. 3,81,15,811 is not allowed as per the above discussion.

20.5 Without prejudice to the fact that no allowance of the claim under section 80HHE of the Income Tax Act is allowed, it is seen that even on the merits also, the assessee-company has made excessive claim of deduction under section 80HHE of the IT Act. The claim of the assessee-company as certified by M/s. N. Rama Prasad, chartered accountant, is reproduced as under: Details relating to the claim by the exporter of computer software for deduction under section 80HHE of the Income-Tax Act, 1961.

Export of computer software or its transmission to any place outside India.

Providing technical services outside India in connection with the development and production of computer software.

Profits derived from business referred to in sub-section (1) of section 80HHE computed under the sub-section (3) of the said section (3-4*5) Export turnover,

deduction in respect of which will be claimed by a supporting software developer in accordance with proviso to sub-section (1) of section 80HHE. Profit from the export turnover mentioned in item 7 above calculated in accordance with proviso to sub-section (1) of section 80HHE. Deduction under section 80HHE to which the assessee is entitled (item 6-item 8) The Expressions "Export turnover", "Total turnover" and "Profits of the business" are with regard to the software business other than the income considered as exempt under section 10A.20.6 In order to examine the relevance of the claim of the assessee-company, it would be useful to refer to the following Explanation below sub-section (5) of section 80HHE of the Income Tax Act: (a) 'convertible foreign exchange' shall have the meaning assigned to it in clause (a) of the Explanation to section 80HHC; (i) any computer programme recorded on any disc, tape, perforated media or other information storage device; or (ii) any customized electronic data or any product or service of similar nature as may be notified by the Board, which is transmitted or exported from India to a place outside India by any means; (c) 'export turnover' means the consideration in respect of computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (2), but does not include freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India; (ca) 'exporting company' means a company referred to in sub-section (1) making actual export of computer software; (d) 'profits of the business' means the profits of the business as computed under the head 'Profits and gains of business or profession' as reduced by- (1) ninety percent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and (2) the profits of any branch office, warehouse or any other establishment of the assessee situate outside India; (i) any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28; (ii) any freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India; and (iii) expenses, if any, incurred in foreign exchange in providing the technical services outside India;' 20.7 It can be seen that deduction provided under section 80HHE is in respect of 'profit derived from the business'. The profit of the business for these purposes as defined Explanation (as reproduced above, is

profits of business as computed under the head 'Profit and gains of the business' as reduced by 90 per cent of receipt by way of brokerage, commission, interest, charges or any other receipt of similar nature. In the above computation furnished by the assessee-company the profit of business has not been computed in accordance with the provisions of this section. The assessee in the computation should have stated that the "profit of business as computed in the head 'Profit and gains of business or profession' amounting to Rs. 15,03,26,070 (as computed in the computation of income filed along with the return) and then proceeded to exclude 90 per cent of the items such as brokerage, commission, interest, rent, other charges and similar receipts." 21. The assessee-company for the purpose of computation of deduction under section 80HHE of the IT Act has disclosed the total turnover of the business at Rs. 13,80,16,246. On verification of the claim made by the assessee-company, it is seen that the total turnover of the business disclosed is the total turnover of the unit for which deduction under section 80HHE is being claimed. The total turnover of the business cannot be Rs. 13,80,16,246 that the assessee declared the total turnover for computation of profit of the business computed under the head 'Profit and gains of business' to be Rs. 12,56.56,18,975. The claim of the assessee-company for the purpose of deduction under section 80HHE is totally erroneous, even though the accountant has thought it appropriate to certify the same.

21.2 In view of the facts and circumstances mentioned above, the deduction under section 80HHE of the Income Tax Act, even if it were to be allowed would be as under: 21.3 The resultant figure comes to Rs. 23,87,909. Thus, if the assessee were to be allowed deduction under section 80HHE of the Income Tax Act, it would amount to Rs. 23,87,909 and not Rs. 3,89,15,811 as claimed by the assessee.

21.4 As stated above, since no deduction under section 80HHE is being allowed in view of the failure to make the claim along with the return of income, the above computation is only academic.* The assessee aggrieved by the order of the assessing officer filed an appeal before the CIT(A) which was disposed by the CIT in the order dated 21-3-2003, in ITA No. 29/CC-1(3)/CIT(A)-V/2002-03. The relevant portion of his order is extracted hereunder: "Ground Nos. 41 to 42 are

preferred against denial of deduction under section 80HHE on technical grounds. Assessee had not claimed deduction under section 80HHE in its return of income. It was only in the course of assessment proceedings that the assessee made a claim under section 80HHE of Rs. 3,89,15,811 and filed a report in Form No. 10CCAF on 15-3-2002. The assessee contended before the Assessing Officer that in respect of software exports not covered by section 10A, it is entitled to deduction under section 80HHE and that since the deduction under Chapter VI-A excluding the deduction under section 80HHE, exceeded the gross total income, a claim was not made in the return of income. The assessee requested the Assessing Officer to allow the deduction, in case the income returned is altered in the assessment. Relying on the provisions of section 80HHE, the assessing officer has held the deduction as inadmissible for the reason that the return of income, and the claim was not made in the return." "17. Issue of admitting a claim for deduction under section 80HHE- The learned CIT(A) erred in confirming the disallowance of the deduction under section 80HHE on the ground that the claim was not made in the return of income.

18. The learned CIT(A) ought to have appreciated that the claim could be (at) any stage of assessment proceedings and the production of the audit report in Form 10CCAF in support of the claim for the deduction under section 80HHE of the Act is merely facilitated the assessing officer to compute and allow the deduction.

19. The learned Commissioner (Appeals) ought to have issued a direction to the assessing officer to allow the deduction under section 80HHE as claimed by the appellant.

Sri K.R. Pradeep appearing before us argued that the authorities below erred in rejecting the claim of the appellant under section 80HHE. He further contended that the findings of the authorities below on the legal sustainability and on the quantum of deduction are legally incorrect and sought for a proper direction to allow the deduction. He argued that the Assessing Officer erred in rejecting the claim on the premise that the deduction under section 80HHE was not claimed in the return of income filed and that the required audit report in Form 10CCAF under Income Tax Rules filed during the course of assessment on 15 -3-2002, was not

as per law. Further, the assessing officer's finding that the total turnover for the purposes of section 80HHE should be Rs. 12,56,56,18,975 as against the turnover indicated in the certificate in Form 10CCAF of Rs. 13,80,16,246. He further contended that the assessing officer has also erred in making adjustment to the profits arrived at by the assessee indicated in Form 10CCAF of Rs. 13,80,16,246.

Thus, Sri KR. Pradeep contended that the issue had to be dealt in three parts : (a) Issue whether the claim made during the course of assessment can be allowed and can the audit report in Form 10CCAF be filed during the course of assessment? (b) What is the total turnover for the purpose of computing deduction under section 80HHE? This issue involves determination of the denominator in the formula for computing the deduction.

(c) The determination of profits of business and adjustment of the same to the extent of 90 per cent as provided in the proviso (c) of Explanation to section 80HHE. Dealing of these three issues would address the issue before us.

Accordingly, Sri K.R. Pradeep argued on the first issue that factually, the assessee had exported the software of Rs. 12,36,29,409 and also had realized and remitted into the country, required convertible foreign exchange. It had claimed a deduction of Rs. 3,89,15,811 computed in the manner provided under the Act. The eligibility for deduction under section 80HHE cannot be in doubt as the appellant had met all the required conditions prescribed under section 80HHE. No claim was made in the return only because the assessee had filed a Nil return of income. The gross total income as per the return filed on 31-12-1999, was Rs. 2,79,32,991 and that the eligible deduction under Chapter VI-A under sections 80-IA, 80HHC, etc. itself was far in excess of the gross total income leading to filing of Nil return. For this reason the assessee could not make a claim for deduction under section 80HHE in the return of income filed though the assessee was eligible had the gross total income been higher than what is disclosed by the assessee in the return of income.

During the course of assessment based on the enquiries made by the assessing officer and on certain submissions made on the assessment of earlier years which would be repeated during the year, the assessee had reason to believe that there

would be substantial addition to the returned income. When these later developments were understood by the assessee, it decided to make a claim for deduction under section 80HHE by filing a letter dated 14-3-2002, the relevant portion of which is extracted hereunder: 1. In respect of software exports not covered by section 10A, we are entitled to deduction under section 80HHE of the Act. As the deductions under Chapter VI-A, even without the deduction under section 80HHE, exceeded the gross total income a claim was not made in the return of income.

2.If the returned income is altered for anyreason, ourclaim fordeduction under section 80HHE may be kindly considered and allowed." It is only for these reasons that the claim was not made in the return of income, Sri Pradeep contended that though sub-section (4) of section 80HHE mentions that the report in Form 10CCAF should be filed along with the return of income, it is just an enclosure with the return of income and is not mandatory and is only directory. It was submitted that the claim in return of income was all procedural in nature and it is not a hard and fast rule that the claim must be made in return of income. In support of this argument, he relied on the decision of the Tribunal in the case of Vinayaka Enterprises, ITA Nos. 177 and 178/B/1993, the relevant portion is extracted hereunder "4. We have considered the rival submissions and the evidence on record. We do not find any infirmity in the order of the learned CIT(A) who has held that the deduction under section 80HHC is admissible in this case, on the basis of certificate in Form 10CCAB filed by the assessee, though not along with the return of income, but at a subsequent stage in the agreement proceedings. The Courts have held that the requirement to file the certificate 'along with the return of income is only directory and not mandatory and, therefore, if, the assessee produces such certificate for some valid reason at a later stage of the proceedings before the assessment order or the appellate order is passed, that should be treated as sufficient compliance with the law. Reliance in this connection is placed on the following decisions:CIT v. Gujarat Oil & Allied Industries [1993]109 CTR (Guj.) 272 [1993] 201 ITR 325 (Guj.); 5. Respectfully following the ratio of these decisions, we hold that the CIT(A) is justified in law in directing the assessing officer to allow the claim of the assessee, after taking into account the certificate No. 10CCAB filed subsequent to the filing of the return during the course of assessment

proceedings." Though the above decision was rendered under section 80HHC the requisites of filing audit report under the said section and that of section 80HHE is similar and parametric. Hence, the decision of the Tribunal would equally apply to the present case also. Insofar as the issue of not claiming deduction under section 80HHE is concerned, Sri K.R. Pradeep argued that the claim in return of income cannot be the sole criteria for deciding eligibility of deduction under the Act merely because the assessee has not claimed a certain eligible deduction, same cannot be held against him if otherwise the claim of the assessee is tenable under law. The provisions of Income Tax Act alone can decide the eligibility of claim and not any other criteria.

In this regard, he submitted that there have been instructions from the CBDT, particularly Circular No. 14, dated 11-4-1955. the relevant portions have been extracted hereunder: The Board have issued instructions from time-to-time in regard to the attitude which the officers of the Department should adopt in dealing with assessee in matters affecting their interest and convenience. It appears that these instructions are not being uniformly followed.

2. Complaints are still being received that while Income Tax officer are prompt in making assessments likely to result into demands and in effecting their recovery, they are lethargic and indifferent in granting refunds and giving reliefs due to the assessee under the Act.

Dilatoriness or indifference in dealing with refund and claims (either under section 48 or due to appellate, revisional, etc. orders) must be completely avoided so that the public may feel that the Government is actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.

3. Officers of the Department must not take advantage of the ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department, for, it would inspire confidence in him that he may be sure of getting a square deal from the

Department. Although, therefore, the responsibility for claiming refunds and reliefs rest with the assesseees on whom it is imposed by law, officers should: (a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other; (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.' Sri K.R. Pradeep further relied on the decision of the Supreme Court in *Kedarnath Jute Mfg. Co. Ltd. v. CIT* 1971 182 ITR 363 (SC) : "The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of account and, therefore, it was debarred from claiming the same as deduction either under section 10(1) or under section 10(2)(xv) of the Act. We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income Tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter," Further, he relied on the decision of the Delhi High Court in *Continental Construction Ltd. v. Union of India* (1990) 185 ITR 230 (Del) the relevant portion extracted hereunder: "During the course of arguments, we were informed that despite the contention of the Department that the case of the petitioner fell under section 80HHB, still the benefit under the said provision has not been accorded to the petitioner. The reason for this is that the petitioner has not complied with the provisions of section 80HHB(3). According to the petitioner, the conditions prescribed under section 80HHB(3) were not complied with because till the introduction of section 80HHB in the IT Act, the petitioner was getting the benefit of section 80-0 in terms of such types of agreements. The petitioner, therefore, did not create reserve accounts as contemplated by section 80HHB(3) though foreign exchange was repatriated from abroad.

In our opinion, it will be extremely unfair not to give the benefit to the petitioner under section 80HHB. The petitioner, admittedly, has executed projects which would entitle it to the benefit of section 80HHB and there was bona fide reason for

the petitioner in not complying with the provisions of section 80HHB(3), because the CBDT had accorded approval to the agreements under section 80-0 and therefore, the petitioner naturally expected that relief would be granted under section 80-0. We have, however, held that on the facts of the present case, the petitioner was entitled to the relief not under section 80-0 but under section 80HHB and this is what In fact was argued before us by learned counsel for the Department. This being so, the Income Tax Department should not stand on mere technicalities and must give an opportunity to the petitioner to fulfil the requirements of section 80HHB(3) and on such compliance within a reasonable time, it should grant the benefit to the petitioner under that provision." The said decision was also confirmed in the decision of the Supreme Court in *Continental Construction Ltd. v. CIT* (1992) 195 ITR 81(SC).

Further, Hon'ble Supreme Court has held in *Bajaj Tempo Ltd. v. CIT* (1992) 196 ITR 188 (SC).

"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally, and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it." Based on the above rulings, he contended that since the assessee had filed an audit report during the course of assessment, the claim of the assessee must be reckoned and should not be rejected for alleged technical ,compliance.

Sri K.R. Pradeep also mentioned about the prosecution by the Department in the appellant's case for the assessment year 1995-96 wherein it had made a claim in excess of the gross total income while at the same time disclosing that the allowability was limited to the gross total income.

The said treatment by the appellant was met with prosecution proceedings and other penal consequences as found mentioned in ITA No.699/ B/2000. Thus, he submitted that when the claim was made in the earlier year, the assessee was found fault with and at the same time when the claim has not been made again, the Department has taken a negative view thus indicating a total lack of consistency or judiciousness in dealing with the eligible claim of the assessee.

Based on these decisions and other arguments, Sr. Pradeep sought a direction that making a claim during the course of assessment and filing ,the audit report before completion of assessment should be declared as sufficient compliance and the deduction under section 80HHE as made by the appellant be allowed.

On the second issue, the total turnover under section 80HHE as declared by the assessee from the eligible business under section 80HHE is Rs. 13,80,16,246, whereas, the Assessing Officer has adopted the same at Rs. 12,56,56,18,975. The reason for not adopting the total turnover declared by the assessee has been explained in para 20.8 which is extracted hereunder: "20.8 The assessee-company for the purpose of computation of deduction under section 80HHE of the IT Act has disclosed the total turnover of the business at Rs. 13,80,16,246, On verification of the claim made by the assessee-company, it is seen that the total turnover of the company disclosed is the total turnover of the unit for which deduction under section 80HHE is being claimed. The total turnover of the business cannot be Rs. 13,80,16,246 that the assessee declared; the total turnover for the computation of profit of the business computed under the head 'Profits and gains of the business' to be Rs. 12,56,56,18,975.

The claim of the assessee-company for the purpose of deduction under section 80HHE is totally erroneous, even though the accountant has thought it appropriate of certify the same".

It is the contention of the assessing officer that the total turnover of the company excluding the turnover from units under section 10A should be treated as total turnover for the purpose of the denominator in calculating the deduction. Sri K.R. Pradeep submitted that the total turnover under section 80HHE should be from the eligible business mentioned in section 80HHE and cannot be confused with the total turnover of the entire company. In support of the proposition, he relied on the decision of the Tribunal, Bangalore Bench, in IT Appeal Nos. 322 to 328/Bang./2001 in case of Wipro GE Medical System Ltd. v.Dy. CIT[2003] 81 TTJ (Bang.) 455-Ed.] wherein the issue was similar to the present case. The relevant portion of the order is extracted hereunder: "30. The next dispute in relation to assessment year 1997-98 relates to deduction under section 80HHE of the Act.

The dispute can be better understood by going into the computation made by the assessee, the assessing officer and the Commissioner (Appeals). The assessee, on its part, has arrived at the profits and gains of software business of Rs. 2,86,05,614 as under: (B) 90 per cent of amounts specified in Explanation (a) to section 80HHE Based on the above profits, the assessee recognized the total export turnover as at Rs. 6,35,77,772. Treating the same as total turnover of the business, the assessee claimed deduction under section 80HHE of the Act. The assessing officer, however, arrived at the deduction under section 80HHE in the following manner : The CIT(A) however, accepted the export turnover at Rs. 6,35,77,722 but considered the total turnover of the entire business at Rs. 1,48,55,01,543 and computed the profits of the business at Rs. 1,14,39,002 and arrived at a smaller deduction under section 80HHE of the Act. The Assessing Officer has added excise duty and sales. tax paid to arrive at the total turnover, which the CIT(A) has directed to be excluded.

