Income Tax Appellate Tribunal - Mumbai
Datamatics Ltd. vs Assistant Commissioner Of Income ... on 14 February, 2007
Equivalent citations: 2008 110 ITD 24 Mum, 2008 299 ITR 286 Mum, (2007) 111 TTJ Mum 55
Bench: K Thangal, Vice, D Srivastava
ORDER K.P.T. Thangal, Vice President

1. These appeals by the assessee and the Revenue, pertaining to asst. yr. 1993-94, are disposed of by this consolidated order, for the sake of convenience.

ITA No. 6616/Mumbai/2003:

2. When the matter was taken up for hearing learned Counsel for the assessee sought permission of the Bench to raise the following additional grounds:

1. That, on the facts and in the circumstances of the case, the lower authorities erred in reopening the assessment by issuing notice under Section 148 and completing the assessment under Section 143(3) r/w Section 147, without providing the assessee with a copy of the recorded reasons for reopening the assessment, in total disregard of the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (2003) 179 CTR (SC) 11 : (2003) 259 ITR 19 (SC), although the assessee prayed for a copy of the same after filing the return in due compliance of the notice under Section 148.

2. That, on the facts and in the circumstances of the case, the learned CIT(A) erred in directing the AO to recompute the interest under Section 234B as per his direction instead of deleting the interest charged in the AO's order under Section 143(3) r/w Section 147 dt. 24th Feb., 2003.

which, according to the learned Counsel, does not call for any finding of new facts but purely a question of law and is admissible in the light of the decision of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT .

3. We heard the rival submissions. Since this ground goes to the root of the matter and challenges the very validity of the assessment order itself and there is no new fact to be brought on record, we are of the view that the additional grounds sought to be taken by the assessee are to be admitted.

4. It is the case of the assessee that the assessment reopened under Section 147, issuing notice under Section 148, completed without providing the assessee a copy of the recorded reasons for reopening the assessment is bad in law and to be held as invalid reopening in view of the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (2003) 179 CTR (SC) 11 : (2003)259 ITR 19 (SC). Learned Counsel submitted, the Hon'ble Supreme Court in this case held that if the assessee prayed for a copy of the reasons recorded after filing of the return, Revenue necessarily has to provide a copy and to hear the assessee on the point.

5. In the case of GKN Driveshafts (India) Ltd. v. ITO (supra), the Hon'ble Supreme Court held : "when a notice under Section 148 of the IT Act, 1961, is issued, the proper course of action for the

noticee is to file the return and if he so desires, to seek reasons for issuing the notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order."

6. Considering the issue in detail, in the case of ITO v. Smt. Gurinder Kaur (2006) 105 TTJ (Del) 198 : (2006) 102 ITD 189 (Del), Tribunal held that noncommunication of the reasons is not fatal in the light of the decision of the Hon'ble Supreme Court in the case of S. Narayanappa v. CIT , rendered by a Bench of three Judges, which was not brought to the notice of their Lordships while considering the matter in the case of GKN Driveshafts (India) Ltd. (supra). Since the Tribunal has considered the decisions of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) and also the case of S. Narayanappa (supra), we are of the view that the plea of the assessee that non-communication of the reasons in spite of request of the assessee made after filing the return cannot be treated as fatal. Hence, the appeal of the assessee on this additional ground is dismissed.

7. Coming to the second additional ground, it is with regard to recomputation of interest under Section 234B as per the direction of the learned CIT(A) instead of deleting the interest charged in AO's order under Section 143(3) r/w Section 147. This issue we will take up in due course.

8. Now coming to the first ground of objection by the assessee, it is directed against the order of the CIT(A) in confirming the disallowance under Section 80-O of the IT Act, 1961, in respect of receipts earned by the assessee from rendering technical services outside India, for which consideration received in convertible foreign exchange, on the ground that as the assessee has claimed deduction under Section 80HHF in respect of the same receipts by applying the provisions of Sub-section (5) of Section 80HHE.

9. In this case the assessee filed the original return on 30th Dec, 1993 declaring income at Rs. 90,94,860. The return was accompanied by Tax Audit Report under Section 44AB in Form Nos. 3CA and 3CD. Assessee filed the revised return on 1st Feb., 1995 bringing down the income to Rs. 13,68,930, consequentially resulting refund of Rs. 68,06,075. The assessment was rectified under Section 154 on 18th Aug., 1995 determining income at Rs. 14,16,194. After giving effect to the CIT(A)'s order, revised income was determined at Rs. 13,68,930.

10. Subsequently, it was noticed, assessee has claimed deduction under Section 80-O amounting to Rs. 1,59,32,301 being 50 per cent of Rs. 3,18,64,600. Assessee claimed deduction on gross basis without taking into account the expenses for earning such income. For the reasons recorded, the Addl. CIT observed that income has escaped assessment within the meaning of Section 147. Consequentially, notice under Section 148 was issued on 22nd May, 2001. Consequent to the above notice, assessee filed the return on 28th June., 2001 declaring income at Rs. 1,47,03,210. While filing the return in response to the above notice, assessee did not claim deduction under Section 80-O; instead claimed deduction under Section 80HHE amounting to Rs. 25,88,463 only. Assessee was asked to explain as to why deduction claimed under Section 80-O amounting to Rs. 1,59,32,301 being 50 per cent of Rs. 3,18,64,600 should not be restricted after deducting all the expenses, particularly in the light of the decisions of the Hon'ble Supreme Court in the case of Distributors

(Baroda) India Ltd. v. Union of India and in the case of CIT v. Kotagiri Industrial Co-operative Tea Factory Ltd. .

11. In response to the above, assessee submitted, briefly, as under:

First the assessee objected to the reopening itself. Without prejudice to the above, assessee, on merit, submitted that deduction under Section 80-O should be allowed on gross basis. It was further submitted that when the return filed in response to notice under Section 148, assessee claimed deduction under Section 80HHE amounting to Rs. 25,88,463 as certified by the accountant in Form No. 10CCAF. It was submitted, for the purpose of deduction, the figure of total turnover to be taken as the denominator in the formula is the total turnover of all the units of the assessee, which comes to Rs. 3,51,73,607. However, in the case of CIT v. Rathore Brothers , the Hon'ble Madras High Court held that where the business of each unit of the assessee is distinct and separate and independent and separate books of account are also maintained for each unit, the total turnover of each unit is to be taken separately for the purpose of computing deduction. If this is the basis, then, it was contended the total turnover of export units at SEEPZ that is eligible for deduction under Section 80HHE would be Rs. 2,13,57,740. It was submitted, since inception the assessee was keeping separate P&L a/c for each unit always. Only on finalisation of consolidated accounts, common set of balance sheet and P&L a/c prepared. It was contended that in view of the decision of the Hon'ble Madras High Court in the case of Rathore Brothers cited (supra), assessee submitted a revised claim for deduction under Section 80HHE by treating each unit as a separate and distinct business.