31. The learned counsel for the assessee vehemently opposed the determination made by the Departmental authorities. He drew our attention to pp. 48, 49, 50 and 51 of the paper book to impress upon us to the correctness of the assessee's claim under section 80HHE. The learned counsel contended that the Department failed to understand the difference between the provisions of sections 80HHC and 80HHE of the Act. The total turnover referred to in section 80HHE cannot include the global turnover of the assessee from all goods and merchandise. What is referred to in section 80HHE is deduction in regard to profits in respect of computer software. According to the learned counsel for the assessee, the total turnover referred to therein relates to the total turnover of the computer software business both local and export. It does not take in its hold anything not connected with the computer software business. The Department was, therefore, totally unjustified in including all the turnover of the assessee not connected with the computer software business and that is the reason why the deduction claimed by the assessee is highly distorted. According to him, this is not the intention of deduction under section 80HHE of the Act. The learned counsel for the assessee relied upon the principle laid down by the Bombay High Court in the case of CIT v. Sudarshan Chemicals Industries Ltd.(2000) 163 CTR (Bom.) 596:(2000) 245 ITR 769 (Bom.). He drew our attention to the provisions of section 80HHC and also

section 80HHE of the Act to impress upon us that the provisions of section 80HHC are concerned with deduction in respect of profits arising out of export business of goods and merchandise whereas the deduction under section 80HHE is in respect of profits from export of software. Under the very scheme of these provisions, what is to be included as total income should be those kinds of receipts which are specified under section 80HHE, viz, computer software or its transmission and providing technical services in connection with development or production of computer software. The eligible profits of the business for the purpose of section 80HHE have also not been computed by the authorities below properly, the learned counsel for the assessee pointed out. He contended that the assessing officer is not justified in reducing the sundry income while arriving at the profits and gaitis from software business.

32. The learned Departmental Representative, on the other hand, strongly supported the impugned orders in the light of the discussions in the orders of the Assessing Officer as well as the Commissioner (Appeals).

33. We have carefully considered the rival submissions and gone through the record. The provisions of section 80HHC and section 80HHE, although speak of deductions with reference to profits from export business, section 80HHC provides for deduction in respect of profits retained for export business whereas section 80HHE deals with export out of India of computer software or its transmission from India to a place outside India by any means and providing technical services outside India in connection with the development or production of computer software.

What is an export turnover is again defined in section 80HHE(5).

Identical provision in section 80HHC(4B) deals with goods and merchandise to which that section applies whereas the provisions of section 80HHE(5) deals with consideration received in respect of computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (2). The total turnover is defined not to include freight, telecommunication charges or insurance attributable to the delivery of the computer software outside India or expenses, if any, incurred in foreign exchange

in providing the technical services outside India. What essentially section 80HHE is dealing with is with reference to the turnover of computer software. The total turnover for the purpose of section 80HHE can only mean the total turnover of the computer software both in India and outside India. Under the scheme of the said section, it is not correct to include any other turnover not connected with the computer software business. We are, therefore, of the opinion that the denominator adopted by the Department is wrong and is not in accordance with the scheme of deductions under section 80HHE of the Act. If we approve the calculation of the Department, the very object of intending and giving deduction under section 80HHE is likely to be defeated if the assessee is having other turnover not connected with the computer software.

34. In this connection, it would be relevant to go into the legislative intent in the insertion of the new section, i.e., section 80HHE of the Act which may be found in (1991) 96 CTR (St) 156: (1991) 190 ITR (St.) 246, which is reproduced below: "The proposed section seeks to provide that where an assessee, being an Indian company or a person (other than a company), resident in India, is engaged in the business of export out of India of computer software or its transmission from India to a place outside India by any means or in providing technical services outside India in connection with the development of production of computer software, he shall be allowed a deduction in the computation of his total income of the profits derived by him in respect of such computer software is received in, or brought into India in convertible foreign exchange within a period of six months from the end of the previous year or such extended period as the CIT may allow in this behalf. Profits derived from the aforesaid business shall be the amount which bears to the total turnover of the business carried on by the assessee.' Therefore, the total turnover under section 80HHE can only mean the turnover of the software business alone and the same should not be treated as to include the turnover of the company totally unconnected with the business of computer software. When the numerator speaks of turnover of software business alone, the denominator should also be of similar nature, i.e., the turnover of the company from the business of computer software. In other words, the computer software business should be treated as an independent unit for the purpose of computing deduction under section 80HHE of the Act. This view of ours is fortified by the decision of the

Bombay High Court in the case of CIT v. Sudarshan Chemicals Industries Ltd. [2000] 245 ITR 769 (Bom). In this regard, it would be relevant to quote from the judgment of the Hon'ble Supreme Court in the case of K.P. Varghese v. ITO [1981] 131 ITR 597 (SC) : 'A statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the Legislature, the Court may modify the language used by the Legislature or even some violence to it, so as to achieve the obvious intention of the Legislature and produce a rational construction.' If the Department's computation is accepted, it would only result in manifest anomalies and arbitrariness. Therefore, in our view, for the purpose of deduction contemplated by the section 80HHE, the total turnover for the said section should not include turnover on account of manufacturing, trading, etc. which is totally unconnected with the public software business. Therefore, in our considered view, the total turnover for the purpose of section 80HHE consists of turnover from computer software business and providing of technical services." The view similar to that of Tribunal, Bangalore, has also been held by the Madras High Court in CIT v. Madras Motors Ltd. [2002] 257 ITR 601 (Mad) at p. 64. The facts relevant to the case are found in pp. 64 and 65, which are extracted hereunder : "The major issue on which the relief was granted by the Tribunal was in respect of a sum of Rs. 6,84,461. This claim was made on the basis of a certificate issued by the chartered accountant in Form 10CCAC and the annexure thereto. The assessing officer while assessing for the year 198990 granted relief for the sum of Rs. 3,49,132. Similarly, for the next assessment year also, the relief was granted by the assessing officer adopting the same method. The dispute related to what should be held as the total turnover of the assessee.

The Assessing Officer took the total turnover to be the turnover from all the sources of business as the assessee was also doing the business of selling motorcycles, spare parts thereof and television sets. The contention of the assessee was that the total turnover must be confined to the turnover of the product which the assessee was exporting.

However, even the CIT(A) confirmed the view taken by the assessing officer and took the view that the turnover of the whole business including the business of sale of motorcycles, motorcycle spare parts and television sets.

The Tribunal, however, accepted the claim of the assessee and proceeded to hold that it was only the total turnover of the forging business which was liable to be taken into consideration for arriving at a profit which was liable to be held as a proper deduction under section 80HHC. Relying on the language of sub-section (3) of section 80HHC the Tribunal interpreted the words therein to mean that in a formula to be used under that section which was $\text{Export turnover} / \text{Total turnover} \times \text{Business profits} = \text{Available deduction under section 80HHC}$, the total turnover should not be the turnover relating to the other business of sale of motorcycles, spare parts thereof and television sets. It is obvious that if the total turnover was considered to be that which included even the turnover of the business other than the forging business, then the denominator would be more and the profits would be less which would be liable for deduction under that section. The Tribunal found that sub-section (3) of section 80HHC was applicable to the present case as the assessee in addition to the export oriented business of forgings had other business also and was earning income therefrom. The Tribunal also realized that apart from the export of the forgings the assessee had the advantage of the local sales of those forgings also. The contention of the assessee was that the forging division was entirely separate from the other division of the company which was engaged in the business of sale of motorcycles, motorcycle spare parts and television sets, and it was the further contention of the assessee that the accounts were completely separate. Therefore, the assessee's contention was that only the turnover of the forgings meaning the export sales of forgings as also the local sales of the forgings was the only turnover which was liable to be used in the aforementioned formula which would be less than the turnover of the whole business of the assessee including that of the sale of motorcycles, spare parts thereof and television sets. In short, according to the assessee, more profits were liable to be arrived at by showing a lower turnover as the denominator in the formula and thereby more profit was liable to be allowed in favour of the assessee which was an allowable deduction. Since this argument was accepted by the Tribunal, the Department required the reference of the questions mentioned above

resulting in the present references." "That leaves us with the second question regarding the true import of the word 'turnover' as used in sub-section (3) of section 80HHC. It would be better for us to quote the whole sub-section itself.

'80HHC. Deduction in respect of profits retained for export business-(3) For the purposes of sub-section (1), profits derived from the export of goods or merchandise out of India shall be, (a) in a case where the business carried on by the assessee consists exclusively of the export out of India of the goods or merchandise to which this section applies, the profits of the business as computed under the head 'Profits and gains of business or profession'; (b) in a case where the business carried on by the assessee does not consist exclusively of the export out of India of the goods or merchandise to which this section applies, the amount which bears to the profits of the business (as computed under the head 'Profits and gains of business or profession'), the same proportion as the export turnover bears to the total turnover of the business carried on by the assessee.' The controversy is about the last words of clause (b) of sub-section (3) of section 80HHC viz., total turnover of the business carried on by the assessee. There can be no doubt that the present case would be governed by clause (b) of sub-section (3) of section 80HHC as admittedly, the business of the assessee is not exclusively of the export out of India of the forgings. The forgings manufactured by the assessee were sold in India also and the assessee earned income from the local sales also. It is also an admitted position that the assessee sold motorcycles, motorcycle spare parts and television sets and earned substantial income out of it. While the contention of the assessee, as accepted by the Tribunal, is that the last words indicated above would mean a turnover of the business relating to forgings alone, the revenue insists that the total turnover of the whole business, i.e., including the sale of motorcycles, motorcycle spare parts, television sets should also be included in the total turnover.

There can be no doubt that under the formula which emerges from the A language of the sub-section, export turnover becomes the numerator while the total turnover becomes the denominator. If the claim of the assessee is accepted as has been done by the Tribunal, the denominator should only relate to the business of forgings thereby the denominator will be less and the result would be more

deductible profits.

Similarly, if the contention of the revenue is accepted then, since the denominator would increase because of the turnover of sale of motorcycles, motorcycle spare parts, television sets, that is bound to result in a smaller quotient and ultimately the lesser deductible profits. Mrs. Venkataraman very strongly urged that where the language of the sub-section is clear enough then, there would be no scope to accept the assessee's contention. Learned counsel urges that since the business of sale of motorcycles, spare parts thereof, television sets was a part of the business of the assessee, the total turnover of the business would certainly include the business of sale of motorcycles, spare parts thereof and television sets, and as such, the turnover on that count would be liable to be included in the total turnover so as to increase the denominator. The Tribunal has taken into account the subsequent amendments to the section in order to arrive at the correct interpretation and on that basis has held that it was always in the mind of the Legislature that the total turnover would be restricted to the total turnover of the exportable goods. Learned counsel further submits that if a restricted, meaning is given to the words then, it would be doing violence to the express language of the sub-section which will be impermissible by the established canons of interpretation.

The argument is undoubtedly extremely attractive but lacks substance.

Even considering the express language, the sub-section would have to be not only appreciated in the light of the language of that sub-section but that sub-section will have to be read along With the other sub-sections like sub-sections (1) and (2). In the first place, considering the language of the sub-section itself, it can not be forgotten,that the sub-section itself mentions the goods or merchandise to which this section applies. It would obviously mean that the sub-section itself refers to the whole section 80HHC. It will be then beneficial to see as to what is the scheme of section 80HHC of the Act insofar as the assessee like the present one is concerned.

It cannot be forgotten that the assessee's business is not exclusively of export in the sense that it has income out of the local sales of forgings also and as such, it

would be governed by clause (b) of sub-section (3). However, that is not the be all and end all of the matter as the whole section pertains to defined goods. Sub-section (1) very clearly provides a rider for the application of section 80HHC in the opening words itself which are as follows: '80HHC. Deduction in respect of profits retained for export business-(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of the profits derived by the assessee from the export of such goods or merchandise.' The goods or merchandise to which the whole section applies are to be found in clause (a) of sub-section (2). The language is extremely important and hence we would reproduce the said sub-section.

'(2)(a) This section applies to all goods or merchandises, other than those specified in clause (b), if the sale proceeds of such goods or merchandise exported out of India are receivable by the assessee in convertible foreign exchange.' Therefore, it is crystal clear that the whole section 80HHC applies only to the goods which are not only exported out of India but the sale proceeds of which are receivable in convertible foreign exchange. When we sit to consider sub-section (3), clause (a) thereof speaks about the assessee who has an exclusive business of exports of such goods or merchandise. Clause (a) would apply where the assessee has no other business meaning all his income would be out of the export sales, the proceeds of which are receivable in convertible foreign exchange. There is again almost by way of abundant caution the use of the words 'goods or merchandise to which this section applies.' Once we have this stage then the task of interpreting clause (b) of sub-section (3) becomes easier because even in clause (a) of sub-section (2) and clause (a) of sub-section (3), the same terminology is used in respect of the goods and merchandise. When a plain meaning has to be given to the opening part of the section, it is clear that the word 'business' means the business relating to the goods to which the section applies and the thrust is on the word "exclusively". The sub-section considers a situation where the assessee's business is of exports and the assessee's business is not that of, export alone. However, one thing is certain that the business has to be

only in respect of the goods or merchandise to which the section applies. As has been stated earlier, the thrust is on the word 'exclusively'. The Legislature has rightly intended the situation where the business could be relating to the goods which would fetch the foreign exchange but there could also be the business in relation to these goods which may not be exported or which may not fetch foreign exchange. However, the whole sub-section.

speaks only about the goods, which are exportable, exported and fetch foreign exchange. It is, therefore, clear that the thrust of the opening clause of clause (b) of sub-section (3) has a stress on the words 'does not consist exclusively of the export'. The sub-section takes into consideration the situation of income out of the export of the goods vis-a-vis income out of these goods other than by way of exports. The words 'total turnover of the business' would then be controlled by and have to be read in the colour of the opening clause.

The formula envisaged by the section would be 'export turnover, F total turnover, D profits and gains of business'. The business contemplated in the section would be restricted to only the goods to which the section applies and, therefore, by necessary implication, even the total turnover of the business would be the total turnover of the business of the goods to which the section applies. If we include the turnover of the goods to which the section does not apply, it would amount to doing violence to the language of the sub-section itself. The sub-section has been created only to see the ratio of the income out of the export to the total income out of the business in respect of those goods because of the obvious difficulty of segregating the profits earned out of export alone vis-a-vis the profits earned otherwise than by export. The total profits earned out of the business of such goods are not exemptible because those profits would, include both profits out of exports, and the profits earned otherwise than by export, but one thing is certain that the business contemplated in the sub-section would be in relation to those goods alone to which the section applies as per clause (a) of sub-section (2). Once we read sub-section (1) of section 80HHC, clause (a) of sub-section (2) and clauses (a) and (b) of sub-section (3), there remains no doubt that the total turnover of the business would contemplate only the business regarding such goods part of which are exported and the others are not so exported. There is just

no scope to include the turnover of the business of the goods which are not contemplated by the section. That way, though the Legislature has specified about the applicability of the section to the goods by clause (a) of sub-section (2), we would be unnaturally making the section applicable even to the goods which are outside the limits of clause (a) of sub-section (2) and that will not be permissible.

Once this situation is clear, there would be no scope for accepting the argument of the revenue that the total turnover of business would include even the turnover of goods which are outside the scope of clause (a) of sub-section (2). Hence, we are of the clear pinion that the turnover from the business of sale of motorcycles, motorcycle spare parts, television sets cannot be introduced to inflate the total turnover artificially in order to reduce the benefit which the assessee is entitled to. That would be clearly going against the object of section 80HHC, which is solely to encourage the exports.

The Bombay High Court in a somewhat similar situation in the decision reported in CIT v. Sudarshan Chemicals Industries Ltd. [2000] 245 ITR 769 (Bom.), while interpreting the words 'total turnover' has observed as follows: 'That the total turnover cannot include the sales-tax and the excise duty and total turnover should be restricted only to such receipts which have an element of profit in it and it would be only the sale price which should be the relevant figure.' In that case, the total turnover which is the denominator in the prescribed formula was tried to be inflated by including the sales-tax and the excise duty into the same. Though the Court was considering the amended section, its observations are apposite. The Bombay High Court in that case took into account the object of the section and observed as under (p. 773) : 'In the circumstances, we are of the view that in order to ascertain the export profits, the above two items cannot be introduced to inflate the total turnover artificially in order to reduce the benefit which an assessee is entitled to. Ultimately, the object of section 80HHC is required to be kept in mind in order to encourage exports.' We are in total agreement with the above observations. The Tribunal has chosen to go to the amended section in order to interpret the unamended section applicable to the case at hand. That is clearly impermissible though the Tribunal has reached a correct conclusion and has accordingly interpreted the term total turnover. It was not necessary to go to the amended

provision to see the intention of the Legislature unless the amendment was of clarificatory or explanatory nature. Even otherwise, as we have pointed out, the correct interpretation of the unamended section would depend upon the language of that section alone.

We would, therefore, choose to affirm the final conclusion of the Tribunal on this issue though for reasons of our own." Sri K.R. Pradeep contended that though the decision was under section 80HHC having regard to the similar wording under sections 80HHC and 80HHE, the decision of the Madras High Court would apply to the decision on hand and accordingly, prayed for treating the total turnover at Rs. 13,80,16,246 and export turnover at Rs. 12,36,29,409.

On the third issue, i.e., the assessee had arrived at the eligible profits under section 80HHE at Rs. 3,89,15,811, whereas the assessing officer, though denied deduction under section 80HHE for non-filing of audit report, had arrived at the figure of the eligible deduction at Rs. 23,87,909 and for this purpose the computation made by him at p. 51 of the assessment order is extracted hereunder: The resultant figure is Rs. 23,87,909. Thus, if the assessee were to be allowed deduction under section 80HHE of the IT Act, it would be Rs. 23,87,909 and not Rs. 3,89,15,811 as claimed by the assessee." Sri K.R. Pradeep pointed out that the assessing officer had erroneously adopted the profit of the company as profits eligible under section 80HHE whereas in the case of the assessee that the profit from the activity of eligible business under section 80HHE alone should be computed as made by the assessee in Form 10CCAF. The case law pertaining to the turnover aspect discussed above would equally apply to the issue of eligible profits also. Thus, he sought for a direction to the assessing officer for allowing the claim made by the appellant.

Sri Indrakumar relied on the order of authorities below in support of his argument. He further filed written submissions, the relevant portion is extracted hereunder: "10. Issue of admitting the claim for deduction under section 80HHE (vide item No. 10 of the summary chart of the grounds). It is urged by the appellant that the appellate CIT erred in confirming the disallowance of the deduction under section 80HHE of the IT Act on the ground that the claim was not made in the return of

income and it is also urged that the claim can be made at any stage of the assessment proceedings.

10.1 It is submitted that when a statute prescribes certain things to be done in a particular manner, there can be no departure from such procedure, in that, the mandatory provision provides that the accountant's certificate should be filed with the return as per section 80HHE(4) of the Act. This being the mandatory position, it is not within the purview of the assessing officer to admit the claim when clearly the requirement is not met. It is untenable to contend that the claim can be put or made at any stage. If it was so, there would be no rationale behind the time-limit. As such, the appellate Commissioner of Income Tax has rightly upheld the disallowance." On the issue of total turnover and the eligible profits, Sri Indrakumar relied on the decision of the Special Bench in *Pearl Polymers v. Dy.*

CIT [2002] 255 ITR 76 (Delhi) (AT) in support of the view taken by the assessing officer, particularly the finding recorded in pp. 76 and 77 : "There is no ambiguity in the language of section 80HHC of the Income Tax Act, 1961. Section 80HHC(3) is a beneficial section. It is intended to provide incentives to promote exports to earn foreign exchange for the country. The incentive provided is to exempt the profits relatable to exports. In the opinion of the Legislature it is possible for an assessee to carry on both export and local business, not only in the same commodity or goods but in a variety of goods not only in trading but also in the manufacture. With a view to avoid litigation, the Legislature deliberately provided that the profits of the entire business including exports must be ascertained irrespective of whether separate accounts were maintained for export or not, computing them by applying those rules as are applicable for the computation of income under the head 'Profits and gains of business or profession' and then apportioning those profits on the basis of turnover of export bearing to the total turnover. Nowhere is it said that if such a person had dealings both in exports and local business, if export profits are easily identifiable then only clause (a) would apply. This is reading something into the section which it did not provide. The object of clause (a) of sub-section (3) is clearly not to identify the export profits. The object of clause (a) of sub-section (3) is to find out whether the business carried on by the assessee consisted exclusively of export of goods outside India. Carrying on an exclusive

business out of India without domestic turnover will disclose only the profits in such exclusive export business. That does not mean that the purpose of clause (a) is to find out whether the profits in export are easily identifiable even in a case where the business carried on does not consist exclusively of exports outside India of the goods or merchandise. If in addition to the export, there are dealings in India then clause (b) will automatically takeover. With a view not to deny the benefit of exemption to persons having domestic turnover and with a view to avoid litigation, the Legislature has provided a formula to arrive at the profits in such situations. So the test for the purpose of sub-section (3) of section 80HHC is whether the assessee is carrying on business of exclusive export or exports and domestic business also.

If it is the former, clause (a) would apply and if it is the later, clause (b) would apply. If clause (a) applies, the entire profits computed in the manner in which the profits under the head 'Profits and gains of business or profession' are to be computed and the whole of them are entitled to deduction. But if clause (b) of sub-section (3) of section 80HHC applies, the profits of the entire business have first to be ascertained and then apportioned in the proportion the export turnover bears to the total turnover to arrive at the profits derived from the export of goods or merchandise. Explanation (baa) would be effective from the assessment year 1992-93. The said Explanation is not retrospective." He further relied on the decision of the Kerala High Court in the case of CIT v. Parry Agro Industries Ltd. [2002] 257 ITR 41 (Ker.) at p. 44, which is extracted hereunder : "What section 80HHC provides is that in a case where the assessee is engaged wholly in the business of export out of India of any goods, the deduction granted should be in accordance with section 80HHC(1). The stress under sub-section (1) is that it is attracted only if the profits are derived by the assessee exclusively from exports and not by indulging in any domestic trade. As such, sub-section (1) is confined to and specifically relates to export trade. Sub-section (3) thereof indicates the manner of computation of the profits derived from the export of goods out of India where the assessee indulges in domestic trade as well. Clause (a) may not be applied here as admittedly, the assessee is carrying on domestic trade as also export. The procedure in clause (b) would take when there is export as well as domestic trade.

The argument of Mr. Jayasanker is that in this case where the profit derived by the assessee by export business is separately maintained and separately ascertained, there is no need to have recourse to section 80HHC(3)(a) and (b). In such a situation, section 80HHC(1) can be applied in exclusion of sub-section (3). Therefore, there was no need for invoking sub-section (3)(b) for finding out what should be the deduction under section 80HHC. Per contra, Mr. Menon, learned counsel for the revenue, submits that this is the only provision that is provided under section 80HHC(1) of the Act. The mode of calculation pleaded by the assessee is not contemplated or provided by the statute.

We notice from sub-section (3) that it points by words for the purposes of sub-section (1), profits derived from the export of goods or merchandise out of India shall be. It means that the section wholly and completely applies to section 80HHC(1). What is mentioned in sub-section (1) is where an assessee is engaged in the business of export out of India of any goods or merchandise to which the said section applies, there shall, in accordance with and subject to the provisions of the said section, be allowed, a deduction of the profits derived by the assessee from the export of such goods or merchandise.' This section disables the permutation of the profits irrespective of the fact whether the assessee maintains, exclusively an account with respect to export business while he carries on business which is a mixture of export as also domestic trade. There is no category of persons who have separate export business even when trading in domestic business. If we are to understand the argument of Mr. Jayasanker and hold that cases where the profits derived by the assessee from the export carried on by him can be separately grouped and in such case one need not have recourse to either clause (a) or (b) of sub-section (3), then it would amount to redrawing the Act by adding certain words to sub-section (3). Then sub-section (1) will have to be rewritten as under: 'where an assessee is engaged in the business of export out of India of any goods or merchandise to which the said section applies and it is ascertainable the income from such export trade then...'.

We are not empowered to rewrite sub-section (3) as contended by learned counsel. We cannot apply our own interpretation which is not contemplated under the statute. The manner as to how to ascertain the profit from export of goods is

only as indicated in sub-section (3); we cannot, by means of interpretation, introduce a third category.

Besides, this is not a case where learned counsel would argue that it is impossible to utilise sub-section (3)(b) and ascertain the profits.

On the contrary, the argument of counsel is that the exercise of invoking sub-section (3) is not necessary as strait-jacket method is possible in this case.

'We notice from sub-section (3)(b) that the formula for ascertainment would be that the entire business including profits of the entire business multiplied by export turnover divided by entire business turnover including export and non-export.' This is the formula utilised for the assessment to be made. If this be so, the order of the Tribunal requires to be modified and fresh assessment order has to be made by the assessing officer employing the above formula. The order is accordingly modified." On basis of the abovesaid decision, he sought for upholding of the order of the assessing officer in denying the claim of the assessee.

In reply, Sri K.R. Pradeep, submitted that the decision of Special Bench in Pearl Polyrners case (supra) and the decision of the Kerala High Court in Parry Agro Industries Ltd.'s case (supra), relied on by the revenue, are inapplicable to the facts and circumstances obtaining the issue. In the cases relied on by the revenue, the issue was that the assessee had both export turnover and domestic sales of products of the same business and consequently, the question addressed by the above authorities was whether export profit could be determined in a manner other than provided by the Act by maintaining separate books of the account, The issue in this case is what is the total turnover for purpose of section 80HHE. Whether total turnover must mean turnover of the entire company which in this case includes turnover of hardware, soaps, detergents, fluid power systems, lighting, etc., or total turnover of the business mentioned in section 80HHE of the Income Tax Act. The question in the present appeal on issue of turnover was not present or not considered in the decisions relied on by the revenue. Consequently, he submitted that the two decisions are not relevant for the purpose of deciding the issue on hand.

We have considered the arguments and perused the records available before us. Firstly, on the issue of making a claim during the course of assessment by the appellant, we find that failure to make claim in return would not defeat the otherwise allowable claim under the Act.

When the assessee has complied with basic conditions such as export and realization of foreign exchange, etc. from an eligible activity, the claim must be examined from a substantive compliance angle.

It has been held by the Supreme Court in Kedarnath Jute Mfg. Co. Ltd.'s case (supra) and score of other cases that the total income and taxable income should be arrived at by the provisions of the Act and not based on the books of account or the return of income filed by the assessee.

In this case there is no denial of the fact that assessee was eligible for deduction under section 80HHE in respect of export of software. The reason for not making the claim in the return of income that the total income was nil is a plausible reason and, subsequently, the assessee having come to know that its return of income would be disposed (of) by making additions, the assessee at that stage can very well make the claim and such a claim must be entertained. There is no reason why a revised return should be filed by the assessee as held in Dy. CIT v. Lab India Instruments (P.) Ltd. [2005] 93 ITD 120 (Pune). Consequently, the claim made during the course of assessment must be entertained.

This view also finds support from Circular No. 14 -mentioned supra. It also finds support from the decision of the Supreme Court in Continental Constructions Ltd.'s case (1992)195 ITR 81 (SC) (supra), Continental Constructions Ltd. [1990] 185 ITR 230 (Delhi) (supra) and the decision of the Supreme Court calling for a liberal interpretation in Bajaj Tempo Ltd.'s case (supra). Similarly, on the issue of filing the audit report in Form 10CCAF during the course of assessment also stands covered by the decision in Vinayaka Enterprises in ITA Nos. 177 and 178 /B/ 1993 mentioned above. Though the decision has been rendered under sections 32AB and 80HHC, it would be applicable to the present case having regard to the similarity in the compliance required under all these sections. It is to be noted that if the assessee is entitled to certain deduction which even if assessee failed to

claim in the return of income, it is the duty and responsibility of the assessing officer to draw the attention of assessee towards such deduction and allow the same. Similar view has been taken by Hon'ble Gujarat High Court in the case of Chokshi Metal Refinery v. CIT [1977] 107 ITR 63 (Guj). Honble Gujarat High Court held thus: "In view of the circular of the Central Board of Revenue issued in June, 1955 (as reproduced above), and the decision of the Supreme Court in Navnit Lal C. Javeri v. K.K. Sen, AAC [1965] 56 ITR 198 (SC), although at the time of the original assessments, the assessee-firm itself did not claim relief under section 84/80J and though the responsibility for claiming refund and reliefs rested with the assessee, the ITO should have drawn the attention of the assessee to this relief under section 84/80J in which the assessee appeared to be clearly entitled but which the assessee had omitted to claim." Mere technical consideration should not come in the way of substantive justice. Accordingly, the claim of the appellant must be allowed.

On the second and third issues of eligible turnover and eligible profits, we find that the issue stands covered by decision of this Tribunal in Wipro GE Medical Systems Ltd. (supra). Such a view has also been upheld by the Madras High Court in Madras Motors Ltd. (supra) at pp. 69 to 70 extracted supra and supports the view that the total turnover of eligible business must be considered, and not the turnover of other business of the company. Here, we may notice that the Form 10CCAF filed by the assessee, wherein the total turnover has been taken at Rs. 13,80,16,246 and the export turnover at Rs. 12,36,29,409, thus, the domestic business of the assessee is Rs. 1,43,95,837.

The assessee has reckoned the turnover of the entire business, that is, domestic and exports. Similarly, the total profit of the business is Rs. 4,34,44,470, whereas the profits derived in manner computed under sub-section (3) of section 80HHE is shown at Rs. 3,89,15,811. From these calculations what can be seen is that the assessee had already computed the profit in the manner of section 80HHE(3) which in effect means it has computed the profits in the manner mentioned in the decision of the Kerala High Court relied on by the revenue. Hence, it is nobody's case that this decision has not been complied with by the assessee in its claim made in the Form 10CCAF. The case law relied on by the assessee, that is, the

Madras High Court in Madras Motors Ltd.'s case (supra) supports the decision of this Bench in Wipro G.E Medical Systems (supra). These squarely address the issue in favour of the appellant. Whereas the decision of the Madras High Court was rendered subsequent to the decision of the Special Bench in Delhi Tribunal in Pearl Polymers Ltd. (supra), consequently, it is essential that the decision of High Court must be followed in preference to the decision of the Special Bench. (Though it is to be mentioned that the issues involved before the Special Bench and before us are somewhat different). Such a course is correct in law as held in CIT v. Smt. Godavaridevi Saraf (1978) 113 ITR 589 (Bom.), the relevant portion is extracted hereunder: "An authority like the Tribunal acting anywhere in the country, has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question." The above view has also been upheld by the Special Bench of Delhi Tribunal in the case of Lalsons Enterprises v. Dy. CIT (2004) 89 ITD 25 (Delhi)(SB). Further, the decision of Madras High Court is itself based on the decision of the Mumbai High Court in CIT v. Sudarshan Chemical Industries Ltd. (2000) 245 ITR 769 (Mum). Even this decision supports the view of the assessee. We particularly rely on the decision in the Madras High Court in this regard. Accordingly, the claim made by the appellant for deduction under section 80HHE of Rs. 3,89,15,811 requires to be allowed for the reason that the claim made subsequent to the return of income is a valid and sustainable claim. The delay in filing of audit report cannot be held against the assessee. Further, total turnover for the purpose of the denominator should be turnover of eligible business mentioned in section 80HHE, in this case Rs. 13,80,16,246. Further, the profits of the business of the assessee as computed in the Form 10CCAF are treated as correct as per the Act. For all these reasons, we direct the assessing officer to allow the claim as made by the assessee in the interest of justice.

The appellant has filed additional ground for assessment year 1998-99 claiming tax credit of Rs. 3,07,93,530. The ground filed by the assessee is extracted hereunder : "The assessee claimed tax credit of Rs. 3,07,93,530 paid in the United States of America on the income which is included in the P&L a/c. of the assessee. The tax credit has not been given by the Assessing Officer. The issue is dealt by the Supreme Court in the case of Union of India & Anr. v. Azadi Bachao

Andolan & Anr. [2003] 263 ITR 706 (SC) which decision was given on 7-10-2003. Since this is a legal issue, the assessee is entitled to raise the issue though not raised before the CIT(A), as held by the Supreme Court in National Thermal Power Corporation Ltd. v. CIT [1998] 229 ITR 383 (SC).

1. Having regard to the facts and circumstances of the case and the law, the assessing officer erred in not giving credit to the taxes paid by the assessee amounting to Rs. 3,07,93,530 as claimed in the return of income." A similar additional ground has also been filed for assessment year 1999-2000 claiming tax credit of Rs. 5,66,12,402.

Shri K.R. Pradeep appearing for appellant, sought admission of the above ground outlining the fact that the said sums were claimed in returns of income filed by the assessee. Inadvertently, the credit was not allowed by the assessing officer and no discussion is available in the assessment order. No ground has been taken before the CIT(A) on this issue. The claim for tax credit paid in USA has been raised for the first time before Tribunal. Sri K.R. Pradeep contended that clarity on the issue was given by the Supreme Court in its order in the case of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC).

In particular, the ruling in page No. 709 which is extracted hereunder: "The test of liability for taxation is not to be determined on the basis of an exemption granted in respect of any particular source of income, but by taking into consideration the totality of the provisions of the Income Tax law that prevails in either of the Contracting States.

Merely because at a given time, there may be an exemption from income-tax in respect of any particular source of income, it is not correct to say that the taxable entity is not liable to taxation.

Liability to taxation is not the same as payment of tax. Liability to tax is a legal situation: payment of tax is a fiscal fact." According to Shri K.R. Pradeep, the aforesaid ruling entitles the assessee to claim the tax paid outside India. Since the issue is legal and all the facts and other documents necessary for considering the claim are available on record, it was submitted that there would not be any

difficulty in entertaining the additional ground and accordingly sought admission of the same. In support of his contention, he relied on the decision of the Supreme Court in *National Thermal Power Co. Ltd. v. CIT* (1998) 229 ITR 383 (SC), an extraction of which is as under: "Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee." Whereas, Shri Indrakumar, appearing for the Department, objected for the admission. The objections in his written submission filed before us are extracted hereunder : "11.1 As regards the claim for preferring additional grounds of appeal, it is submitted, at the outset, that there are no valid and justifiable grounds whatsoever to allow the additional grounds of appeal. As mentioned earlier, it is now pointed by the appellant that the assessee claimed tax credit paid in the United States of America on the income which is not included in the P&L a/c. of the assessee and the tax credit has been given by the assessing officer.