It was further submitted, in the original return filed on 30th Dec, 1993, deduction under Section 80-O was claimed on 'net of direct expenses basis' at Rs. 81,72,372 and it was revised claiming deduction under Section 80-O on 'gross basis' based on the decision of the Tribunal, Mumbai Bench, in the case of J.B. Boda & Co. (P) Ltd. v. ITO (1992) 41 ITD 36 (Bom). It was further submitted, since contrary view has been taken by the Special Bench of the Tribunal in the case of Petroleum India International v. Dy. CIT , deduction under Section 80-O had not been claimed. But it was submitted, assessee intended to keep the issue alive since Special Bench decision of the Tribunal is before the Hon'ble High Court in appeal. It was further submitted, unlike Section 80-IA(9), there is no bar in Section 80-O from claiming benefits under both the sections, viz. Sections 80-0 and 80HHE; as such, to consider the revised claim for deduction under both the sections. In support of the above submission, assessee relied upon the decision of the Hon'ble Supreme Court in the case of Continental Construction Ltd. v. CIT . It was submitted, the scheme for granting deduction under Section 80-O, which is to promote the export of services to earn foreign exchange, should be interpreted liberally. As such, expenses not directly connected with the services rendered outside India should not be deducted while arriving at the claim for deduction under Section 80-O. Assessee supported the above contention in the light of the decisions of the Tribunal reported in M.N. Dastur & co. Ltd. v. Dy. CIT (1991) 42 TTJ (Cal) 231 : (1991) 40 ITD 521 (Cal) and M.N. Dastur & Co. Ltd. v. Dy. CIT (1997) 58 TTJ (Bang) 748 : (1997) 62 ITD 113 (Bang) and also the decision of the Mumbai Bench of the Tribunal in the case of J B Boda & Co. (P) Ltd. (ITA No. 1850 & 51 of 1991). It was contended that the expenses incurred in India in Indian currency could not be computed with reference to convertible foreign exchange received from or brought into India while computing deduction under Section 80-O for the purpose of expenses. It was contended that the

self-contained provisions of Section 80-O make Section 80AB totally inapplicable for computing the deduction.

Subsequently, the assessee was asked to furnish details of expenses incurred in each unit separately. It was further submitted before the AO that reference application preferred by the Revenue against the order of the Tribunal in the case of CIT v. Asian Cables Corporation Ltd. was rejected by the jurisdictional High Court, wherein the Revenue challenged the decision of the Tribunal that deduction under Section 80-O should be allowed on the basis of gross receipt and not on the basis: of net receipt (after reducing expenses).

12. The above claim of the assessee with regard to deduction under Section 80-O was rejected by the AO in view of the Special Bench decision of the Tribunal in the case of Petroleum India International v. Dy. CIT cited (supra) and also the decision of the Calcutta Bench of the Tribunal in the case of M.N. Dastur & Co. Ltd. v. Dy. CIT (supra) overruled by the jurisdictional High Court as reported in CIT v. M.N. Dastur & Co. (P) Ltd. (2000) 159 CTR (Cal) 417 : (2000) 243 ITR 10 (Cal). While coming to the above conclusion, AO also relied upon the decision of the Hon'ble Madras High Court in the case of CIT v. M.K. Raju Consultants (P) Ltd. and also the decision of the Hon'ble Delhi High Court in the case of CIT v. Chemical & Metallurgical Design Co. .

13. Coming to the deduction under Section 80HHE, the claim of the assessee was also rejected by the AO for the reasons stated herein, briefly, as under:

Assessee was carrying on business of export as well domestic and the turnover for the purpose of computation of deduction under Section 80HHE should be worked out on the basis of total turnover and not export turnover alone. In support of the above, AO relied upon the decision of the Special Bench of the Tribunal in the case of International Research Park Laboratories Ltd. v. Asstt. CIT (1994) 50 TTJ (Del)(SB)661 : (1994) 501TD 37 (Del)(SB); the decision of the Calcutta Bench of the Tribunal in the case of Dy. CIT v. Chloride Industries Ltd. (2001) 70 TTJ (Cal) 407 : (2000) 111 Taxman 81 (Cal) (Mag); and also the decision of the Hon'ble Kerala High Court in the case of CIT v. Parry Agro Industries Ltd. . Aggrieved by the above order, assessee approached the first appellate authority.

14. Assessee, before the CIT(A), relying upon the decision of the Hon'ble Supreme Court in the case of Continental Construction Ltd. v. CIT (supra), contended that there is no bar to allow deduction under two sections forming part of Chapter VI-A, in respect of same receipts. It was submitted, deduction under Section 80HHE as well as Section 80-O should be allowed.

15. This claim of the assessee was rejected by the learned CIT(A) vide para 4 of his order in the light of specific provisions contained in Sub-section (5) of Section 80HHE, which states that where the assessee has claimed a deduction and allowed in respect of profits of the business referred to in Sub-section (1) for the very same year, no deduction shall be allowed in relation to such profits under any other provision of this Act for the same or any other assessment year.

16. We heard the rival submissions, gone through the orders of the Revenue authorities and the decisions cited. The second ground before the CIT(A) and the first ground before us is against the action of the AO, in computing the amount eligible for deduction under Section 80-O on the net receipt and not on gross receipt. The claim of the assessee is that it should be allowed deduction on gross receipt. However, we find considerable force in the reasoning of the CIT(A), wherein he rejected the assessee's claim of deduction under Sections 80-O and 80HHE in view of Sub-section (5) of Section 80HHE, which reads as under:

80HHE(5) : Where a deduction under this section is claimed and allowed in respect of profits of the business referred to in Sub-section (1) for any assessment year, no deduction shall be allowed in relation to such profits under any other provision of this Act for the same or any other assessment year.

Explanation....

17. In the light of the clear provision quoted above, rejection of assessee's claim for deduction under Section 80-0 was in the right perspective and this ground by the assessee fails and dismissed.

18. Coming to the second ground of objection (ground Nos. 2 and 3) by the assessee before us, it is without prejudice to the first ground, i.e. confirming the action of the AO that deduction under Section 80-O is to be allowed on the net receipt after deducting all the expenses and not on the gross receipt.

19. Since we have already held that assessee is not entitled for deduction under Section 80-O, there is no reason to entertain this ground as well. Hence this ground of the assessee also fails and dismissed.

20. The next ground of objection (ground Nos. 4 and 5) by the assessee is directed against the order of the CIT(A), in considering total turnover of all the units and not of the unit in SEEPZ for deduction under Section 80HHE.

21. According to the assessee, CIT(A) is wrong in confirming the order of the AO in considering total turnover of entire business instead of turnover of only the unit located at SEEPZ for the purpose of deduction under Section 80HHE. According to the assessee, CIT(A) failed to appreciate that where the two separate business of an assessee are properly demarcated in terms of location, operations and also where separate books of account are maintained for different units, it should be considered as separate entity and only turnover of SEEPZ unit should have been considered while calculating deduction under Section 80HHE.