11.2 Adverting to the foregoing claim so made that the assessee claimed tax credit and that such credit has not been given by the assessing officer, it is relevant to mention at this stage that no such claim was put forth requiring the assessing authority to give credit. A perusal of the return of income for the assessment year 1998-99 would show that at p. 4, the assessee has stated thus under the heading 'Foreign tax paid'.

So also in relation to the assessment year 1999-2000, the same kind of narration is forthcoming. Thus, it is untenable on the part of the appellant to contend that the assessing authority failed to give credit for the tax amount so paid. It is significant to note that the appellant has only furnished information of some payment of tax amount paid in the other countries and it is stated that set off eligible in case of double taxation of income. By no stretch of imagination, this can be considered as a claim put forth by the appellant seeking credit of any tax amount paid in the foreign country. On the other hand, the narration discloses that set off is eligible in case of double taxation of income. No such claim of any double taxation of income

is made out.

It is also relevant to note that what is now stated by the appellant is to the effect that tax amount is paid in the United States of America 'on the income which is included in the P&L a/c. of the assessee'. As such, what is claimed is that tax amount is paid in the United States of America on an income which is included in the P&L a/c. of the assessee.

11.3 It is, therefore, submitted that the question of entertaining and admitting the present additional grounds of appeal preferred by the appellant do not arise at all. The decision relied upon by the appellant in the case of National Thermal Power Corpn. Ltd. (supra) is not applicable inasmuch as, at no point of time the appellant had put forth the claim in accordance with the provisions of the IT Act. Even the present claim made by the appellant is not based upon any factual foundation whatsoever and the issue never arises out of the assessment order. Hence, there is no legitimate case to admit the additional grounds." Shri K.R. Pradeep, in reply, submitted that when all the relevant facts and data are available and the issue admittedly being legal must be dealt with by the Tribunal. The judicial dictum on the issue of admission of additional ground is in the favour of admission and not against. We find that the claim of the appellant made in the return has not been entertained and no reasons have been attributed by the assessing officer. Further, the details of nature of income on which the foreign tax paid are already available on record. On the issue of eligibility for tax credit, the legal position is outlined by the Supreme Court in Azadi Bachao Andolan case (supra). When the decisions of the Supreme Court on the subject are available, it is not possible for the Tribunal to shut its eyes from even considering the additional grounds. After all, mere admission of a ground cannot be detrimental to either party.

It has been repeatedly clarified by the Apex Court that when technical considerations are pitted against dispensing substantive justice, the right course is to prefer substantive justice to technical consideration. Accordingly, we are inclined to admit the additional grounds raised by the assessee for both the assessment years.

On merits, learned Authorised Representative submitted that the appellant, had claimed tax credit of Rs. 3,07,93,530 of the assessment year 1998-99 and Rs. 5,66,12,402 for assessment year 1999-2000. The said claim had been shown in the statements of the income accompanying the returns filed.

He submitted that the appellant is a multi-product and multi-location Indian multinational company. It has a business presence in the United States of America as well as in many other countries. The appellant-company is a resident Indian company and under section 5 of the Income Tax Act, it is liable for income-tax in India on the income earned/received anywhere in the world. Thus, the world income of the appellant is liable for tax in India on the basis of its Indian residential status. At the same time, the income earned outside India is liable for tax in the respective countries in which such income is earned. The liability for taxation outside India on the business income earned depends on the existence of permanent establishment in such country. The business income earned in the United States of America from the business of software services has been taxed in the United States of America as per the existing domestic laws of that country.

The appellant has filed return of income in the United States of America and also paid tax in the United States of America (converted as per rule 115 of the Income Tax Rules) Rs. 3,07,93,530 for the assessment year 1998-99 and Rs. 5,66,12,402 for assessment year 1999-2000. The income earned in the United States of America has been included in the total income computed under the Indian IT Act. The said income having been earned from software services activity has been included in income from STPI units.

The turnover achieved in the United States of America, expenditure incurred and the profits earned thereon have been included in the results of STPI units. The income earned from the STPI units has been included in the return of income filed. The eligible deduction under section 10A has been claimed on the income from STPI units. On these factual matters, the learned Authorised Representative outlined the argument that since the world income is included for tax in India, the income earned in the United States of America and the income-tax paid thereon in the said country is also included in the IT returns in India. Consequently, there is a

double taxation of the said income in both the countries. It was further argued that though a certain exemption under section 10A was given in India, still there is an impact of double taxation inasmuch as the fact that a certain income was exempt for a particular period of time did not underscore the fact that the income was included for tax in both the countries.

In this regard, he relied on the decision of the Supreme Court in the case of *Azadi Bachao Andolan* (supra), the relevant portion is extracted hereunder : The test of liability for taxation is not to be determined on the basis of an exemption granted in respect of any particular source of income, but by taking into consideration the totality of the provisions of the Income Tax law that prevails in either of the Contracting States.

Merely because, at a given time, there may be an exemption from income-tax in respect of any particular source of income, it is not correct to say that the taxable entity is not liable to taxation.

Liability to taxation is not the same as payment of tax. Liability to tax is a legal situation: payment of tax is a fiscal fact.

He also relied on the provision of the DTAA between India and United States of America, in particular article 7.1 which is extracted hereunder: 7.1 The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of an enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in the other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in the other State of the same or similar kind as those effected through that permanent establishment." Similarly, on the taxes paid by appellant-company in the United States of America, article 25(2)(a) is extracted hereunder: "Where a resident of India derives income which, in accordance with the provisions of those convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of the resident an amount equal to the income-tax paid in the United

States, whether directly or by deduction. Such deduction shall not, however, exceed that part of the income which may be taxed in the United States." Shri S.K. Pradeep also relied on section 90 which is extracted hereunder: "90. Double taxation relief agreement with foreign countries.-(1) The Central Government may enter into an agreement with the Government of any country outside India- (a) for the granting of relief in respect of income on which have been paid both IT under this Act and income-tax in that country, or (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or (c) for exchange of information for prevention of evasion or avoidance of income-tax chargeable under this Act or under corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or (d) for recovery of income-tax under this Act and under the corresponding law in force in that country, and by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee." Based on the DTAA read with section 90 and the decision of the Supreme Court, the learned Authorised Representative sought for a direction, to allow the claim of the tax paid in the United States of America against the tax liability in India.

Sri Indrakumar, appearing for the department, filed his objections by way of written submissions, the relevant portion is extracted hereunder: "11.4 In any event and without prejudice to the foregoing contention, it is submitted that the ground put forth by the appellant to the effect that the assessing officer erred in not giving credit to the taxes paid in the foreign country is not tenable. As can be noticed on a perusal of the additional grounds, it is submitted that the claim is based upon the position that the tax amount is paid in the foreign country on the income which is included in the P&L a/c. of the assessee. It is reiterated that none of the provisions of the Income Tax Act enables any claim for tax relief to be put forth in respect of the tax amount paid by the appellant in the foreign country in respect of any

income which is included in the P & L a/c. of the assessee. As such, the grounds urged by the appellant in this behalf are patently untenable and unsustainable in law.

11.5 It is also further submitted that the reliance placed by the appellant on the decision of the Supreme Court in the case of *Union of India v. Azadi Bachao Andolan* (2003) 263 ITR 706 (SC) is wholly misplaced and except citing this decision it is not at all elaborated or explained as to how and on what ground, the decision of Supreme Court is applicable to the appellant's case. It is pointed out in the additional ground that the issue is dealt by the Supreme Court, but however, there is not elaboration of the position as to the issue is dealt with by the Supreme Court and as to how in the light of the facts of the appellant's case, any relief can be allowed." It is further submitted without prejudice that the subject-matter of granting relief on the grounds of double taxation, in the terms of section 90 of the IT Act, has been considered in several rulings. At this stage, it is suffice to rely upon the Division Bench judgment of the Hon'ble jurisdictional High Court of Karnataka decision in the case of *CIT v. R.M. Muthaiah* (1993) 202 ITR 508 (Kar), wherein the legal position regarding the applicability of the provisions of section 90(a) and (b) of the IT Act is dealt with and explained hereunder: 'Section 90(a) of the Income Tax Act also refers to the granting of relief in respect of income on which income-tax has been paid both under the said Act and under the Income Tax Act of the other country.

Similarly, clause (b) also refers to the avoidance of double taxation.

We are not concerned with the other clauses of section 90 in the instant case. In other words, the parties to an agreement, to avoid double taxation are to grant relief to the assessee in case the law of two countries operates on the same income and the assessee may have to pay tax in both countries. The revenue's contention in the instant case is entirely based on sections 4 and 5. But, these provisions shall have to be read subject to the provisions of the agreement in question. The agreement in question, by necessary implication, takes away the power of the Indian Government to levy tax on the income in respect of certain categories as per articles 6, 7, 8, 9, 10, 11, etc. of the agreement.

In case the income from a source is not covered by any of the provisions of the agreement, then the provisions of sections 4 and 5 of the IT Act would operate on the said income and the tax certainly could be levied by the Indian Government. In such an event, to claim the benefit against double taxation, clause 2 of article 22 of the agreement shall have to be satisfied. The effect of 'agreement' entered into by virtue of section 90 of the Act would be: (i) If no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the appellate authorities and the Court.' The foregoing ruling is also, approved by the Supreme Court in the case of *Azadi Bachao Andolan* (supra). It is, therefore, submitted that having regard to the correct legal position as regards any claim being made on the grounds of double taxation, the factual foundation as envisaged in section 90 is to be laid out. Herein, the appellant has never made out any such case at all and such issue does not arise out of the assessment order. As such, the question of granting any relief hereunder does not arise at all. It is reiterated that a mere vague and bald claim is put forth herein which cannot be accepted in the eye of law. It may not be out of place herein to refer to a Division Bench decision of the Honble High Court of Andhra Pradesh in the case of *CIT v. C.S. Murthy* [1988] 169 ITR 686 (And), wherein it is held that if any particular slice of foreign income is not subjected to tax in the assessment made in India, it is not possible to treat such foreign income not subjected to tax in India also as forming part of doubly tax income for the purpose of section 91 of the Income Tax Act. The principles laid down in the said decision disclose the legal position that by merely including any foreign income in the total income, it cannot be said that foreign income is subjected to tax.

In reply, Shri K.R. Pradeep submitted that section 90 read with the DTAA between India and the United States of America provide for relief on payment of tax in the case of double taxation and he pointed out that the contention of Shri Indrakumar that no provision existed under the Act, is incorrect.

He further submitted that the decision relied on by the Department in R.M. Muthaiah's case (supra) does not cover the situation under appeal inasmuch the issue before the Karnataka High Court was income earned by Indian resident in Malaysia. Further, articles 6 and 7 of the DTAA between India and Malaysia had exempted the income earned in Malaysia from tax in India. The provisions of DTAA between India and Malaysia are materially different from that of India and the United States of America. Further, the Karnataka High Court in the said decision has clearly held that : "The effect of an 'agreement' entered into by virtue of section 90 of the Act would be: (i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement would prevail over the provisions of the Act and can be enforced by the appellate authorities and the Courts. To the same effect is the circular issued by the CBDT as per Circular No. 333, dated 2-4-1982, which reads thus; 'It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the assessing officers when they find that the provisions of the agreement are not in conformity with the provisions of the Income-Tax Act, 1961., The correct legal position is that where a specific provision is made in the DTAA, that provision will prevail over the general provisions contained in the Income-Tax Act, 1961. In fact, the DTAAs which have been entered into by the Central Government under section 90 of the Income-Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the agreement.' Thus, where the DTAA provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the agreement, it is the basic law, i.e., the Income Tax Act, that will govern the taxation of income." These findings are in fact in favour of the assessee. Insofar as the other decision relied on by Shri Indrakumar, ie., C.S. Murthy's case (supra), Shri Pradeep submitted that the said decision is inapplicable as it is a case law of section 91 of the IT Act and not on section 90.

Section 91 deals with tax credit in cases of countries with which no agreement exists whereas in this case, applicable provision would be section 90 and not section 91. He further contended that absence of Foreign Tax Credit Rules cannot come in the way of allowing credit as per DTAA. We have considered the arguments on both the sides and also perused the records and documents produced before us. Legally speaking, the issue before us boils down to whether the appellant-resident Indian company is eligible for tax credit of the income-tax it paid in United States of America on the income earned in the United States of America but included in the return of income filed in India. Further fact to be seen is that the income earned in the United States of America is reflected as a part of income from software services. The net profit earned from the software services is eligible for exemptions /deduction under section 10A/80HHE of the IT Act. These facts are admitted on both the sides. What is to be seen is the appellant's eligibility for foreign tax credit in computing the tax liability in India. A perusal of section 90 indicates that assessee would be eligible for tax credit to the extent and in the manner provided in the DTAA between the countries. The assessing officer has not discussed the issue. The CIT(A) has also not discussed the same as no ground was raised before him. However in interest of justice, we direct the assessing officer to verify whether the assessee has included the income earned in the United States of America in its return filed in India. The assessing officer shall grant the credit as per applicable provision of DTAA between India and USA. The assessing officer shall also verify and ensure that the taxes have indeed been paid outside India before allowing the credit. Accordingly, the issue is sent to the assessing officer for proper determination and further action as per the law.

The appellant has prayed for consequential relief on interest charged under section 234B of the IT Act. The prayer of the appellant is in line with the law and accordingly, assessing officer is directed to grant consequential relief in levy of interest under section 234B of the Act.

The issues involved in the appeals filed by the Department in ITA. Nos.

881 and 882/B/2003 are discussed and disposed off as under The Department has raised the following grounds for both the assessment years : "The CIT(A)

erred in holding that the premium on sale of special import license of Rs. 1,01,35,514 is to be considered as exempt under section 10A. The CIT(A) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The Commissioner (Appeals) ought to have appreciated that the decision of the Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka." "The CIT(A) erred in holding that the premium on sale of special import license of Rs. 1,30,00,404 is to be considered as exempt under section 10A. The Commissioner (Appeals) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The Commissioner (Appeals) ought to have appreciated that the decision of the Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka." Brief facts of the issue for both the assessment years are (that) the assessee-company had claimed a sum of Rs. 1,01,35,514 for assessment year 1998-99 and Rs. 1,30,00,404 for assessment Year 1999-2000 representing premium received on sale of special import licence as income attributable to software export. The assessing officer had disallowed the claim on the ground that the premium on sale of special import licence is not an item attributable to software export, The assessee-company filed appeal against the disallowance made by the assessing officer and the CIT(A) on finding that the facts being identical to the facts in the assessee's own case in the decision of Tribunal in ITA No. 65 1 /B/ 1994 for the earlier year, decided the issue against the Department. We find that the facts in the present appeals before us are identical and similar to the issue decided by the Tribunal in ITA No. 651 /B/ 1994 and no new facts or reasons have been brought on record by the Department or the learned Departmental counsel in his written submissions on the issue, hence we are inclined to agree with the decision of the CIT(A) who has followed the order of Tribunal and dismiss this ground of the Department on the above issue.

Issue of allocation of corporate and group overheads to section 10A units The grounds of the Department on the above issue are extracted hereunder for both the assessment years "The CIT(A) erred in directing the assessing officer to delete the additional allocation of Rs. 4.2 crores made out of corporate and group

overheads to section 10A unit. The Commissioner (Appeals) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department.

The Commissioner (Appeals) ought to have appreciated that the decision of the Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka." "The CIT(A) erred in directing the assessing officer to delete the allocation made to section 10A units of Rs. 8,27,10,805 being the expenditure of Wipro Infotech Group. The CIT(A) has of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The CIT(A) ought to have appreciated that the decision of the Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka." Brief facts relating to the issue are that the assessing officer made additional allocation of expenditure out of corporate and group overheads to section 10A units based on the similar allocation made in the assessment for assessment year 1997-98. In appeal, the CIT(A) deleted the additional allocation made by the Assessing Officer and the Department is in appeal against the deletion. The arguments of the Department as submitted by Sri Indrakumar in his written submissions are extracted hereunder : "(a) Assessment year 1998-99 An relation to the assessment year 1998-99, while concluding the assessment, a sum of Rs. 4,20,69,175 which remained unallocated in the Infotech division books was allocated to the section 10A units and consequently, reduced from the exemption income so computed. In doing so, the assessing authority assigned the reasons in paras 19, 20 and 21 of the assessment order as under: 19. The bifurcating of expenditure of Rs. 4.28 crores between the section 10A and non-10A units by two methods as done by the assessee is now discussed. In the first method, the assessee bifurcated the expenditure of Rs. 4.20 crores in the same ratio in which the original bifurcation of Rs. 20.68 crores was made. This resulted on allocation of 2.04 crores to the software section 10A sub-division. In the second method, the assessee company allocated the expenditure on the basis of sales turnover and arrived on an allocation of 1.66 crores. The second method is not acceptable because sales turnover was never the basis for booking expenditure.

20. The first method, namely, the allocation on the basis of original bifurcation of 20.68 crores is also not acceptable because the nature of the unallocated expenditure as indicated above is towards exhibitions, road-shows, demonstrations, conferences, gifts and greeting cards, management salaries, licenses, insurance, travel, training and recruitment, etc. All these are generally incurred more by the software division than the rest of the Infotech division. Further, at the end of the day, it is the unit which is most profitable, which absorbs the costs. The software sub-division has a turnover of 391 crores and an income of Rs. 101 crores in contrast to the rest of the units, which contribute only about Rs. 3 crores income despite a turnover of nearly Rs. 6 crores. The past record of the assessee, when on similar issue, it did not prefer an appeal is also to be kept in mind. Keeping all these facts and circumstances in view, this expenditure of Rs. 4.2 crores is now allocated fully to the software division/section 10A units only.