22. The facts narrated by the AO have already been recorded hereinabove. In the reopened assessment proceedings, assessee claimed deduction of Rs. 25,88,463 under Section 80HHE, which was subsequently enhanced to Rs. 49,39,517 as per letter dt, 3rd Oct., 2002. The enhanced claim was made on the basis of the decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Bros (supra). It was contended that assessee was maintaining separate books of account for

the export business and other business. The claim of the assessee was rejected by the AO, briefly, for the following reasons:

First of all, the turnover for the purpose of computation for relief under Section 80HHE should be worked out on the basis of total turnover and not export turnover. Secondly, AO relied upon the decision of the Special Bench of the Tribunal in the case of International Research Park Laboratories Ltd. (supra), wherein it was held that if the business does not consist exclusively of exports, irrespective of whether the profit of export is ascertainable or not and if there is domestic turnover, Section 80HHC(3)(b) would become operational and according to Clause (b) the entire business must be aggregated and then only apportioned. Hence the assessee's claim for considering the units as separate entity was rejected. While coming to the above conclusion, AO also relied upon the decision of the Calcutta Bench of the Tribunal in the case of Dy. CIT v. Chloride Industries Ltd. (supra), wherein it was held that where the business consists of export and local income, export business cannot be treated as separate business and for deduction under Section 80HHC(3)(b) entire business should be considered. AO also relied upon the decision of the Hon'ble Kerala High Court in the case of CIT v. Parry Agro Industries Ltd. (supra). Aggrieved by the above order, assessee approached the first appellate authority.

23. It was contended before the CIT(A) that the assessee has three business units physically located separately and entirely different and distinct services were provided. The unit which carried out the software business, in respect of which the assessee claimed deduction under Section 80HHE, was located entirely in the Software Export Processing Zone and no service from this zone was required to be provided to any domestic client. Due to contractual requirement of this export processing zone, the assessee has to maintain separate books of account for software business conducted from within the said zone and the question of pro rate turnover for deduction in respect of the profit therefrom does not arise. The two other business units of the assessee company were 100 per cent domestic business units and located outside the Software Export Processing Zone and are not engaged in any software activities. There is no overlapping or commonality between the activities carried out from the three units and they are mutually exclusive. Hence, it was contended, AO should have worked out the deduction under Section 80HHE on the basis of total turnover of export business located in SEEPZ only and with no reference to total turnover of the entire company. Assessee relied upon the decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra).

24. CIT(A) held, this plea of the assessee is devoid of much merit, particularly in view of the fact that the various judicial pronouncements have clearly held that since Section 80HHE is similar to that of Section 80HHC and Sub-section (3) of both the sections provides for computation of eligible amounts allowable for deduction, the decisions rendered by various judicial bodies in respect of Sub-section (3) of Section 80HHC would be clearly applicable. In view of the above, he held that the assessee is carrying on the business activities from different locations in the same city and whether that itself is sufficient to accept the claim of the assessee is required to be considered. In this regard, CIT(A) held, the decision of the jurisdictional High Court in the case of CIT v. Shirke Construction Equipments Ltd. (Bom) is relevant. He held that a bare reading of Section 80HHC(3) along with Clauses (ba) and (baa) of Explanation indicates that the profits of the business are required to be

computed under the head "Profits and gains of business and profession". Section 28 comes under the caption "Profits and gains of business". Section 29 categorically states that income referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43D. The claim of the assessee was disallowed by the CIT(A) vide paras 13 and 14 of his order, observing as under:

13. If this decision is taken into account, it is clear that for the purpose of Section 80HHC or for that matter Section 80HHE the profits of the business has to be computed as a whole as that of the appellant and not in a piecemeal. In such circumstance, the total turnover also is required to be taken as the total turnover of business and cannot be restricted only in respect of the turnover of one portion of the business to which the provisions of the section apply. Similar view has been clarified in the CBDT Circular dt. 5th July, 1990 bearing No. 564. [(1990) 85 CTR (St) 53 : (1990) 184 ITR (St) 37\. In para 9 of the said circular the following clarification has been given.... However, in order to arrive at the amount deductible under Section 80HHC in the case of an assessee doing export business as well as some other domestic business, the fraction of 'export turnover' to 'total turnover' is to be applied to his profit computed under the head 'Profits and gains of business and profession'. The same rationale has been upheld by the Tribunal Special Bench 'D' in their decision in the case of International Research Park Laboratories Ltd. v. Asstt. CIT (1994) 50 TTJ (Del)(SB) 661 as well as CIT v. Parry Agro Industries Ltd. (2002) 177 CTR (Ker) 257 which have been relied upon by the AO while disallowing the claim. In the said latter decision, the Hon'ble High Court have also held that if the total turnover is not taken with reference to the entire business, it would amount to rewriting the legislation. Furthermore, the Tribunal, Mumbai Bench in their order Ascho Industries Ltd. v. Jt. CIT ITA No. 2447/Mum/2000 dt. 14th Jan., 2003, have upheld this legal position.

14. In view of the above referred discussion, it is clear that both the 'profits and gains of business and profession' as Well as the total turnover for the purpose of working out the deduction under Section 80HHE of the Act are required to be taken as if whole business is one. It cannot be compartmentalised unit-wise as has been done in the return filed while making the claim. Therefore, the action of the AO to carry out necessary adjustment in working out the eligible amount for deduction is legally correct and is hence sustained. The appeal in respect of this ground is dismissed.

Aggrieved by the above order, assessee is in appeal before the Tribunal.

25. Recapitulating the events, learned Counsel for the assessee submitted that initially the assessee claimed deduction under Section 80-0, which was beneficial to the assessee, particularly as the judicial pronouncements were in favour of the assessee However, the judicial view changed thereafter and the matter now stands concluded against the assessee by the decision of the Hon'ble Madras High Court in the case of CIT v. M K Raju (P) Ltd. (supra) and also by the decision of the Special Bench of the Tribunal in the case of Petroleum India International v. Dy. CIT (supra), wherein it has been held that deduction under Section 80-O has to be allowed only after deducting direct as well as indirect expenditure from the gross foreign exchange received in India. Therefore, in the return filed in response to the notice under Section 148, assessee initially claimed deduction under Section 80HHE amounting to Rs. 25,88,463, to which it was entitled. Accountant's certificate

in Form No. 10CCAF was duly filed along with the return. Assessee computed the quantum of deduction under Section 80HHE by taking the figure of total turnover of all its units as the denominator, i.e. Rs. 8,51,73,607. Subsequently, in view of the decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra), assessee, vide letter dt. 3rd Oct., 2002, claimed that its entitlement to deduction under Section 80HHE should be worked out on the basis of turnover of export units at SEEPZ and quantified the same at Rs. 2,13,57,740. Learned Counsel submitted, in the case of CIT v. Rathore Brothers (supra), the Hon'ble Madras High Court held that where the business of each unit is distinct and separate and where the assessee maintains independent and separate books of account for export as well as domestic sale, the turnover of each unit should be considered separately for the purpose of computing deduction under Section 80HHC. Learned Counsel further submitted, since inception the assessee maintained books of account of each unit (both export and domestic business units) separately and separate P&L a/c are prepared for each individual unit. Only on finalisation, the accounts of all the units are consolidated into one common set of balance sheet and P&L a/c. Therefore, the ratio of the decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra) applies in its entirety.

26. Learned Counsel further submitted, this view canvassed by the assessee did not find favour with the Revenue authorities, particularly in view of the decisions of the Tribunal in the case of International Research Park Laboratory Ltd. (supra) Dy. CIT v. Chloride India Ltd. (supra) and the decision of the Hon'ble Kerala High Court in the case of CIT v. Parry Agro Industries Ltd. (supra). CIT(A) also placed reliance on the decision of the jurisdictional High Court in the case of CIT v. Shirke Construction Equipments Ltd. (supra). Learned Counsel submitted, subsequently however some of the Courts have taken a different view than that expressed by the Tribunal in the case of International Research Park Laboratory Ltd. (supra). Learned Counsel brought our attention to the decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra), particularly the following observation:

Where the assessee had maintained separate accounts and it had maintained its trading receipts and P&L a/c separately for export sales and domestic sales and there was sufficient material supported by all the necessary documents to show that the deduction claimed was entirely due to export there was no warrant for disallowing any portion of the export earnings pro rata by invoking Clause (b) of Sub-section (3) of Section 80HHC of the IT Act, 1961. The purpose of the clause was to disallow a part of the allowance under that section only when the entire deduction claimed could not be regarded as being relatable to exports.

and also the decision of the same High Court in the case of CIT v. Madras Motors/M M Forgings Ltd. , wherein it was held as under:

The turnover from the business of the sale of motorcycles, motorcycle spare parts and television sets could not be included in the total turnover of the assessee for the purpose of computation of special deduction under Section 80HHC. The Tribunal was right in holding that the total turnover in Section 80HHC was only the turnover relating to export business of the assessee and not the turnover relating to other business of the assessee.

27. Learned Counsel submitted, the decision relied upon by the learned CIT(A) in the case of Shirke Construction Equipments Ltd. (supra) is on facts distinguishable. In that case the issues before their Lordships were-(a) whether Section 80AB could be applied to work out deduction under Section 80HHC; and (b) whether in determining the business profits under Section 80HHC, the unabsorbed business losses of earlier years should be set-off ? Learned Counsel submitted, none of these issues are involved in the instant case of the assessee. The sole issue is whether for the purpose of computation of deduction under Section 80HHE, the turnover of the entire business should be taken into account when separate accounts for software export are maintained by the assessee and there are no difficulties for ascertaining the export turnover.

28. Learned Counsel further submitted, all the decisions referred to above are in respect of allowance of deduction under Section 80HHC. The CIT(A), in para 11 of his order, observed that provisions of Sections 80HHE and 80HHC are similar and therefore the ratio of the decisions pronounced in respect of Sub-section (3) of Section 80HHC are equally applicable. Learned Counsel submitted, this observation of the CIT(A) is superfluous and without appreciating the import of the provisions of Section 80HHE. Learned Counsel submitted, the history of enactment of a particular piece of legislation is very crucial to understand the object and scope. He invited our attention to the speech of the Hon'ble Finance Minister in his Budget Speech for the year 1991-92, extending the tax concession available under Section 80HHC to the profits from export of software, as given in (1991) 96 CTR (St) 39 : (1991) 190 ITR (St) 111, relevant portion of which reads as under:

Our software industry has made considerable progress in recent years. However, there is still a vast unexploited potential for growth. It is time we make allout efforts to capture the overseas software market. With this objective, I propose to extend the tax concession under Section 80HHC of the IT Act to export of software. With this concession the exports of this industry should register rapid growth.

29. Learned Counsel submitted, it is significant that no such amendment was brought in Section 80HHC with a view to extend its benefits to software exports was proposed in the Finance (No. 2) Bill of 1991. On the contrary, an entirely new section was introduced, i.e. Section 80HHE, exclusively dealing with the deduction allowable to profits derived from the export of computer software [(1991) 96 CTR (St) 134 : (1991) 191 ITR (St) 220}. The intention of the legislature is clear. Had the legislature intended to allow deduction to profit derived from export of computer software on the same footing as provided for export of other goods and merchandise within the meaning of Section 80HHC, there was no need for introducing a new provision. As a matter of fact, there are certain striking and subtle differences between Sections 80HHC and 80HHE. Section 80HHC speaks of allowance of deduction "to the extent of profits, referred to in Sub-section (IB), derived by the assessee from the export of such goods or merchandise". Clause (a) of Sub-section (2) of Section 80HHC states that "this section applies to all goods or merchandise, other than those specified in Clause (b)". Clause (b) states that "this section does not apply to (i) mineral oil; and (ii) minerals and ores other than processed minerals and ores specified in the Twelfth Schedule". On the other hand, learned Counsel submitted, deduction under Section 80HHE is available "to the extent of the profits, referred to in Sub-section (IB), derived by the assessee from such business". The wordings are quite different. Section 80HHC refers to goods or merchandise" whereas Section 80HHE refers

to "such business". Learned Counsel pointed out that computer software, as specified in Clause (i) of Sub-section (1) of Section 80HHE and defined in Expln. (b) to the said section, could very well be covered by the expression "goods or merchandise" within the meaning of Section 80HHC. One of the purposes for incorporating the new Section 80HHE was to extend the benefit of deduction to persons providing technical services outside India in connection with development or production of computer software. But this purpose would have been served by merely adding the word "services" to the expression "goods or merchandise" used in Section 80HHC. Instead of amending the Section 80HHC, new Section 80HHE was introduced. There is no reason to assume that this subtle difference in the language of two sections is without any merit or consequence. The legislature in its wisdom apparently used a different expression in Section 80HHE from the one used in Section 80HHC with specific objective. The modus operandi of computing relief under Section 80HHE has been so conceived as to exclude from consideration everything else except the profit/turnover of "such business", i.e. the software business, the particular business of the assessee in which the export is made. By making the aforesaid alteration in the language of new section, legislature intended to indicate that profits/turnover of the goods or services, the export of which are not entitled to exemption under Section 80HHE, need not be considered for computation of deduction allowable under this section in all cases. Learned Counsel submitted, quite clearly, whether or not the assessee derives income from carrying on any other business is wholly extraneous to the scheme of granting deduction under Section 80HHE. It necessarily follows that in cases where the assessee has been engaged solely in the business of export of computer software or providing technical services abroad in connection with development or production of computer software and has maintained distinct separate account for such business, Sub-section (3) of Section 80HHC would have no application in working out the profit derived from such business. Learned Counsel further submitted, where the assessee also having domestic software business, such profit, i.e. profit from eligible business would be computed as per the provisions of Sub-section (3) of Section 80HHE. Naturally, even if the assessee had derived profit from the business of any other goods or merchandise. turnover from that business would not be considered for the purpose of determining profit derived from export of computer software within the meaning of Sub-section (3) of Section 80HHE. Furthermore, Sub-section (3) of Section 80HHE will be applicable only in cases where the accounts are so maintained that profit derived from export of computer software is incapable of precise ascertainment. Where the profit on software export business carried on by the assessee is precisely ascertained and segregated from other profits of business on the basis of duly audited accounts, full deduction under Section 80HHE should be allowed without being affected by the profits/turnover in domestic software business. Learned Counsel thus submitted that direction may be issued to allow deduction under Section 80HHE by computing the quantum of the same on the basis of turnover of its export unit at SEEPZ, as claimed by the assessee.