21. An expenditure of Rs. 4,20,69,175 which remained unallocated in the Infotech division books is, therefore, now allocated to the section 10A units and is reduced from the exempted income so computed'.

On appeal, the CIT(A) by following the Tribunal's order, has held in favour of the appellant by directing the deletion of the additional allocation of Rs. 4.2 crores made to the section 10A units.

(3.1) It is submitted that the revenue has preferred appeal against the appellate order of the Tribunal relied upon by the CIT(A) and, therefore, the issue has not reached finality. In any event it is submitted that, in relation to the present assessment year, the assessee itself had made an allocation of group overheads on the basis of the sales to various units. The remaining unallocated amount was to the tune of Rs. 4.2 crores. The assessing officer examined the expenses after calling the revenue trial balance and held them to be attributable to section 10A units after due verification of each item booked by the assessee. Even otherwise, since unallocated expenditure did not yield any income, the same could not be allowed as per the provisions of section 14A of the Income-Tax Act. As such, the assessing officer has examined this expenditure and on such due consideration and verification allocated the expenditure to section 10A units on the basis and the

same pertains to software business. It is submitted that having regard to such factual position, the allocation so made by the assessing authority to section 10A units cannot be found to be untenable.

(3.2)(b) Assessment year 1999-2000: In relation to the assessment year 1999-2000, an amount of Rs. 8,27,10,805 has been allocated to the software sub-division and consequently exemption under section 10A of the Income-Tax Act has been reduced by an identical amount. In the course of the assessment order, the assessing authority has pointed out that as per the system of accounting followed by the assessee-company each business unit division separately carries all its business as an independent profit centre, but, however, certain expenditure is incurred by Infotech group and that this expenditure is allocated by the assessee-company for the purposes of taxation between various divisions and sub-divisions. It was noticed that the software exports from a sub-unit of the Wipro Infotech group, the assessee-company, was required by the assessing authority to furnish the details of expenditure directly relatable to units engaged in software exports and the expenditure which was allocated by the group towards the units eligible for exemption under section 10A and other units, and was also asked to explain the rationale behind the allocation made. Thereupon, in the reply the assessee furnished a summarized income and expenditure account of the Wipro Infotech group (referred to in para 7.1 of the assessment order) and on verification, it was seen that Wipro Infotech group had shown net deficit of Rs. 1,93,00,14,901. It was claimed that such deficit cannot be further allocated to further various sub-divisions of the Infotech group including the sub-division engaged in software. The assessing authority found the argument put forth by the assessee to be not acceptable in view of the fact that software division is the main stay of the assessee-company. The revenue craves leave to refer to the reasoning adverted to by the assessing authority in para 7.3 of the assessment order. Eventually, the assessing authority worked out that a sum of Rs. 8,27, 10,805 requires to be allocated to the software sub-division and consequently, exemption under section 10A of the Income-Tax Act is reduced by the identical amount.

(3.3) On appeal, the CIT(A) following the decision of the Tribunal had deleted the allocation made by the assessing authority to section 10A units in the sum of Rs.

8,27,10,805.

(3,4) It is submitted that the CIT(A) by following the decision of the Tribunal has deleted the allocation as made by, the assessing authority to section 10A units for the aforesaid two assessment years 1998-99 and 1999-2000. It is submitted that, as mentioned earlier, the revenue has contested the decision rendered by the Tribunal which has not attained finality. In any event, it is submitted that the allocation as made for the said two assessment years cannot be said to be without any basis.

The facts as noticed by the assessing authority for the assessment years in question justify the allocation." Sri K.R. Pradeep, in reply, submitted that an identical and similar issue for the earlier year has been decided in favour of the assessee by the Tribunal in ITA No. 651 /B/ 1994 in paras 27.1 to 27.14 in pp.

76 to 92, the relevant portion is extracted hereunder: '27.14. In view of these entire facts of the case and in the absence of any specific finding by the authorities below that the expenditure is incurred for the various units claiming exemption/ deduction in an artificial way of allocating the expenses and that too on surmises is not justifiable. We are, therefore of the opinion that the profits of the undertaking eligible for exemption under section 10A is correctly worked out and no artificial working can be attributed thereto. The ground taken by the assessee is, therefore, allowed and the order of the Commissioner (Appeals) is reversed on this aspect." and that the Commissioner (Appeals) has rightly decided the issue in favour of the assessee by following the order of the Tribunal and prayed for dismissing this ground of the Department and upholding the decision of the Commissioner (Appeals).

We have gone through the arguments and submissions on the issue from both sides and find that the issue is covered by the decision of this Tribunal mentioned supra. No new facts or points have been brought to our notice by the Department other than reiterating that the allocation made by the assessing authority is just and that the decision of the Tribunal has not attained finality. We agree with Sri Pradeep that the issue is covered by the decision of the Tribunal and the CIT(A) has rightly decided the issue in favour of the assessee by following the decision of

the Tribunal and accordingly, we uphold the order of the CIT(A) deleting the addition made by the assessing officer and dismiss the grounds for both the assessment years.

Issue of allocation of expenditure incurred by corporate office to section 10A units: The Department has raised the following grounds on the above issue for both the assessment years: "The Commissioner (Appeals) erred in directing the assessing officer to delete the allocation of 50 per cent of expenditure incurred by the corporate office to the section 10A unit amounting to Rs. 10,85,44,984.

The CIT(A) ought to have appreciated that the business expenditure incurred by the corporate office amounting to Rs. 21,70,28,968 comprised of interest on borrowed capital amounting to Rs. 18,22,49,250 and net corporate expenses of Rs. 3,47,74,719 which the assessee has not allocated to section 10A units and that the assessing officer was right in allocating the same to section 10A units.

The CIT(A) erred in directing the assessing officer to delete the allocation of 50 per cent of expenditure incurred by the corporate office to the section 10A unit amounting to Rs. 9,43,52,711. The CIT(A) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The CIT(A) ought to have appreciated that the decision of the Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka.

Brief facts relating to the issue are that the assessing officer allocated expenditure out of corporate office to section 10A units based on the similar allocation made in the assessment for assessment year 1997-98. In appeal, the CIT(A) deleted the additional allocation made by the assessing officer and the Department is in appeal against the deletion. The arguments of the Department as submitted by Sri Indrakumar in his written submission are extracted hereunder .:

"(a) Assessment year 1998-99: While concluding the assessment for the assessment year of 1998-99, the assessing authority allocated an expenditure of Rs. 10,85,11,984 to section 10A units and consequently deducted the same in the computation of income exempted under section 10A of the Income-Tax Act. The

assessing authority has extensively dealt with this issue in paras 22 to 34 of the assessment order. On analyzing the related facts placed on record, the assessing authority recorded the findings as under vide para 31 of the assessment order.

'31. The growth and the visible impact and results are clearly in the software sector. It is also an undisputed fact that the name of the company, M/s. Wipro is today synonymous with software technology. In this background, it is, therefore, a fallacious argument that the strategic planning and indeed about the software growth the profitability in that line, but none of the expenditure incurred on such strategic planning could be attributed to and debited to the software account. The arguments of the assessee are, therefore, rejected.' Thereupon, the assessing authority has distinctly and comprehensively analyzed the related facts in the course of paras 32 and 33 of the order. The analysis so made is based on cogent and relevant factors having a bearing upon the issue of allocation which is considered and dealt with by the assessing authority. Thus, keeping all such factors in view and particularly the software sector acquired for the company in terms of real profit, 50 per cent of the expenditure incurred by the corporate office totalling to Rs. 21,70,23,968 is allocated to the software unit entitled for exemption under section 10A of the Income-Tax Act and consequently, an expenditure of Rs. 10,85,11,894 has been allocated to the section 10A units and deducted in the computation of income exempted under section 10A of the Income-Tax Act.

(4.1) On appeal, the CIT(A), by following the decision of the Tribunal, has directed deletion of the expenses of the sum of Rs. 10,85,11,894 from the profits of the section 10A units.

(4.2) It is submitted that the revenue has contested the decision of the Tribunal rendered on the said issue. As such, no finality is reached regarding the said issue.

(4.3) It is however, submitted that the assessing authority has resorted to the allocation in question after carefully noticing and analyzing the related factors. On a correct and proper evaluation of the all bearing importance of software sector in terms of real profits and keeping in view the related factors having a bearing upon the subject-matter of allocation, the assessing authority has rightly allocated

expenditure of Rs. 10,85,11,984 and the same cannot be held to be without any basis and material. As such, it cannot be reached that there is any, artificial and unrealistic approach to the issue under consideration. It may be relevant to mention that the Hon'ble Tribunal in the order dated 31 -7-2002, at para 27.14 has pointed out that in the absence of any specific finding by the authorities below that the expenditure is incurred for the various units claiming exemption /deduction in artificial way of allocating the expenses and that too on surmises is not justifiable. It has also been further held by the Tribunal that there is no finding by the assessing officer that the amount borrowed is not for the purpose of business claiming exemption under section 10A of the Income-Tax Act. The CIT(A) has relied upon the appellate order of the Tribunal. Herein, it is respectfully submitted that the facts as noticed and considered by the assessing authority are totally different for the current assessment year, It is reiterated that the assessing authority has dealt with the issue in detail examining the various expenditures. In that, of the total expenditure of Rs. 21.7 crores, Rs. 18 crores comprised of, interest expenses and other Rs. 3,47,74,718. In the course of the assessment order at para 33, the assessing officer has sought to examine the loan usage and interest payment. In that behalf, it was, however, submitted by the assessee that the fund utilization breakup was not possible and no details for interest expenditure as against loan utilization were furnished. Even the interest burden on the company as discussed in para 33 of the order is as follows. Of the total interest payment, the allocation made to various units was It is also relevant to note that the question also arises as to whether the corporate needed to bear the expenditure of a huge sum of Rs. 21.7 crores out of which Rs. 18 crores were only interest expenditure. Also, the corporate account shows income of Rs. 10.8 crores being from sales and other income and rent recovery and expenditure of Rs. 14.3 crores against this, because of which an excess of expenditure over income resulting to loss of Rs. 3.4 crores was booked. It is pertinent to note that the provisions of section 14A of the Income-Tax Act introduced by the Finance Act, 2001, with retrospective effect provide that- 'for the purposes of computing the total income under this chapter, no deductions will be allowed in respect of expenditure incurred by the.

assessee in relation to income which does not form part of the total income under this Act....' This, it may be seen from the above that the expenses in relation to income exempts under the provisions of section 10A of the Income-Tax Act have been claimed as expenditure in the Wipro Corporate which is not in accordance with section 14A of the Income-Tax Act. Since the interest did not pertain to the income generated by Wipro Corporate, it could not be absorbed here; the unabsorbed expenditure has to be allocated to the business unit on the basis of loan utilization. Since the details were not furnished as remarked in para 33 of the assessment order, the assessing officer opted to allocate the same and allocated 50 per cent of software business after discussing the allocation on merit and comparing the turnover and profit of the overall company's statistics.

(4.4) Thus, on a consideration of the foregoing factors, as forthcoming from the assessing order and the discussion made thereto, the allocation as made by the assessing authority is justifiable.

(4.5) (b) Assessment year 1999-2000: While concluding the assessment for this assessment year of 1999-2000, the assessing authority has allocated an expenditure of a sum of Rs. 9,43,52,711 to the section 10A units and thereby refusing such amount from the income exempted under section 10A of the Income-Tax Act. The assessing authority noticed that the organization set up of the assessee-company includes Wipro Corporate consisting of chairman's office, corporate human resources, corporate finance and mission, quality and IM and corporate affairs.

Wipro Corporate incurs expenses by way of salary, travel and other administrative overheads and interest to meet these business objectives and also manages its own assets. At para 8. 1 of the assessment order, the assessing authority has noticed several related features. During the assessment proceedings, the details of corporate expenses and recoveries were called for, as referred to in para 8.2 of the order. It was found that the Wipro Corporate had incurred an expenditure of Rs. 18,87,05,422 over and above its income. Inasmuch as the assessee-company is primarily known for software business, a request was made to the company to explain whether any portion of such expenditure was allocated to the units

claiming exemption under section 10A of the Income-Tax Act. In response, the assessee company submitted that section 10A units are part of the Wipro Infotech group and as such recoveries of corporate expenditure are made from the Infotech group and since Wipro Corporate has already recovered its expenses from the various divisions for the use of its services, no further allocation was necessary. It was claimed that the item of expenditure totally related could not be adjusted against the profits of section 10A units.

(4.6) The assessing authority, for elaborate cogent reasons as adverted to in para 8.4(a)(b) has found such contention to be unacceptable. It is found that the non-allocation of net deficit of the Wipro Corporate to the section 10A units automatically enhances the exemption under section 10A of the IT Act. This enhancement is found to be artificial and arbitrary, in that, with non-allocation with the entire deficit is absorbed by the units that are not entitled for any exemption and taxable as per the normal provision of the IT Act. Consequently, along with the enhancement of the exempted income, the non-allocation results in the reduction of the taxable income. The assessing authority also found that the primary thrust of the assessee business is software and the business of the software section has multiplied substantially over the years. This factual aspect is discussed in para 8.4(b) of the assessment order. Thus, keeping all such facts in view and particularly the significance of the software sector of the company, 50 per cent of the expenditure incurred by the corporate office totalling to Rs. 18,87,05,422 is allocated to section 10A units, and consequently, the expenditure of the sum of Rs. 9,43,52,711 is allocated to the section 10A units and is reduced from the income exempted under section 10A accordingly.

(4.7) It is submitted that on appeal, the CIT(A), by following the decision rendered by the Tribunal, directed the deletion of the allocation of the sum of Rs. 9,43,52,711 as made to the section 10A units.

(4.8) It is submitted that the assessing authority has essentially found and demonstrated an artificial and arbitrary approach by the assessee. Also, the discussion made by the assessing authority at paras 8.1, 8.2, 8.3 and 8.4 would show that in resorting to the allocation of 50 per cent of expenditure, the assessing

authority has taken note of all the related factors and has rightly resorted to allocation. Even, applying the Tribunal's decision, it can be noticed that the assessing authority has made a proper evaluation of all the related factors in the matter of the allocation." Sri K.R. Pradeep submitted that the issue of allocation of expenditure has already been considered and decided in favour of the assessee in the earlier years by the Tribunal in its order in Wipro Information Technology Ltd. v. Dy. CIT (2004) 88 TTJ (Bang.) 778 - EDJ at paras 27.1 to 27.14 at pp. 76 to 92 and the CIT(A) following the same has deleted the allocation made by the assessing officer and prayed for dismissing of these grounds of the Department.

We have gone through the records and the submissions of both the sides on the above issue. From the submissions made by the Department we find that no new point or reason has been brought to our notice to deviate from our stand in the Tribunal's order mentioned supra. We agree with the learned Authorised Representative of the assessee that the issue stands covered by the decision of the Tribunal and the Commissioner (Appeals) relying on the said decision has decided the issue in favour of the assessee. Accordingly, we dismiss the grounds of the Department and uphold the orders of the CIT(A) on this issue.

The Department is in appeal against the decision of the CIT(A) on this issue for the assessment years 1998-99 and 1999-2000 and the grounds of the Department are extracted hereunder: 'The CIT(A) erred in holding that the disallowance of the expenditure claimed on imported software amounting to Rs. 3,68,76,920 was not warranted. The CIT(A) has of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The CIT(A) should have appreciated the fact that the Tribunal had not decided about applicability of section 40(a)(i) of the Act. The CIT(A) ought to have appreciated that the decision of Tribunal has not become final and an appeal under section- 260A has been filed before the Honble High Court of Karnataka.'" "The CIT(A) erred in holding that the disallowance of the expenditure claimed on imported software amounting to Rs. 3,68,76,920 was not warranted. The CIT(A) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The CIT(A) ought to have appreciated that the decision of Tribunal has not become

final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka." The expenditure incurred on software imported for inhouse utilization was disallowed by the assessing officer in the assessments for both the assessment years and in appeal, the Commissioner (Appeals) has decided the issue in favour of the assessee following the decision of the Tribunal in ITA No. 651 /B/ 1994 on a similar issue for earlier year.

Being aggrieved by the order of the CIT(A), the Department is in appeal before us.

Sri Indrakumar, apart from oral arguments, has submitted written submissions on this issue which are extracted hereunder for the sake of convenience : "(a) Assessment year 1998-99 : While concluding the assessment year 1998-99, the assessing authority has disallowed a sum of Rs. 3,68,76,960 being disallowance of expenditure claimed on imported software.

(5.1) On appeal, the CIT(A) by following the Tribunal's order dated 31-7-2002, holding the provisions of section 195 are not applicable and hence the amount cannot be disallowed by recourse to section 40(a)(i) of the IT Act, has held that the disallowance of the expenditure claimed on the imported software is not warranted.

(5.2) (b) Assessment year 1999-2000: Also for this assessment year, the assessing authority had disallowed and added back the expenditure in a sum of Rs. 5,42,15,924 on account of software imported for inhouse utilization. On appeal, the CIT(A), in the light of Tribunal's order had directed the assessing authority to allow the deduction of the tune of Rs. 1,34,29,998 in the computation of business income and also similarly reduced the sum of Rs. 4,07,85,926 from the profits computed under section 10A of the Income Tax Act.

(5.3) It is submitted that the decision of the Tribunal relied upon by the CIT(A) has not reached finality since the matter is contested by the revenue.

(5.4) In any event, it is submitted that the disallowance of expenditure on imported software, as made by the assessing authority is to be upheld in view of the position explained hereinafter.

(5.5) It is submitted that this Hon'ble Tribunal in its order dated 31-7-2002, had negated the revenue's claim, on the issue under consideration on the ground that the issue before the appellate commissioner of income tax was the allowability of the expenditure or otherwise in view of the provisions of section 40(a)(i) only and the question as to the expenditure being of capital in nature cannot be gone into. The Tribunal opined that what is held by the assessing officer is to the effect that since the payment` being towards royalty and no TDS being made in terms of section 195 of the Act, and by virtue of section 40(a)(i) of the IT Act, expenditure cannot be allowed. The Tribunal observed that by virtue of recourse to section 40(a)(i) of the Act, it can be inferred that the assessing officer himself treated the expenditure as revenue in nature. On such view, the Tribunal negated the ground put forth by the revenue.

(5.6) It is submitted that, for the present assessment years, it is extremely relevant to note that while concluding the assessments and dealing with the legality of the claim regarding the expenditure claimed on imported software, the assessing authority has adverted to the position that the expenditure although capitalized in the books has been written off as revenue expenditure. Thus, the position emerges from the present assessment that the expenditure is of capital nature.

As such, in this background, when the legal issue arising for consideration in the present appeal touches upon the legality or otherwise of the addition made by the assessing authority by disallowance of the claim of the expenditure on imported software and when such issue arises out of the related assessments and the appellate order thereto, the revenue's contention that the expenditure being of capital nature requires to be considered in the present appeals by the Honble Tribunal. As such, it is submitted that the expenditure being the capital in nature, the addition made by the assessing authority requires to be upheld, inasmuch as the software used inhouse being a to of business, the same cannot be held as revenue expenditure but only an expenditure of capital nature. Thus, the legality of the addition made by way of disallowance of the expenditure on software being subject-matter of consideration in the present appeals and on the facts as noticed by the assessing authority, the plea made herein that the expenditure being of capital nature, the disallowance is to be sustained on this ground. In this behalf,

reliance is made on a decision of the Supreme Court in the case of National Thermal Power Corporation Ltd. v. CIT (1998) 229 ITR 383 (SC), wherein it is held that the purpose of assessment proceedings before the taxing authorities is to assess correctly the liability of an assessee in accordance with law and the Tribunal is not at all precluded from considering the questions of law arising in assessment proceedings although not raised earlier. In the light of this decision of the Apex Court, it is submitted that the legality of the addition made by way of the disallowance in respect of imported software being subject-matter of consideration, the contention herein put forth by the revenue to the effect that the expenditure being of capital nature, the disallowance is to be upheld, is amenable for being considered in the present appeals. Thus, it is submitted that inasmuch, as the software used in house being the tool of business, the expenditure on the same is to be held as capital expenditure and consequently, the disallowance as made by the assessing authority is sustainable in law.' Sri Pradeep submitted that the CIT(A) has rightly dismissed the grounds on this issue by following the order of Tribunal as the issue is squarely covered by the order of the Tribunal mentioned supra at pp.

161 to 163 in paras 50.1 to 50.4 which are extracted hereunder: 'We have considered the rival submissions and the relevant facts of the case. Since the issue before the CIT(A) was the allowability of the expenditure or otherwise in view of the provisions of section 40(a)(i) only, we cannot go into the question whether the expenditure is capital in nature. What is held by the assessing officer is that since the payment is towards royalty on which no TDS has been made under section 195 of the Act in view of section 40(a)(i), the expenditure cannot be allowed which is otherwise allowable as revenue expenditure under the Act. Hence, it can be inferred that the assessing officer himself treated the expenditure as revenue in nature which has been confirmed by the CIT(A). The issue dealt with by the CIT(A) is only that the provisions of section 195 are not applicable and hence, the amount cannot be disallowed resorting to section 40(a)(i) of the Act. This ground raised before us, therefore, cannot be said to be arising out of the order of the CIT(A) and hence, we are unable to entertain the same.

This ground is accordingly dismissed." Further, no new reasons or points have been brought by the Department other than stating that the decision of the Tribunal has not become final. And submitted that the order of the CIT(A) be upheld by dismissing the grounds of the Department on this issue.

We have considered the facts and the arguments of both the sides. We find that the CIT(A), as submitted by Sri K.R. Pradeep, has rightly followed the decision of the Tribunal in deciding the issue in favour of the assessee, as the issue being identical and similar to the one decided by the Tribunal in the earlier year in the assessee's own case.

The Department has not brought any fresh reasons or points before us, so as to reverse the decision of the Commissioner (Appeals), hence, we uphold the decision of the Commissioner (Appeals) on this issue and dismiss the ground of the Department.

Issue relating to disallowance of provisions for bad and doubtful debts : The next of the grounds taken by the Department is on the above issue and the grounds is as follows: (a) The CIT(A) erred in directing the assessing officer to verify the correctness claims made by the assessee regarding the provision for bad and doubtful debts amounting to Rs. 9,42,61,936 and decide in accordance with the directions contained in the order passed by the Tribunal on 31-7-2002',, for assessment year 1997-98. The CIT(A) ought to have appreciated that the deduction claimed by the assessee was disallowed by the Assessing Officer as section 36 does not provide for such deduction..As the assessee's case is not covered by rule 46A(1) the CIT(A) should not have permitted further evidence to be filed- (b) The CIT(A) failed to note that under section 251(1)(a) of the, Act, in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment and cannot remit the matter back to the assessing officer.

(a) The Commissioner (Appeals) erred in directing the assessing officer to verify the correctness of claims made by the assessee 'regarding the provision for bad and doubtful debts amounting to Rs. 9,42,61,936 and decide in accordance with the directions contained in the order passed by the Tribunal on 31-7-2002, for assessment year 1997-98. The CIT(A) ought to have appreciated, that the

deduction claimed by the assessee is only a contingent liability and, the order of the Tribunal on this issue has not become final.

(b) The Commissioner (Appeals) failed to note that under section 251 (1) (a) of the Act in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment and cannot remit the matter back to the assessing officer." Sri Indrakumar has submitted written submissions apart from the oral arguments made during the course of hearing of the appeal, which are extracted hereunder: "(a) Assessment year 1998-99: In relation to the present assessment year, while concluding the assessment the assessing authority has dealt with the claim made by the assessee regarding provision for bad and doubtful debts. It was noticed that the assessee has debited to, the P&L a/c a sum of Rs. 9,42,61,936 being in the nature of provision for bad debts. In the course of assessment order, the particulars of the claim are referred to and the same are reproduced below: The assessee, as regards its claim regarding provision referred to above submitted as under before the assessing authority.

'Without prejudice to our claim that the provision for doubtful debts aggregating to Rs. 9,42,61,936 should be allowed, we submit that if our claim is not admitted, the bad debts written off against the provision amounting to Rs. 2,51,644 to be allowed as a deduction.' The assessing authority examined the claim made to the tune of Rs. 9.42 crores. It was held by the assessing authority that the provisions of section 36(1)(vii) allow write off of bad debts and the fundamental requirement is that, in the first instance, the debts should have become bad and mere write off is not the only requirement, but the position that the debt has become bad and irrecoverable is to be established to sustain the claim. In that behalf, the assessing authority relied upon the decision of the Delhi Bench of the Tribunal in the case of Dy. CIT v. India Thermit Corporation Ltd. [1996] 56 ITD 307 (Delhi). It was further observed by the assessing authority that the assessee itself indicates 'evaluates' a debt, makes a provision and then makes 'adjustments' to this provision as an ongoing process. It was seen that the assessee had written off only Rs. 2,51,644 and as such the intended item for allowing as bad debt under the provision of section 36(1)(vii) is the said actual debt amount of Rs. 2,51,644 and not the provision of Rs. 9.42 crores. Eventually, the assessee allowed an amount of Rs.

2,51,644, as bad debt written off as against the claim of Rs. 9,42,61,936 and the net addition for the said assessment year is, therefore, to the tune of Rs. 9,40,10,292 (vide para 50 of the assessment order).

(6.1) On appeal, the CIT(A) by following the Tribunal's order dated 31-7-2002, held that the classification of the claim of the bad debts as made subsequent to the Tribunal's order is to be verified and decided afresh. On such premises, the CIT(A) directed the assessing authority to verify the correctness of the claim made by the appellant and decide in accordance with the directions contained in the order passed by the Tribunal.

(6.2) (b) Assessment year 1999-2000: In relation to this assessment year, the assessee-company had claimed deduction of the sum of Rs. 9,19,43,371 on account of provision for bad and doubts debts. It was noticed that the bad debts actually written off were to the tune of Rs. 1.26 crores only. The assessing authority disallowed the provision for bad and doubts debts, in that, out of the total provision made in the sum of Rs. 9,19,43,371, the amount of Rs. 1,26,78,832 on account of bad debts written off during the year was allowed as deduction. As such, the net disallowance on account of provision for bad and doubt debts was to the tune of Rs. 8,63,64,539.

(6.3) On appeal, the CIT(A) by following the directions as made by the Tribunal in the earlier order directed the assessing authority may verify the claim and decide afresh.

(6.4) It is submitted that the revenue has preferred appeals in respect of the order passed by the Tribunal regarding the aforesaid issue of provision of bad and doubtful debts and as such it has not attained finality.

(6.5) It is, however, submitted that on the facts of the case pertaining to the aforesaid assessment years and having regard to the provisions of the Income Tax Act as applicable, the question of allowing the provision regarding bad and doubtful debts does not arise.

(6.6) The assessing authority has disallowed the provision made for bad and doubtful debts on the ground that the mere provision as made by the assessee cannot be allowed in terms of the provisions of section 36(1)(vii) of the IT Act. It is submitted that the fundamental ingredient envisaged under the provisions of section 36(1)(vii) of the Income Tax Act for allowing the bad debt is to the effect that the debt in question should have become bad. This indispensable requirement of establishing that the debt has become bad and irrecoverable requires to be established for claiming deduction under section 36(1)(vii) of the IT Act and the said provision does not dispense with this requirement.

This legal aspect has been brought out in the decision of the Hon'ble Tribunal of Delhi Bench in the case Dy. CIT v. India Thermit Corporation Ltd. 'Before the amendment, the assessee was to prove that the debt had become bad in the relevant previous year. Such requirement led to the enormous litigation and, therefore, the amendment was brought so as to eliminate the controversy with regard to the year in which the debt had become bad. If the debt had become bad, it would be allowed in the year in which it was written off by the assessee.

However, nowhere did it say that any debt could be written off and claimed as bad debt. Had that been the intention of the Legislature, it would have mentioned any debt or part thereof which is written off as irrecoverable in the amended provision. Therefore, the debt written off had to be a bad debt.

It was the prior condition for allowability of the deduction under section 36(1)(vii) even after the amendment of the provision. Once the debt was established to be bad, deduction would have to be allowed in the year in which the assessee wrote off the same'.M/s.

Fairgrowth Financial Services Ltd. v. Dy. CIT (ITA No. 5 10/ 1996 and other connected appeals dated 23-7-2004), has held that mere provision for bad and doubtful debts without establishing the debt to have become bad cannot be allowed by the assessing authority under the provisions of the Income Tax Act. it is held thus in the said case: 'We have heard the learned standing counsel and we find full force in his stand that the said amount is just a provision for doubtful debts and the assessee has not been able to show that the debt had been established to

have become bad during the previous year in question under section 36(2), in the light of the clear provisions of the Act.

Inasmuch as that it is in the nature of only a provision and not against the actual loss suffered by the assessee, we do not find any infirmity in the order of the assessing officer is, therefore, restored.' It is, therefore, submitted that there being only a provision made and the debts not being established to have become had irrecoverable, the assessing authority has rightly disallowed the said provision." We have gone through the records and the submissions made on the above issue by both the sides. We find that the CIT(A) had allowed the issue by deleting the addition on comparison of the facts for the assessment year in question to that of facts of assessment year 1997-98 on a similar issue wherein the addition was deleted by the Tribunal.

Since the CIT(A) had deleted the addition relying on the earlier order of the Tribunal, no objection can be taken. Further, even the assessing officer for the assessment year 1999-2000 in para 7.5 of his order (the relevant portion is extracted hereunder) "75 Allocation of the entire unabsorbed expenditure of the Wipro Infotech group has been made wherein unallocated expenditure has been fully allocated to the section 10A units. However, in the appellate order for assessment year 1997-98 which was passed subsequent to the assessment order for assessment year 1998-99, the learned CIT(A) has stated that reasonable method would be to allocate the unallocated expenditure of the Wipro Infotech group according to the sales turnover of the various sub-divisions. Respectfully following the observations of the learned CIT(A), I, therefore, allocate the unabsorbed expenditure of the Wipro Infotech group amounting to Rs. 19,30,14,901 on the sales turnover of software sub-division and other sub-divisions.

However, this deficit of Rs. 19,30,14,901 has to be increased by an amount of Rs. 1,30,00,404 on account of SIL premium allocated to non-section 10A units, and decreased by an amount of Rs. 2,41,13,380 on account of provision for bad debts/ advances to section 10A sub-divisions retained in group books".

has held that the addition for the year is on the basis of addition made in assessment year 1997-98. It is incumbent for the authorities to follow the decision of earlier year when the facts are identical as held by the Madras High Court in CIT v. L.G. Ramamurthi (1977) 110 ITR 453 (Mad). Fairgrowth Financial Services Ltd. v. Dy. CIT [IT Appeal No. 510 (Bang.) of 1996 dated 23-7-2004], we find that the facts in that case are not similar to the present case. In this case, the claim for bad debts was on account of non-performance of contracts by the assessee, over invoicing, under supply, defective supply, etc.; in such cases the debt itself has not accrued in favour of the assessee. These are classic instances of reversal of sales or sales return and are unenforceable debt due to the default of the assessee. These instances are factually and materially different from the case relied on by the Departmental Representative mentioned supra. Hence, the decision is not relevant for the issue on hands. Further, the CIT(A) has only remitted the issue to the assessing officer for a fresh decision and adjudication. No grievance can arise to the Department on a such a course of action, hence this ground is not sustainable.

The Department being aggrieved by the order of the CIT(A) on the above issue has raised the following grounds before us "The Commissioner (Appeals) erred in directing the assessing officer to allow deduction of Rs. 11,95,607 from the profits of section 10A units out of Rs. 1,46,65,878 representing disallowance of provision for doubtful advances and directing the assessing officer to verify the correctness of the claim made by the assessee-in respect of the balance amount. The Commissioner (Appeals) ought to have appreciated that a provision cannot be allowed as deduction under section 36 of the Act in the assessment case and, decided the issue instead of remitting the matter back to assessing officer as per the provisions of section 25(1)(a) of the Act.

(a) The Commissioner (Appeals) erred in directing the assessing officer to verify the correctness of the claim made by the assessee in respect of provision, for bad and doubtful advances aggregating to Rs. 3,98,95,026. The Commissioner (Appeals) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The Commissione (Appeals) ought to have appreciated that the decision of the

Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka.

(b) The CIT(A) ought to have decided the issue instead of remitting the matter back to assessing officer as per the provisions of section 251 (1)(a) of the Act." Sri Indrakumar, apart from the oral submissions has submitted written arguments on the issue which are extracted hereunder: "Assessment year 1998-99: In relation to this assessment year, the assessee had made provision for write off of advances to the tune of Rs. 1,46,65,873. The assessee claimed deduction regarding the said provision for doubtful advances on the following ground as referred to in the assessment order at para 51 : 'While a specific provision governs the deduction for debts, there is no specific provision for allowing deduction for advances made in the ordinary (course) of business and which have subsequently become bad.

They qualify as a business loss under section 28 of the Act. The method in which the loss is recognized in the books is not applicable to advances. In fact, even if no entries are passed in the books of account, a business loss would still be eligible for deduction.' The assessing authority, thereupon, called for the various particulars and evidence as referred to in the assessment order at p. 52 reproduced below: '52. The above claim was examined. Advances given can be either on capital account or on revenue account. In case a capital advance becomes irrecoverable and has to be actually written off, it takes the character of capital loss. The assessee was, therefore, asked to furnish the details on this account. Details like name and complete address of the person to whom the advance was given, amount, date, the purpose for which the advance was given, the amount which remained outstanding, the amount written off and the reasons for such write off were to given case-wise.' As noticed in the assessment order (para 53), the assessee merely stated that the advances are in the nature of earnest money deposits, other deposits, employees advances, advances to suppliers and other claims receivable. However, the details were not made available and the assessee finally stated that the provision has been made following the principle of prudence and they qualify as loss incurred in the ordinary course of business. The assessing authority held that what is being claimed is only a provision and does not represent the actual amount of advances written off and

that the provision being only a contingent liability is not allowance under section 28 of the Income Tax Act.