30. Replying to the above, learned Departmental Representative supported the orders of the Revenue authorities and submitted that the action of the Revenue authorities to take the total turnover for the purpose of computation of eligible amount for deduction under Section 80HHE as the total turnover of the entire business of the assessee company, instead of total turnover only in respect of the undertaking profit, is in accordance with law. Learned Departmental Representative further submitted that Section 80HHE on this point is very clear.

31. We heard the rival submissions, gone through the orders of the Revenue authorities and the decisions cited. We find that only in the case of CIT v. Parry Agro Industries Ltd. (supra) the Hon'ble Kerala High Court has discussed the issue clearly in the case of an assessee who is keeping separate accounts relating to export and domestic trade. After discussing the issue, the Hon'ble High Court held that in computing the deduction under Section 80HHC, the total turnover of the entire business, including the tea estates from which the export profits derived, should be considered together. The direction of the Tribunal to restrict the turnover only to the Assam tea estate, if the entire sales from the said unit were export oriented, Hon'ble High Court held, is not in accordance with law.

32. As rightly contended by the learned Counsel, the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra) held : "where the assessee had maintained separate accounts and it had maintained its trading receipts and P&L a/cs separately for export sales and domestic sales and there was sufficient material supported by all the necessary documents to show that the deduction claimed was entirely due to export; there was no warrant for disallowing any portion of the export earnings pro rata by invoking Clause (b) of Sub-section (3) of Section 80HHC of the IT Act, 1961. The purpose of the clause was to disallow a part of the allowance under that section only when the entire deduction claimed could not be regarded as being relatable to exports". This decision of the Hon'ble Madras High Court supports the view canvassed by the assessee. The question referred to the Hon'ble High Court in the case cited supra was "whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that Clause (b) of Sub-section (3) of Section 80HHC of the IT Act, 1961, cannot be invoked in this case and the assessee is entitled to relief under Section 80HHC of the Act in respect of the entire export net profits ?". The decision of the Hon'ble Madras High Court in the case of CIT v. Rathore Brothers (supra) was not accepted by the AO on the ground that Revenue had gone in appeal against the aforesaid order.

33. Similar view was again expressed by the Hon'ble Madras High Court in the case of CIT v. Madras Motors Ltd./M M Forgings Ltd. (supra). This was a case wherein the assessee's business was not exclusively of the export out of India of the forgings. In other words, assessee was selling the forgings manufactured in India as well and earned domestic income. Dealing with the issue, the Hon'ble High Court held : "Sec. 80HHC of the IT Act, 1961, 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 . The legislature has intended the situation where the business could relate to goods which would fetch foreign exchange but there could also be business in relation to these goods which may not be exported or which may not fetch foreign exchange. The thrust of the opening clause of Clause (b) of Sub-section (3) of Section 80HHC of the Act, has a stress on the words 'does not consist exclusively of the export; The words 'total turnover of the business' would be controlled by and have to be read in the colour of the opening clause. 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. 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. Hence, it is impermissible to apply the section even to goods which are outside the limits of Clause (a) of Sub-section (2)". This decision also supports the view canvassed by the learned Counsel for the assessee.

34. Now coming to the argument of the Revenue that Sections 80HHC and 80HHE are similar and Sub-section (3) of both the sections, which provide for computation of eligible amount for deduction in terms of Sub-section (1) are identical; and, therefore, various judicial decisions pronounced in respect of Sub-section (3) of Section 80HHC are equally applicable for computation of eligible amount to be allowed as deduction under Section 80HHE(1), we are unable to agree with the blanket proposition. As rightly argued by the learned Counsel, Section 80HHC speaks of deduction to the extent of 'profits, referred to in Sub-section (1B), derived by the assessee from the export of such goods or merchandise whereas Section 80HHE speaks of deduction to the extent of the profits, referred to in Sub-section (1B) derived by the assessee from such business. Perusal of Sub-section (2) of Sections 80HHC and 80HHE brings out the difference, which reads as under:

80HHC	80HHE
(2)(a) This section applies to all goods or merchandise, other than those specified in Clause (b), if the sale proceeds of such goods or merchandise exported out of India are received in, or brought into, India by the assessee other than the supporting manufacturer in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf. behalf.	(2) The deduction specified in Sub-section (1) shall be allowed only if the consideration in respect of the computer software referred to in that sub-section is received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this

Sub-s. (2)(a) of Section 80HHC speaks of sale proceeds of such goods or merchandise exported ou

35. It is the case of the assessee that assessee company is exporting the computer software manufactured in SEEPZ unit. Assessee is keeping separate account. The entire activity of the assessee in this zone is independent from assessee's other business. There is no overlapping and mingling of the services or any link between the manufacturing activities of both. Both are exclusive of each other.

36. As lightly contended by the learned Counsel, Section 80HHC speaks of deduction in respect of profits derived by the assessee from export of such goods or merchandise; whereas Section 80HHE speaks of such business. 'Such business' only could mean the business of export of computer software. The scope of consideration has been narrowed down. In other words, whether the assessee

derives income from any other business or not, is not a criteria and it is wholly extraneous while granting deduction under Section 80HHE, which is exclusively for computing deduction in respect of profit from export of computer software etc. For the reasons stated hereinabove, we allow the claim of the assessee on this ground.

37. Coming to the next ground (ground Nos. 6 and 7) of objection by the assessee, it is directed against the order of the CIT(A) in confirming disallowance of prior period expenses amounting to Rs. 47,264.

38. It was the case of the assessee before the AO that though the liability pertained to earlier years, expenses were crystallised and accrued during the year under consideration as the bills were raised during this period. The claim of the assessee was rejected by the CIT(A) as the assessee failed to furnish any evidence to rebut the basis on which the disallowance was made by the AO.

39. Before us, learned Counsel submitted that the details of prior period expenses were annexed to the Tax Audit Report furnished under Section 44AB, filed along with the return, which explains the nature of expenditure, date of payment, amount and reasons for delay. The delay was due to late submission of bills by the respective payees. The liability was ascertained only during the year under consideration. Learned Counsel submitted, there is no quarrel that the deduction is otherwise allowable in computing income from business. Learned Counsel relied upon the decision of the Hon'ble Allahabad High Court in the case of CIT v. Apollo Textiles Agency .

40. The learned Departmental Representative, on the other hand, supported the orders of the Revenue authorities.

41. We heard the rival submissions. In the case of CIT v. Apollo Textiles Agency (supra), the Hon'ble Allahabad High Court held that the liability to pay an amount, which came into existence and accrued for the first time during the year under consideration is to be allowed though it pertains to earlier years. In view of the above, we are of the opinion that the appeal of the assessee on this ground is liable to be allowed. It is allowed.

42. Now coming to the second additional ground taken by the assessee, quoted hereinabove vide para 2 of our order, facts leading to the dispute, briefly, are as under:

The total tax payable by the assessee in accordance with intimation under Section 143(1)(a) dt. 21st March, 1995 was Rs. 8,39,528. Assessee paid TDS at Rs. 4,48,873 and advance tax of Rs. 59,00,000. An amount of Rs. 68,06,075, including interest of Rs. 13,17,288 under Section 244A was refunded. There was no interest under Section 234B payable by the assessee in terms of intimation under Section 143(1)(a).