(7.1) On appeal, the CIT(A) held that it would be in the interest of justice to allow the appellant to furnish party-wise details of various advances, deposits etc. and reasons for writing off such items before assessing officer who is directed to verify the same and decide on the correctness of the claim made by the appellant in the computation of profits and gains of the business as also profits under section 10A of the Income Tax Act.

(7.2) (b) Assessment year 1999-2000: In relation to the said assessment year of 1999-2000, the assessing authority had noticed that the assessee-company had debited to the P&L a/c. a sum of Rs. 3,98,95,026 being the provision for bad and doubtful debt advances. It was submitted by the assessee that the provision had been made following the principle of prudence and qualify as loss incurred in the ordinary course of business. On an analysis of the submissions so made by the assessee-company, the assessing authority held that the claim for deduction was on account of merely a provision and at best a contingent liability and does not represent the amount actually written off. Thus, the sum of Rs. 3,98,95,026 was added back to the total income of the assessee-company.

(7.3) On appeal, the CIT(A) held that the direction given in the course of appellate order for the assessment year 1998-99 will hold good for the said assessment year also and the assessee was directed to furnish party-wise details and reasons for write off before the assessing authority who was directed to verify the same and decide afresh.

(7.4) It is submitted that inasmuch as the claim preferred by the assessee is only in respect of the provision and being in the nature of the contingent liability, the assessing authority has rightly disallowed the same. It does not represent the actual amount of advances written off. The assessments so concluded do not suffer from any infirmity regarding the adjudication of the said claim put forth by the assessee." We have gone through the records and the submissions made by both sides, oral as well written submissions. We find that the CIT(A) has remitted back the issue to the assessing officer with a direction to verify the claim made by

the assessee after going through the details of the advances. No grievance can arise to the Department on a such a course of action, hence this ground is not sustainable.

The grounds raised by the Department on the above issue are as follows : "The CIT(A) has erred in deleting the disallowance of provision for warranty expenses.

The CIT(A) erred in directing the assessing officer allow the assessee's claim of provision for warranties of Rs. 2.08 crores. The CIT(A) has, of course followed the decision of Tribunal in the case of Wipro GE Medical Systems for the assessment years 1991-92 to 1997-98 which has been contested by the Department. The CIT(A) ought to have appreciated that the decision of Tribunal has not become final and an appeal under section 260A has been filed before the Honble High Court of Karnataka." In the assessments for the above assessment years, the assessing officer has disallowed the claim made by the assessee for provision for warranty on the ground that it is only a provision and not actual write off, therefore, it is only a contingent liability. In appeal, the CIT(A) has decided the issue in favour of the assessee following the decision of the Tribunal in ITA. Nos. 322 to 328/13/2002 in the case of Wipro GE Medical Systems Ltd. (supra) on a similar issue. Being, aggrieved with the order of the Commissioner (Appeals), the Department is in appeal before us on the above issue.

Sri Indrakumar, Departmental Representative, has submitted written submissions before us on the above issue which are extracted hereunder : "(a) Assessment year 1998-99 : The assessee-company had claimed an expenditure and the net impact on account of provision made for warranty liabilities was to the tune of Rs. 2,41,24,278. The assessing authority noticed that the claim made in respect of such warranty expenditure was only in the nature of the provision and thereby it is a contingent liability and that it was a liability based on contractual obligation and it would arise only when such liability is ascertained or invoked by the customer or the buyer. Relying upon the decision of the High Court of Allahabad in the case of Swadeshi Cotton Mills Co.

Ltd. v. CIT [1980] 125 ITR 33 (All.), the assessing authority disallowed the claim.

(8.1) On appeal, the CIT(A) following the decision of the Tribunal in the appellate order passed in the case of M/s. Wipro GE Medical Systems Limited (supra), for the assessment years 1991-92 to 1997-98 deleted the disallowance of provision for warranty. .

(8.2) (b) Assessment year 1999-2000: The assessee-company had debited an expenditure of Rs. 2,08,80,414 on account of provision for warranty.

On the particulars and the details furnished by the assessee, it was held by the assessing authority that the expenditure claimed by the assessee was essentially in the nature of provision and there by it partook the character of a contingent liability. As such, the assessing authority disallowed the same.

(8.3) On appeal, the CIT(A), on the basis of the earlier decision of the Tribunal in the case of M/s. Wipro GE Medical Systems Ltd. (supra) allowed the claim.

(8.4) It is submitted that the decision of the tribunal rendered in the case of M/s. Wipro GE Medical Systems Ltd. (supra), has not attained finality and is contested by the revenue.

(8.5) It is submitted that the assessing authority has rightly disallowed the claim on account of warranty expenditure as it was purely of contingent nature. It is significant to note that warrant commitment, which is an obligation arising out of contract between the seller and the buyer in respect of a product sold by the seller, is to be executed on the claim as may be made by the buyer. The liability ripens and comes into play only when the concerned buyer invokes the warranty claim. 'Therefore, such warranty claim being of contingent nature, a provision made regarding the same cannot be allowed at all.

In the case of Metal Box Company of India Ltd. v. Their Workmen [1969] 73 ITR 53 (SC), the Supreme Court has clearly held that what is in the nature of contingent liability cannot be claimed as deduction.

Therefore, having regard to this feature of the expenditure being a contingent liability, the assessing authority has rightly disallowed the same." Sri K.R. Pradeep, in reply to the above submissions, submitted that the issue is covered by

the decision of this Tribunal in the case of Wipro GE Medical Systems Ltd. In ITA Nos. 321 to 328/B/2002 (supra) and the CIT(A) has correctly decided the issue in favour of the assessee by following said decision. The Department has not brought out any fresh points or facts other than submitting that provision for warranty is contingent liability.

We have gone through the assessment order, appellate order and the decisions relied on. As submitted by Sri Pradeep, we find that the issue has been already decided by the Tribunal in the abovementioned case and the CIT(A) has correctly decided the issue in favour of the assessee by following the said decision and we have no hesitation in upholding the order of the CIT(A) on this issue and dismiss the grounds of the Department accordingly. Further, this issue stands covered by the decision of the Kerala High Court in the case of CIT v. Indian Transformers Ltd. [2004] 270 ITR 259 (Kar) and the decision of the Madras High Court in the case of CIT v. Beema Mfrs. (P.) Ltd. (2003)130 Taxman 400 (Mad), wherein the Department has conceded the issue before the Madras High Court. Hence, we dismiss this ground of the Department.

Issue of the claim under section 43B of the IT Act in respect of excise duty : "(a) The CIT(A) erred in directing the assessing officer to verify the claim of assessee under section 43B in respect of excise duty and allow if the conditions are fulfilled in keeping with the order of Tribunal.

The CIT(A) has, of course, followed the decision of Tribunal in the assessee's own case for assessment year 1997-98 which has been contested by the Department. The CIT(A) ought to have appreciated that the decision of Tribunal has not become final and an appeal under section 260A has been filed before the Hon'ble High Court of Karnataka.' In the assessment, the assessing officer had not given full effect in respect of excise duty paid under section 43B of the Act. In, appeal, the CIT(A) on finding that the issue is covered by the decision of the Tribunal in ITA No. 651 /B/ 1994 in pp. 25 to 33 at paras 10. 1 to 11.5 has remitted the issue back to the assessing officer for verification and allowing the claim of excise duty, if the conditions are fulfilled in keeping with order of the Tribunal. Being aggrieved the decision and direction of the CIT(A), the Department is in appeal on the issue

before us.

Sri Indrakumar has submitted written submissions on the issue which are extracted hereunder: "Assessment year 1998-99 : In relation to this assessment year, while concluding the assessment, the assessing authority had noticed that in the computation of the income statement filed along with the return, the assessee-company had made an addition of Rs. 58,05,908 on account of excise duty/customs duty on uncleared manufactured /imported goods.

It also refers to Annex. 4 filed along with the return. In the Annex. 4 to the return, however, the net disallowance was only computed at Rs. 82,02,552 and thereby there was difference amount of Rs. 23.96 lakhs.

The assessee was asked why the said difference amount of Rs. 23.96 lakhs should not be disallowed. However, by letter filed in that behalf, the assessee enclosing the reworking claimed a deduction of Rs. 2,36,04,819 to be allowed in its case. Adverting to the claims so put forth by the assessee regarding the said sum of Rs. 2,36,04,819, the assessing authority referred to the salient features as regards the accrual and payment of excise duty liability. The assessing authority noticed that the liability towards excise duty arises immediately on manufacture and when the goods are despatched or removed, the duty is paid and gets accounted and when both events occurred during the year, it does not make much difference, but, however, when the balance sheet and P&L a/c. are drawn with reference to a cut-off date 31st of March, the issue arises. The assessee had claimed the deduction in the sum of Rs.2,36,04,819. While concluding the assessment, the assessing authority dealt with the correctness of the claim and on noticing that the claim was untenable, the same was disallowed by the assessing authority. In that behalf, the assessing authority recorded the finding as under: '88. The computation of impact of Rs. 44.97 lakhs is what the assessee had described in his notes up to stage two. The assessee, however, went ahead in making a further adjustment and sought a deduction of Rs. 2.81 crores. The logic of this claim was explained as under: 89. In the first stage, the Department had 'modified' the closing stock by including the accrued liabilities. Having done so, this amount would, therefore, get allowed next year as opening stock. However, by virtue of

section 43B, to the extent taxes get paid, deduction has to be allowed in the present year itself. Therefore, the closing stock adopted would now have to be re-determined to exclude the taxes paid as per section 43B. Therefore, there would now be a reduction in the value of closing stock to this extent.

90. The above argument of the assessee is incorrect. The impact of section 43B has already been considered and to the extent the taxes were paid, were reduced to arrive at a net impact of Rs. 44.97 lakhs.

If one were to go by the assessee's claim, then the principle of balancing of accounts laid down by the Hon'ble Supreme Court in the case of Chainrup Sampatram v. CIT (1953) 24 ITR 481 (SC), cited by the assessee itself is disturbed as explained below: 91. The P&L a/c. of the assessee-company is getting debited on account of these modifications by an amount of Rs. 3.26 crores and the credit side of the P&L a/c. is getting credited by an equal amount of Rs. 3.26 crores as closing stock in the first phase. However, the value of closing stock is immediately modified to only Rs. 44.97 lakhs since the assessee is now reducing a further amount of Rs. 2.81 crores. This is not acceptable.' (9.1) On appeal, the Commissioner (Appeals) held that the Tribunal in its earlier order had held that the amount paid by the assessee towards excise duty as shown in P&L a/c. under excise outstanding at the end of the year is allowable and on such premises the Commissioner (Appeals) directed the assessing officer to verify the claim of excise duty and allow if the conditions are fulfilling in keeping with the order of the Tribunal.

(9.2) It is submitted that the appellate order of the Tribunal relied upon by the CIT(A) in directing the assessing authority to allow relief in respect of excise duty claimed has been contested by the revenue and the said order of the Tribunal has not attained finality.

(9.3) It is submitted that the assessing authority, while concluding the assessment, has looked into the correctness of the claim regarding excise duty made by the assessee and in that behalf, in the course of paras 80 to 92, the assessing authority has sustained the position as to how the claim made by the appellant is untenable and unsustainable.

It is particularly noticed by the assessing authority that if one were to go by the assessee's claim, then the principle of balancing of accounts laid down by the Hon'ble Supreme Court in the case of Chainrup Sampatram v. CIT (supra) cited supra by the assessee itself would stand impaired. The assessment so concluded involving rejection of the claim regarding excise duty is, therefore, based on valid and cogent grounds." Sri Pradeep, in reply, submitted that the issue is covered by the decision of the Tribunal in ITA. No..651 /B/ 1994, dated 31-7-2002, in paras 10.1 to 11.5 appearing in page Nos. 25 to 33, and following this decision the CIT(A) has correctly decided the issue in favour of the assessee with a direction to the assessing officer to verify the claim and allow if the conditions are fulfilled in keeping with order of the Tribunal. He prayed that in view of the directions of the CIT(A), the department cannot have any grievance on this issue and further prayed for dismissing of the ground of the department.

We have gone through the arguments on both sides. We find that the issue stands covered in favour of the assessee in the above cited decision of this Tribunal and CIT(A) has correctly decided the issue in favour of the assessee by following the decision of the Tribunal and we have no hesitation in upholding the order of the CIT(A) on this issue and further the Department cannot be aggrieved as the CIT(A) has directed the assessing officer to verify the claim of the assessee and then to allow if the conditions are fulfilled in keeping with the order of the Tribunal. Hence, we dismiss the ground of the Department on this issue.

Issue of the claim under section 43B of the IT Act in respect of customs duty : The Department has raised this ground for the assessment year 1999-2000.

"The CIT(A) erred in directing the assessing officer to verify the claim of customs duty of Rs. 23,10,309 under section 43B with reference to supporting annexures /documents. The CIT(A) ought to have decided the issue instead of remitting the matter back to the assessing officer as per the provisions of section 251 (1)(a) of the Act." The facts relating to the issue as found in the written submissions and the arguments of the Department are extracted hereunder for the sake of convenience : "Assessment year 1999-2000 : While concluding the assessment for this assessment year, the assessing authority made an addition of Rs.

23,10,309 on account of increase in valuation of closing stock regarding the component of customs duty. The assessing authority had noticed that in the case of excise duty on goods manufactured but not cleared, the liability was to the tune of Rs. 1,87,91,884 and as per the audit report the same being remitted before the due date of filing of return of income, the impact from the point of view of revenue was neutral and no addition was called for on account of valuation of closing stock. However, the situation regarding customs duty was found to be different, with regard to said duty payable on goods imported but not cleared and while customs duty is deemed to accrue on the landing of the material at the Indian port, the said liability was to the extent of Rs. 1,21,08,879, but however, out of such sum, only a sum of Rs. 97,98,517 was remitted before the due date of filing of return of income. Hence, on the footing that the net of two has to be considered as addition on account of customs duty on goods imported but not cleared for the purposes of valuation of closing stock, an addition of a sum of Rs. 23,10,309 was made on account of increase in the valuation of closing stock.

(10.1) On appeal, it was contended before the CIT(A) by the appellant that the said disallowance was already considered by the appellant in the return of income and making a further disallowance amounted to duplication and the appellant furnished the copy of the computation of income enclosed to the return of income to substantiate the claim. The CIT(A) on the ground that it is not possible to make out where exactly the said sum of Rs. 23,10,309 figures in the computation and the verification is to be made with reference to supporting annexures and documents, directed the assessing officer to verify the factual position and decide accordingly.

(10.2) It is submitted that the assessing authority, while concluding the assessment had dealt with the claim issue with reference to all the related material and, therefore, no interference was called for." We have heard both the parties on this issue and we find that the CIT(A) after considering the arguments and documents, etc., submitted by the assessee has directed the assessing officer to verify the factual position and decide accordingly. We do not find anything wrong with the direction given by the CIT(A) and the Department cannot have any grievance on the said directions, accordingly, dismiss this ground of the

Department.

Issue relating to deduction under section 80-IA relating to peripherals unit at Mysore : The Department is in appeal on the above issue for both the assessment years and the ground taken by the Department is as under: "The CIT(A) erred in directing the assessing officer to delete the allocation of expenditure of Rs. 33,95,466 made to peripherals unit at Mysore for computing deduction under section 80-1A, out of the expenditure of computers and peripherals divisions of which peripherals unit at Mysore is a part, without appreciating that the assessing officer had worked out the allocation of various expenses on equitable basis.

"The CIT(A) erred in directing the assessing officer to delete the allocation of expenditure of Rs. 1,50,97,909 made to the peripherals unit at Mysore for computing deduction under section 80-IA out of the expenditure of computers and peripherals division of which peripherals unit at Mysore is a part without appreciating that the assessing officer had worked out the allocation of various expenses on equitable basis." Sri Indrakumar, has submitted written submissions on the above issue which have been extracted hereunder.

'(11.1)(a) Assessment year 1998-99 : In the course of the assessment proceedings for the assessment year 1998-99, the matter of claim for deduction under section 80-IA of the IT Act in respect of peripherals unit at Mysore, has been thoroughly and extensively considered by the assessing authority. In that behalf, the assessing authority has taken note of the business activity of five major divisions of the assessee-company. The assessing authority on marshalling of the related facts having the bearing upon the subject-matter of allocation of expenditure pertaining to peripherals unit at Mysore, has analysed and evaluated the same in the course of the discussion and the finding recorded thereto in paras 108 to 130 of the assessment order regarding the deduction under section 80-IA of the Income Tax Act.

(11.2) On appeal, the CIT(A) directed the deletion of the allocation of a sum of Rs. 33,95,46,466 made in respect of the peripherals unit at Mysore on the ground that there is no justification to sustain the additional allocation made by the assessing officer.

(11.3)(b) Assessment year 1999-2000, In respect of this assessment year, the assessing authority has dealt with the issue pertaining to deduction under section 80-IA of the IT Act regarding the peripherals factory at Mysore. As noticed by the assessing authority in para 22. 1, the peripherals factory had shown sales and services turnover of Rs. 77,97 crores and a profit of Rs. 2.42 crores and correspondingly, the peripherals division has shown a turnover of Rs. 177.93 crores and a profit of Rs. 5 crores approx. On analysis of the details furnished by the assessee in that behalf, the assessing authority has recorded the finding in paras 22.4 and 22.5 of the assessment order to the effect that further allocation of a sum of Rs. 1,50,97,909 is required to be made to the peripherals factory. Accordingly, a further allocation of the sum of Rs. 1,50,97,909 was made by the assessing authority to the peripherals factory resulting in consequential variation.