43. According to the assessee, Section 234B(3), which reads as under:

234B(3) : Where, as a result of an order of reassessment or recomputation under Section 147 or Section 153A, the amount on which interest was payable under Sub-section (1) is increased, the

assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under Sub-section (1) of Section 143 and where a regular assessment is made as is referred to in Sub-section (1) following the date of such regular assessment and ending on the date of the reassessment or recomputation under Section 147 or Section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under Sub-section (1) of Section 143 or on the basis of the regular assessment aforesaid.

makes it clear that in case of reassessment under Section 147, interest under Section 234B is imposable only on the amount on which interest was payable under Section 234B(1) is increased. In other words, if the interest is not payable under Section 234B(1) at all because of the excess payment of TDS and advance tax, no interest under Section 234B(3) could be imposed. Assessee paid excess TDS and advance tax, which resulted in refund and no interest was levied under Section 234B.

44. Since this is purely a legal ground, we admit the same and proceed to decide the issue.

45. The issue has been discussed by the CIT(A) vide para 34 of his order, as under:

34. The submission made by the appellant's representative has been considered. A perusal of the computation reveals that the AO has prima facie calculated interest on the shortfall worked out on tax payable on the income determined in the assessment order under appeal as reduced by the tax payable on the income determined under Section 143(1)(a) of the Act w.e.f. 1st April, 1993. In doing so, the AO ignored the fact that till the date of order under Section 143(1)(a), i.e. 15th Dec, 1996 the appellant had paid advance tax in excess of the tax liability subsequently determined under Section 143(1)(a) of the Act. In doing so, the AO clearly has not determined the tax liability in terms of Section 234B of the Act. As provided in the said section, the tax liability under the section has to be determined upto the date of order under Section 143(1)(a) i.e. 15th Dec, 1996 in terms of Sub-section (1) of Section 234B of the Act and hence, the advance tax paid by the appellant is to be reduced from the tax determined in the order under appeal for working out the interest liability. For the remainder period i.e. from the date of order under Section 143(1)(a), i.e. 15th Dec, 1996 to the date of order under appeal interest chargeable is to be worked out in terms of Sub-section (3) of Section 234B of the Act based on the shortfall to be arrived at by reducing from the tax on income determined in the order under appeal the tax on the income determined in the order under Section 143(1)(a) of the Act. The AO is directed to rework the interest under Section 234B of the Act accordingly. However, since the levy of interest is consequential based on the tax on the income as finally determined in view of the relief granted in this appellate order, and the revised eligible amount for deduction under Section 80HHE of the Act the appellant shall get relief on this account as well. The appeal in respect of ground No. 9 is held as partly allowed.

Aggrieved by the above direction, assessee is in appeal before the Tribunal.

46. We heard the rival submissions. In the case of Haryana Warehousing Corporation v. Dy. CIT (2000) 69 TTJ (Del)(TM)859 : (2000) 75 ITD 155 (Del)(TM). the Tribunal held that the default in

payment of advance tax is a condition precedent for invoking the provisions of Section 234B. This was a case wherein assessee claimed certain exemptions and the Revenue allowed all the claims in the preceding years. Subsequently, after end of previous year relevant to the assessment year, Hon'ble Rajasthan High Court in the case of CIT v. Rajasthan State Warehousing Corporation , held that certain incomes were not eligible for exemption, which was approved by the Hon'ble Supreme Court on 1st April, 1999 in the case of Orissa State Warehousing Corporation v. CIT . Assessee's claim was disallowed by the AO on the basis of the decision of the Hon'ble Rajasthan High Court, which resulted in disallowing certain exemptions and consequently the tax liability increased. The Third Member held that during the relevant year under consideration it was impossible for the assessee to foresee future decision of the Hon'ble Supreme Court and the assessee could not be made liable to pay advance tax and as a result, case of the assessee fell beyond the ken of Section 208 and therefore no interest could be levied on the assessee for default in payment of advance tax.

47. In the case of CIT v. K.K. Marketing , the Hon'ble Delhi High Court held that in a case where the Revenue accepted the return filed by the assessee and in fact it was found that they were entitled to a refund, which was more than the amount of cash that was seized, there is no justification in charging interest under Sections 234B and 234C and it would be appropriate not to charge interest from the assessee. This was a case, wherein there was a search and seizure action in the premises of the assessee and during the search action huge amount of cash was recovered and so, when the payment of advance tax became due in September, 1993, the assessee requested the Department to adjust the cash seized towards advance tax. While passing the assessment order under Section 143(1)(a), it was held that the assessee was entitled to a refund. AO, however, charged interest from the assessee under Sections 234B and 234C. The Hon'ble Delhi High Court held that there was no justification.

48. Coming to the instant case of the assessee, it is not disputed that the assessee received a huge refund as a result of processing of the return under Section 143(1)(a). Subsequently, the tax component was enhanced as a result of the reassessment done under Section 143(3) r/w Section 147. As such, the decision of the Hon'ble Delhi High Court in the case of CIT v. K.K. Marketing (supra) is applicable on facts.

49. In the case of Balakrishna Breeding Farms (P) Ltd. v. Chief CIT , the Hon'ble Karnataka High Court, in the following circumstances, held that interest cannot be charged under Section 234B:

Assessee, engaged in the business of hatchery, claimed deduction under Sections 80HHA and 80-I for the asst. yrs. 1993-94 to 1995-96 and 1997-98. The claim was based on the decision of the jurisdictional High Court. Subsequently, the Hon'ble Supreme Court reversed the judgment of the jurisdictional High Court, wherein it was held that units engaged in poultry farming or hatcheries did not manufacture any article or thing and they were not entitled to deduction under Sections 80HHA and 80-I. AO issued notice under Section 148. On receipt of the notice, assessee deposited all the tax payable. Assessment was completed and interest was charged under Section 234B. Assessee approached the Chief CIT with waiver petition and the Chief CIT waived the interest partly. On appeal, their Lordships of the Hon'ble Karnataka High Court held "that there is no provision in the Act requiring the assessee to file a revised return of income in regard to the relevant assessment years after the Supreme Court had reversed the judgment of the High Court. It was for the AO to

issue a notice under Section 148 to assess the escaped income. Notice under Section 148 was issued to the assessee only on 27th Dec, 2000, and the assessee filed its revised returns within the time allowed by that notice and the assessments were completed. The tax that became due in terms of the revised returns had also been paid within time and thus no delay could be attributed to the assessee. The Chief CIT should have waived the entire interest that was levied by the AO. The order of the single Judge affirming that of the Chief CIT could not be sustained. Thus, the interest levied on the assessee under Section 234B was waived.