(11.4) On appeal, the CIT(A) has observed in the appellate order that similar issue of reallocation of overheads was raised in relation to the appeal for the assessment year 1998-99 which has been discussed in detail in the appellate order for the said assessment year. Thereupon, it is held by the CIT(A) that the findings given in that appellate order also holds good for the said assessment year of 1999-2000 and the assessing officer is directed to follow the directions given in the appellate order pertaining to the assessment year 1998-99.

(11.5) It is submitted that the Commissioner (Appeals) erred in passing the appellate order as referred to above on the issue pertaining to deduction. In relation to the assessment year 1998-99, the Commissioner (Appeals) has erroneously held that the assessing authority has not made out a strong case for disturbing method of allocation followed by the appellant. The Commissioner (Appeals) has failed to appreciate and take cognizance of the position that, while concluding the assessment the assessing authority in the course of paras from 107 to 130, has extensively analysed and dealt with the issue pertaining to deduction under section 80-IA of the IT Act relating to peripherals unit at Mysore. Having regard to such analysis, discussions and findings recorded thereto, it is submitted that the appellate commissioner of income tax erred in passing the appellate order on the footings that the assessing authority has not made out a case. While assessing authority, on proper analysis has substantiated the claim

made by the appellant under section 80-IA of the IT Act relating to peripherals unit of Mysore being patently untenable and incorrect, the CIT(A) erred in passing the appellate order holding that the assessing authority has failed to make out a case. In relation to the assessment year 1999-2000, the CIT(A) has held that the directions as made in the appellate order for the assessment year 1998-99 will also apply. It is submitted that inasmuch as the appellate order relating to assessment year 1998-99 is not tenable and vitiated, as urged above, the appellate order pertaining to the assessment year 1999-2000 is also equally untenable.' On the basis of the above submissions and oral arguments prayed for reversing the order of CIT(A) and to restore the order of the assessing officer.

In reply, Sri K.R. Pradeep submitted that the assessing officer disallowed a sum of Rs. 33,95,466 whereas the Departmental Representative in his submissions has stated it as Rs. 33,95,46,466. He further submitted that the assessee has maintained separate books of account for Mysore units and the results disclosed are in conformity with the same. Similar results for the earlier years have been accepted by the Department. The assessing officer has erred in construing the entire expenditure as indirect or common expenditure while factually both direct and indirect expenditures have been treated as common expenditure by the assessing officer. He further submitted that the allocation made is without any rationale and there is no need to disturb the allocation, as the Department has accepted the results for the last several years. That allocation is a part of method of accounting as has been accepted by the Department cannot be changed except for just cause. That the CIT(A) has rightly deleted the allocation made by the assessing officer. Therefore, he submitted that this ground of the Department requires to be dismissed and the order of the CIT(A) to be upheld. We have considered the arguments of both sides, the facts, records and the orders of the lower authorities on this issue. We find that the allocation made by the assessing officer is without any rational basis and is made only on surmise and suspicion when the Department having accepted the results of peripherals unit at Mysore for the last several years based on the separate books of account maintained by the Mysore unit. Even before us, the Department has not made out any case, other than reiterating the findings of the Assessing Officer. We agree that allocation is a part of method of accounting and has been accepted by the Department and the

same cannot be changed except for just cause.

Further, the rationale for allocation is reasonable and correct. Sri Indrakumar is not able to point out any inconsistency. In such circumstances, no interference is called, hence we refuse to interfere with the orders of the CIT(A) in the absence of valid reasons and, therefore, we dismiss the grounds of the Department on the above issue.

Issue relating to deduction under section 80HH relating to, Amalner unit: The Department being aggrieved by the order of the CIT(A) deleting the allocation of expenditure made by the assessing officer in the assessment order for the assessment year 1998-99 has come in appeal before us and has raised the following ground : "The CIT(A) erred in directing the assessing officer to delete the expenses allocated to Amalner unit amounting to Rs. 1,89,00,000 from the consumer care division in which Amalner unit is a part, for the purpose of working out eligible profits under section 80H11 without appreciating that the assessing officer had worked on the allocation of various items of expenses on equitable basis." "Assessment year 1998-99 : In relation to this assessment year, while concluding the assessment, the assessing authority has dealt with the deduction claimed under section 80HH of the IT Act relating to Amalner unit. It was noticed by the assessing authority that assessee-company had declared profit of FAGP unit of Amalner plant of Rs. 4,88,48,851 and the said unit produces an intermediate raw material like fatty acid which is in turn consumed captively for production of finished goods, like toilet soap. At para 135 of the assessment order, the assessing authority has pointed out as to how the deduction as claimed under the said provision was not tenable and on further analysis of the expenditure allocation on account of direct and indirect expenses, it was found that on account of direct and indirect expenses, it was found that on account of improper expenditure allocation as referred to therein, the Amalner unit has ended up showing good profits which is in turn utilized for claiming deduction under Chapter VI-A of the IT Act. Thus, taking into consideration all such facts and circumstances and in the light of findings recorded in paras 131 to 139 of the assessment order, the assessing authority allocated an expenditure of Rs. 1,89,00,000 to Amalner unit.

(12.1) On appeal, the CIT(A) has, however, directed the assessing officer to delete the expenses to the tune of Rs. 1,89,00,000 from the eligible profit under section 80H14 of the IT Act on the ground that the composition of sale of the consumer care division of Amalner unit being entirely different and not comparable, the ratio of turnover of CCD and indirect expenses cannot be applied for allocating indirect expenses to the Amalner unit.

(12.2) It is submitted that the Commissioner of Income Tax erred in directing the assessing officer to delete the expenses in respect of Amalner unit from the eligible profit under section 80HH of the IT Act.

The Commissioner of Income Tax has failed to appreciate that the assessing authority has dealt with the issue regarding the allocation of expenditure on account of direct and indirect expenses. In doing so, the assessing authority has taken into consideration the total revised sales shown in respect of Amalner unit. In para 137, the assessing authority has substantiated the apparent improper allocation of the expenditure which has resulted in artificially boosting up the profit in respect of Amalner unit which is in turn utilized for claiming deduction under Chapter VI-A of the IT Act. Thus, taking into consideration such factual position as substantiated therein, the assessing authority had rightly allocated the expenditure to Amalner unit. The CIT(A) ought to have confirmed such allocation and the reasoning of the CIT(A) is not justified on the facts as noticed by the assessing authority and the finding recorded thereto.

The above issue is with respect to allocation of expenditure. We have discussed and decided a similar issue of allocation of expenditure made to 80-IA unit supra. As the issue involved herein is identical and similar, we, therefore, following our decision given supra dismiss the grounds of the Department on this issue also.

The Department being aggrieved by the order of the CIT(A) deleting the allocation of expenditure made by the assessing officer in the assessment order for the assessment year 1998-99 has come in appeal before us and has raised the following ground: "The CIT(A) erred in directing the assessing officer to delete the expenses allocated to Tumkur unit amounting to Rs. 1,81,00,000 from the consumer care division in which Tumkur unit is a part, for the purpose of working

out eligible profits under section 80-1 without appreciating that the assessing officer had worked out the allocation of various items of expenses on equitable basis." The arguments of the Department on the above issue as submitted by Sri Indrakumar in his written submissions are extracted hereunder : "Assessment year 1998-99 : While concluding the assessment for this assessment year, the assessing authority has dealt with the deduction claimed by the assessee under section 80-1 of the IT Act relating to Tumkur unit. It was noticed by the assessing authority that the assessee-company had declared profit of Tumkur FAGP plant at Rs. 2,17,84,523 and the said unit produces an intermediate raw material like fatty acid which in turn is consumed captively for the production of finished goods like toilet soap. At para 135 of the assessment order, the assessing authority has pointed out as to how the deduction as claimed under the said provision was not tenable and on further analysis of the expenditure allocation as outlined therein, the Tumkur unit had ended up showing good profits which is, in turn, utilized for claiming deduction under Chapter VI-A of the IT Act. Thus, taking into consideration all such facts and circumstances and in the light of the findings recorded in paras 131 to 139 of the assessment order, the assessing authority allocated an expenditure of Rs. 1,81,00,000 to Tumkur unit.

(13.1) On appeal, the CIT(A) directed the deletion of the expenditure of Rs. 1,81,00,000 from the profits under section 80-1 and to recompute the eligible profits on such deletion. The appellate CIT, in doing so, held that the finding given in respect of Amalner unit also holds good in respect of Tumkur unit, as the facts are identical.

(13.2) It is submitted that CIT(A) has deleted the allocation so made by the assessing authority in respect of Tumkur unit and in deleting the same, the appellate CIT has opined that the finding in respect of Amalner unit is applicable herein. It is reiterated that as outlined and urged in respect of Amalner unit, there is no justification for the appellate CIT to have deleted the allocation as made by the assessing authority. While assessing authority has demonstrated the substantiated and the apparent improper allocation of the expenditure resulting in artificial boosting of profit, the appellate CIT erred in directed such deletion' The above issue is with respect of allocation of expenditure. We have discussed and

decided a similar issue of allocation of expenditure made to section 80-IA unit supra. As the issue involved herein is identical and similar, we, therefore, following our decision given supra we dismiss the grounds of the Department on this issue also.

Issue relating to deduction under section 80-IA relating to Peenya unit : The Department being aggrieved by the order of the CIT(A) deleting the allocation of expenditure made by the assessing officer in the assessment orders for the both assessment years has come, in appeal before us and has raised the following grounds: "The CIT(A) erred in directing the assessing officer to restore the allowance of deduction under section 80-IA as claimed by the assessee instead of Rs. 13,65,355 allowed by the assessing officer in respect of Peenya unit without appreciating that the assessing officer had worked out the reallocation of various items of expenses on equitable basis.' 'The CIT(A) erred in directing the assessing officer to delete the expenses allocated to Peenya unit amounting to Rs. 1,05,23,323 for the purpose of working out eligible profits under section 80-IA without appreciating that the assessing officer had worked out the allocation of various items of expenses on equitable basis." The arguments of the Department on the above issue as submitted by Sri Indrakumar in his written submissions are extracted hereunder: "14.1(a) Assessment year 1998-99: The assessee-company has a factory at Peenya manufacturing hydraulic cylinders for the fluid power division.

The total profit shown by this unit of Peenya is at Rs. 1,45,64,462 and the deduction claimed under section 80-IA was to the tune of Rs. 43,69,339. The eligible profit was computed in the sum of Rs. 13,65,335 and in doing so, a sum of Rs. 1,00,00,000 was allocated to the said unit as the assessing authority found there is short allocation.

14.2 On appeal, the CIT(A) has directed the restoration of the allowance of deduction under section 80-1 A of the Income Tax Act as claimed by the appellant.

14.3(b) Assessment year 1999-2000 : While concluding the assessment for this assessment year, regarding the deduction under section 80-IA of the IT Act in

respect of Peenya unit, the assessing authority made a further allocation of a sum of Rs. 1,05,23,323 to this unit.

14.4 On appeal, the CIT(A) by following the appellate order relating to the assessment year 1998-99 and the findings given thereto has held that the said finding also holds goods for the present assessment year and consequently, the assessing officer was directed to follow the directions given in the appellate order relating to the assessment year 1998-99.

14.5 It is submitted that the appellate orders passed by the commissioner of income tax on the foregoing issue for the aforesaid two assessment years are not tenable. In the course of the appellate order for the assessment year 1998-99, which is also applied for the assessment year 1999-2000, the appellate commissioner of income tax has proceeded upon the footing that the apportionment of overall operating expenses on the basis of turnover is not justifiable and it is not a rational basis to reckon and essentially operating expenses are not of the nature to be disturbed. It is submitted that the appellate order so passed by the commissioner of income tax is not tenable having regard to the categorical finding recorded by the assessing authority in paras 142 to 149 of the assessment order relating to the assessment year 1998-99. It can be noticed that the assessing authority has referred to various inconsistencies regarding the claim of deduction. On noticing all the features pertaining this claim, the assessing authority has eventually recorded the finding as under vide para 149.

'149. It is very uncanny that the company as a whole is making 'profits' inevitably and precisely from the units which are eligible for deduction under Chapter VI-A even on a same line of products to be it printers or now the hydraulic cylinders. It is too much of a coincidence as seen earlier from the discussion of various units, the indirect expenses were stated to have been allocated. The normal basis of allocation followed by the company was based on proportionate turnover. As already calculated in the earlier paragraphs, if turnover is to be made the basis, on expenditure of Rs. 5.98 crores should have been debited as against Rs. 3.68 crores. Thus, even as per the method of allocation normally followed by the company, there is a short allocation of Rs. 2.3 crores. Keeping all these factors in

view, a further allocation of Rs. 1,00,00,000 is made to the Peenya unit. The eligible profits are recomputed as under : It is submitted that as can be noticed from the foregoing findings of the assessing authority that in resorting to reallocation, the assessing authority has assigned valid and cogent reason. Even the normal basis of allocation followed by the assessee-company was itself based on proportionate turnover. But, however, even reckoning the same as a basis, the assessing authority has shown that there is short allocation. This being the case, the appellate commissioner of income tax erred in passing the appellate order, on the footing that the apportionment on the basis of turnover is not rational basis to reckon. The appellate order therefore, ignores the valid reasons as assigned by the assessing authority. As such, the appellate commissioner of income tax is not correct in law in disturbing the allocation as made by the assessing authority for the said assessment year." The above issue is with respect to allocation of expenditure. We have discussed and decided a similar issue of allocation of expenditure made to 80-IA unit supra. As the issue involved herein is identical and similar, we, therefore, following our decision given supra, dismiss the grounds of the Department on this issue also.

The Department is in appeal against the directions given by the CIT(A) on the above issue and has raised the following ground for the assessment year 1999-2000 on the above issue: "The CIT(A) erred in directing the assessing officer to verify the Modvat claim of assessee and if there is an unavailed Modvat credit the same has to be added back to the income. The CIT(A) ought to have decided the issue instead of remitting the matter back to the assessing officer as per the provisions of section 251 (1)(a) of the Act." Sri Indrakumar has submitted written arguments on the above issue which are extracted hereunder "Assessment year 1999-2000: In relation to this assessment year of 1999-2000, while concluding the assessment the assessing authority added back a sum of Rs. 1,39,89,220 to the total income on account of the impact of unavailed Modvat credit on the closing stock. The assessing authority, in doing so, held that the excise duty paid on the cost of material will be part of the cost and if some unutilized cost of the raw material is lying in the godown, its value should necessarily be taken into account for the purpose of valuation of the stock. In any event, in terms of section 145A of the Income-Tax Act which has come into effect from the present assessment year

which states that the valuation of stock should include the amount of any tax, duty actually paid or incurred to bring the goods to its present location and condition, the assessing authority made the said addition. (151) On appeal, the CIT(A) has however, directing the assessing authority to call for reworking of trading and manufacturing account or P&L a/c.

incorporating the- excise duty in opening stock, purchases, sales and closing stock and to verify the same, and if there is any unavailed Modvat credit, the same has to be added back to the income. (15.2) It is submitted that the appellate CIT erred in directing the assessing officer to cause verification to be made, although the assessing authority has recorded the categorical finding to the effect that the unavailed valued Modvat credit to the extent of Rs. 3,15,20,952 is to be considered for addition to the value of closing stock of raw materials and eventually, taking into consideration the addition made to the closing stock in the previous assessment year, an amount of Rs. 1,39,89,220 was rightly added back to the assessing authority. As such, the question of direction for any verification was not tenable." We have gone through the assessment, appellate records and the submissions made by both sides. We find the assessee has also raised a ground on the above issue which has been decided above. We have dismissed the ground of the assessee as there is nothing wrong with the directions given by the CIT(A) and since the present ground of the Department is also on the same issue, we, therefore dismiss this ground of the Department also on the above issue.

Issue relating to deduction under section 80HHC in respect of excise duty and sales-tax : "The CIT(A), erred in directing the assessing officer to exclude sales-tax and excise duty from the total turnover and recompute the deduction under section 80HHC The Department has raised the above ground for the assessment year 1999-2000. The facts in brief are that the assessee-company excluded sales-tax and excise duty from the total turnover while computing the deduction under section 80HHC of the Act relying on the decision of the Bombay High Court in the case of CIT v. Sudarshan Chemicals Industries (supra). The assessing officer included the same in the total turnover while computing the deduction under section 80HHC for the reason that there was no decision of the jurisdictional High

Court on this point.

Since the issue was covered by the decision of the Bombay High Court mentioned above and the decision of the Calcutta High Court in the case of CIT v. Chloride India Ltd. [2002] 256 ITR 625 (Cal), the CIT(A) directed the assessing officer to exclude the sales-tax and excise duty from the total turnover and recompute the deduction under section 80HHC. The Department is in appeal against the decision of the CIT(A).

On going through the facts and the records, we find that the issue stands covered by the decision of the Hon'ble Karnataka High Court in the case of CIT v. Bharat Earth Movers Ltd. [2004] 268 ITR 232 (Kar) and accordingly, uphold the decision of the CIT(A) on this issue and dismiss this ground of the Department.

In the result, the appeals of assessee are partly allowed and that of revenue are dismissed.

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