50. Coming to the instant case, there is no default on the part of the assessee in paying the advance tax. For the first time the dispute arose consequent to the reassessment done under Section 143(3) r/w Section 147. The stand of the Revenue is that charging of interest under Section 234B is mandatory. Mandatory does not mean that it is mandatory under all circumstances. It is mandatory when the conditions are fulfilled. The condition is that the assessee should have defaulted. If the assessee has not anticipated reopening or the assessee has not anticipated a superior Court decision, which goes against the assessee, it is difficult to hold that such an assessee is a defaulter. If the assessee takes due diligence and care and makes the payment and if it is accepted by the Revenue, such an assessee cannot be held as a defaulter only because subsequently the assessee's income has been enhanced.

51. In the case of CIT v. Sedco Forex International Drilling Co. Ltd. (Uttaranchal), the Hon'ble Uttaranchal High Court held that where there exist a bona fide dispute, imposition of interest under Section 234B was not justified without a hearing and without reasons. In other words, if there are conflicting views on a point, by virtue of decision of the Tribunal, High Court or Supreme Court, imposition of interest under Section 234B could not be justified without affording a hearing. The finding of the Hon'ble High Court reads as under:

That at the relevant time there were conflicting decisions of the Tribunal as to the interpretation of contracts regarding on-period and off period salary. A bona fide dispute was pending. The assessee had to estimate his current income. The words used under Section 209(1)(a) made the assessee estimate his current income and since a bona fide dispute was pending which, was clarified by the legislature by the Finance Act, 1999, imposition of interest under Section 234B was not justified without a hearing and without reasons.

52. The same principle, we are of the view, is applicable in the instant case of the assessee. When the return was processed under Section 143(1)(a), assessee was entitled for refund of fairly large amount. Subsequently the assessment was reopened and the liability of the assessee increased as a consequence of this. The case of the assessee is that, to charge interest, first of all there should be a liability on the part of the assessee and assessee should be in default.

53. Section 234B reads as under:

234B(1): Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under Section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of Section 210 is less than ninety per cent of the assessed

tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under Sub-section (1) of Section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1 : In this section, "assessed tax" means the tax on the total income determined under Sub-section (1) of Section 143 or on regular assessment as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income.

Explanation 2 : Where, in relation to an assessment year, an assessment is made for the first time under Section 147 or Section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

(2) ...

(3) Where, as a result of an order of reassessment or recomputation under Section 147 or Section 153A, the amount on which interest was payable under Sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under Sub-section (1) of Section 143 and where a regular assessment is made as is referred to in Sub-section (1) following the date of such regular assessment and ending on the date of the reassessment or recomputation under Section 147 or Section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under Sub-section (1) of Section 143 or on the basis of the regular assessment aforesaid."

(4) ...

54. Perusal of Expln. 2 to Section 234B(1) makes it clear that if an assessment is made under Section 147 or under Section 153A for the first time, then the assessment so made shall be regarded as a regular assessment for the purpose of Section 234B. In other words, in case of an assessee where the assessment has already been completed and the refund has already been done as far as the excess payment concerned, the reassessment done subsequently under Section 147 or Section 153A, interest cannot be charged for the first time if the assessee could not have anticipated the enhancement of income, even if the assessee had taken due care and diligence. This is clear from the decisions cited supra in the case reported in (2000) 69 TTJ (Del)(TM)859 : (2000) 75 ITD 155 (Del)(TM) (supra); (supra); (supra) and CIT v. Hyundai Heavy Industries Co. Ltd. (Uttaranchal). If the circumstances were such that if the assessee had taken due care and diligence, assessee would not have defaulted in making advance tax under Section 206 or the payment of advance tax would not have fallen 90 per cent of the assessed tax as contemplated under Section 210, then the assessee

becomes a defaulter. The decisions cited supra makes it clear that if the assessee could not have contemplated such a situation, charging of interest under Section 234B cannot be justified.

55. This all the more supports the assessee's counsel's argument that charging of interest under Section 234B is not mandatory always. It is mandatory only in the first instance in the case of an assessee, who has not filed the return and consequentially notice under Section 147 was issued or in the case of an assessee, who was assessed to tax but the taxable income was enhanced as a consequence of search or requisition.

56. Reading of Section 234B(3) makes it clear that where, as a result of an order of reassessment or recomputation under Section 147 or Section 153A, the amount on which interest was payable under Sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent.... The reading of the section further makes it clear that first of all there should be a default on the part of the assessee in the regular assessment and the assessee should have been held liable to pay interest under Section 234B. In that case, if there is reassessment or recomputation under Section 147 or Section 153A, the liability of the assessee is increased and not otherwise.

57. We are of the view, for the reasons stated hereinabove, the claim of the assessee is liable to be allowed. Hence, the appeal of the assessee on this ground is allowed.

58. In the result, appeal of the assessee stands allowed in part.

ITA No. 6678/Mum/2003:

59. The first ground of objection by the Revenue is directed against the order of the CIT(A) in deleting the addition of Rs. 31,90,000 made on account of bad debts written off.

60. The issue has been discussed by the CIT(A) vide paras 17 to 23 of his order, briefly, as under:

The claim of the assessee was disallowed by the AO on the ground that the same was not accounted for in the books of account of the assessee on accrual basis. Before the CIT(A), assessee submitted, assessee was appointed as registrar and transfer agents by M/s Finolex Pipes Ltd. Assessee was processing the folios of shares of the said company and was also maintaining the same. For these, assessee was charging the client company Rs. 2,55,555 as monthly fixed folio maintenance fees. During the year under consideration, the said company came with a rights issue of Rs. 180.32 crores. This was the first year of new mode of payment being stock invest instruments. Instruments value received was Rs. 54,30,420. The instruments could not be encashed in time and became stale due to clerical errors etc. In fact, the bankers did not standardize the format of stock invest. There were procedural differences for deposing the stock invests in various banks. As a result, the concerned banks returned the instruments deposited after several weeks for resorting, preparation of fresh list, etc. This process continued several times resulting in lapse of time and the stock invest became stale. Assessee was held accountable for loss of Rs. 54.30 lakhs by M/s Finolex Pipes Ltd. and refused to pay fixed folio maintenance charges, as well as processing charges of Rs. 8,94,186 on rights issue. The client company found fault with the assessee to avoid payments of processing

charges, fixed monthly folio maintenance fees, etc. and terminated the appointment of the assessee as its registrar and transfer agents. All assessee's attempts became futile.

CIT(A) noted that the AO made the disallowance on the ground that the amount has not been offered for taxation. He held, AO ignored the fact that the liability written off had arisen in the accounting year under consideration itself. Relying upon the decision of the Hon'ble Calcutta High Court in the case of CIT v. Coats of India Ltd. and the decision of the jurisdictional High Court in the case of CIT v. Jethabhai Hirji & Jethabhai Ramdas held that the write-off was bona fide and the claim of the assessee is allowable. Aggrieved by the above order, Revenue is in appeal before the Tribunal.

61. Learned Departmental Representative supported the order of the AO.

62. Learned Counsel for the assessee submitted that the assessee had no chance of recovering the aforementioned amount. Assessee had no choice but to treat it as irrecoverable and write off as bad debt. This was a bona fide act, which could not be questioned. Learned Counsel submitted, if any portion of the amount is recovered in future, Revenue can take recourse to Section 41(1) to bring the same into tax net. The amounts receivable from M/s Finolex Pipes Ltd., as per the invoices raised by the assessee, were duly credited to the processing fees account, which was subjected to audit. There was no qualification in the auditors' report stating that the write off was not on business consideration.

63. Considering the rival submissions and going through the facts, we find that the issue has to go in assessee's favour in the light of the Special Bench decision of the Tribunal in the case of Dy. CIT v. Oman International Bank . Hence, the appeal of the Revenue on this ground fails and dismissed.

64. The second ground of objection by the Revenue is directed against the order of the CIT(A) in deleting the addition of Rs. 5,10,781 on account of doubtful advances given to the employees, which were written off.

65. This issue has been discussed by the AO vide para 18 of his order, as under:

18. As regards doubtful advances amounting to Rs. 5,10,781 written off, assessee's explanation that those employees to whom these advances were given have left the job is not acceptable. The assessee was in possession of the whereabouts of these employees. The assessee has neither proved that the advances were given to those employees nor furnished the details of the action taken by them to recover these advances. In view of the above, the claim of the assessee is disallowed and the amount of Rs. 5,10,78 is added to the total income.

Aggrieved by the above order, the matter was carried before the first appellate authority.

66. Assessee contended before the CIT(A) that the claim of deduction is in respect of doubtful advances given to the employees who were sent abroad on company's project but left the company without informing. Such advances could not be recovered and the assessee was forced to write off.

This is a loss incidental to the business and hence admissible, it was contended. Assessee relied upon the decision of the Hon'ble Supreme Court in the case of Ramchander Shivnarayan v. CIT .

67. CIT(A) noted that these small sums were advanced to ex-employees, who left the assessee without informing. There is no chance of recovery. CIT(A) agreed with the assessee's contention that this was a loss that has arisen in the course of business. Hence, he allowed the claim of the assessee. Aggrieved, Revenue is in appeal before the Tribunal.

68. Learned Departmental Representative supported the order of the AO.

69. Learned Counsel for the assessee submitted that some of the employees, who went abroad, were paid USD 500, which was the amount permitted by RBI as advance against expenses. Some of the employees left the job without informing the assessee or not agreed to repay the amount.

70. Considering the rival submissions, we are of the view that there is no reason to disturb the order of the learned first appellate authority on this point. Assessee made the payments to its employees, who subsequently left the service without, informing the assessee or making the repayment. Hence, the appeal of the Revenue on this ground fails and dismissed.

71. The third ground of objection by the Revenue is directed against the order of the CIT(A) in deleting the addition of Rs. 18,69,207 being commission paid to foreign parties, which were not found genuine by the AO.

72. This issue has been discussed by the AO vide para 19 of his order, which reads as under:

19. Regarding the payment of Rs. 18,69,207 under commission on sales, assessee has furnished the details of the parties to whom these payments were made. It is seen that all the recipients of the commission are located outside India and the payments are made for services rendered outside India. It is further stated that the payments are made through RBI. However, no supporting evidence has been furnished by the assessee. Moreover, since these parties are situated outside India, the genuineness of the payment and the nature of services rendered cannot be verified at this stage. Further, the assessment is getting barred by limitation. Therefore, the claim of the- assessee is disallowed being unverifiable.

Aggrieved by the above order, assessee approached the learned first appellate authority.

73. Before the CIT(A), assessee submitted that the commission paid to foreign parties was in respect of sales made to customers, introduced by such foreign parties. These payments were remitted through authorised banking channels, which could have been very well verified. Only after verifying the relevant documents and certifying that the payments were in terms of RBI regulations, commission payments were made. Hence, it was contended that the addition made should be deleted.

74. Considering the fact that the payments were made through banking channel, which at the relevant point of time could be only done after the bank satisfied themselves regarding the genuineness of the payments; and the assessee produced copy of bank vouchers/bank intimation, CIT(A) deleted the addition. Aggrieved by the above order, Revenue is in appeal before the Tribunal.

75. Learned Departmental Representative supported the order of the AO.

76. Learned Counsel for the assessee reiterated the submission made before the CLT(A) and further submitted that the assessment was getting time-barred and the AO was in a hurry and therefore he could not make proper enquiries.

77. We heard the rival submissions considering the fact that the payments were made through the banking channel as per the RBI regulations prevailing at that point of time which could only be made after the bank satisfied themselves about the genuineness of the payments and further considering that the bank vouchers/intimations were placed on record, we are of the view that there is no reason to disturb the order of the learned first appellate authority on this point. The appeal of the Revenue, hence, on this ground fails and dismissed.

78. In the result, appeal of the Revenue stands dismissed. IT A No. 1598/Mum/2005:

79. In this appeal, the assessee has taken the following two grounds:

On the grounds and in the circumstances of the case, the learned CIT(A)-VIII [CIT(A)]:

1. erred in confirming the levy of interest under Section 234B, without considering the submission of the appellant that additional tax liability has arisen consequent to the judicial decision subsequent to the filing of original return and hence, interest under Section 234B in respect of enhanced tax liability is not justified.

2. erred in confirming the action of the AO in levying interest under Section 234B of the Act, without directing to grant credit of TDS, advance tax and self assessment tax paid at the time of filing the return while computing the interest under Section 234B.

3. erred in confirming the calculation of interest under Section 220(2) of the Act made by the AO.

80. Coming to the first ground (ground Nos. 1 and 2) of objection by the assessee, in this case, in the original assessment, there was a refund. Subsequently the assessment was reopened under Section 147. AO charged interest to the tune of Rs. 1,24,14,234 resorting to Section 154 of the IT Act, 1961, against the interest charged originally in the reopened assessment at Rs. 44,83,792.

81. While dealing with the issue hereinabove in assessee's appeal in ITA No 6616/Mum/2003, we have already held that the assessee is not liable to pay interest under Section 234B(3). In view of the above, this ground of appeal by assessee is dismissed as infructuous.

82. Coming to the next ground (ground No. 3) of objection by the assessee, i.e. calculation of interest under Section 220(2), learned Counsel submitted, he is under instruction not to press this ground. Hence, the appeal of the assessee on this ground is dismissed as not pressed.

83. In the result, appeal of the assessee stands dismissed as indicated above.

ITA No. 1672/Mum/2005:

84. The only effective ground urged by the Revenue reads as under:

On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to recompute the interest chargeable under Section 234B, without appreciating the facts of the case and without appreciating the provisions of Sub-section (3) of Section 234B of the IT Act, 1961, which explicitly provides 'where, as a result of an order of reassessment or recomputation under Section 147 or Section 153A, the amount on which interest was payable under Sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of month comprised in the period commencing on the day following the date of determination of total income under Sub-section (1) of Section 143 and where a regular assessment is made as is referred to in Sub-section (1) following the date of such regular assessment and ending on the date of the reassessment or recomputation under Section 147 or Section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under Sub-section (1) of Section 143 or on the basis of the regular assessment aforesaid.

85. This appeal by the Revenue is liable to be dismissed for the reasons stated hereinabove in assessee's appeal in ITA No. 6616/Mum/2003, that charging of interest under Section 234B for the first time was not justified. Hence, the appeal of the Revenue fails and

86. In the result, appeal of the Revenue stands dismissed.