Panasonic Energy India Co.Ltd, Baroda vs Assessee on 15 October, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL,
" D " BENCH, AHMEDABAD
Before Shri G. C. GUPTA, HON'BLE VICE PRESIDENT
and Shri A. K. GARODIA, ACCOUNTANT MEMBER
I.T.A. No.45 / Ahd/2009 & 46/Ahd/2009
(Assessment year 2003-04 & 2004-05)

M/s. Panasonic Energy India Co. Ltd., Formerly: Matsushita Lakhanpal Battery India Co. Ltd., GIDC, Makarpura, Vadodara	ACIT, Circle 4, Baroda

I.T.A. Nos. 317 & 318/Ahd/2009
(assessment year 2003-04 & 2004

ACIT, Circle-4, Baroda	Vs.	M/s. Panasonic Energy India Co. Ltd. Formerly: Matsushita Lakhanpal Battery India Co. Ltd., GIDC, Makarpura, Vadodara

PAN/GIR No. : AAACL3332K

(APPELLANT)	..	(RESPONDENT)
Appellant by:		Shri Milin Mehta, AR
Respondent by:		Shri D P Gupta, CIT DR

Date of hearing: 15.10.2012
Date of pronouncement: 30.11.2012
ORDER

PER SHRI A. K. GARODIA, AM:-

These are cross appeals of the assessee and the revenue for two assessment years which are directed against two separate orders of Ld. CIT(A) III, Baroda both dated 03.11.2008 for the assessment years 2003- 04 & 2004-05. All these appeals were heard together and are being disposed off by way of this common order for the sake of convenience.

2. First, we take up the appeal of the assessee for the assessment year 2003-04 in I.T.A.No. 45/Ahd/2009.

2.1 Ground No.1 is general. Ground No.2 is as under:

> "2. The learned CIT(A) erred in fact and in law in confirming action of the AO in disallowing payment of Rs. 40,709/- being amortization of premium paid for land taken on lease on the ground that the same represents capital expenditure."

2.1.1 At the very outset, it was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the tribunal order in assessee's own case for the assessment year 2002-03, copy of which is available on page 485 of the paper book and the relevant para of the tribunal order is para 8.4. He also submitted that this issue is also covered in favour of the assessee by the judgement of Hon'ble Gujarat High Court rendered in the case of Sun Pharmaceutical Ind. Ltd. Vs DCIT 24 DTR 262. 2.1.2 Ld. D.R. supported the orders of authorities below. 2.1.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. Since this issue is squarely covered in favour of the assessee by the tribunal order in assessee's own case for the assessment year 2002-03, the disallowance made by the A.O. and confirmed by Ld. CIT(A) cannot be sustained and hence, we delete the same. This ground of the assessee is allowed. 2.2 Ground No.3 is as under:

"3. The Learned CIT(A) erred in fact and in law in confirming the action of the AO in making ad hoc disallowance of Rs. 84,908/- being 10% of Miscellaneous Expenses on the ground of non- business use."

2.2.1 It was fairly admitted by the Ld. A.R. that this issue is covered against the assessee by the same Tribunal order in assessee's own case for the assessment year 2002-03 and the relevant para is para 6.3.

Accordingly, this ground of the assessee is rejected by following the tribunal order in assessee's own case for the assessment year 2002-03. 2.3 Ground No.4 is as under:

> "4. The Learned CIT(A) erred in fact and in law in confirming the action of the AO in making ad hoc disallowance of Rs.2,08,999/- out of Welfare Expenses."

2.3.1 It was fairly admitted by the Ld. A.R. that this issue is covered against the assessee by the same tribunal order in assessee's own case for the assessment year 2002-03 and the relevant para of the Tribunal order is para 6.3. Accordingly, this ground of the assessee is also rejected by following the earlier year tribunal order.

2.4 Ground No.5, 5.1 and 6 are interconnected, which are regarding deduction claimed by the assessee u/s 80-IB of the Income tax Act, 1961. It was submitted by the Ld. A.R. that ground No.5.1 is not pressed and accordingly, the same is rejected as not pressed. Remaining grounds No.5 & 6 are as under:

> "Deduction u/s. 80IB:
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> 5. The Learned CIT(A) erred in fact and in law in confirming the action of the AO in holding that the following amounts are not eligible for deduction u/s 80IB of the Income Tax Act, 1961 ["the Act"] on the ground that these incomes are not derived from the business of the industrial undertaking:

Sr.No:	Particulars	Amount (In Rs.)

1	Interest on staff loan	28,261
2	Insurance Claim	8,13,129
3	Discount Receipt	13,03,545
	Total	21,44,935

6. The learned CIT(A) erred in fact and in law in confirming action of the AO in considering repairs to building amounting to Rs.1,64,032/- as capital expenditure instead of revenue expenditure as claimed by the appellant."

2.4.1 It was submitted by the Ld. A.R. that there are three issues involved regarding the claim of the assessee for deduction u/s 80-IB which was rejected by the authorities below. He submitted that the first issue is regarding income of the assessee on account of interest on staff loan of Rs.28,261/-. He fairly conceded that this aspect of the matter is covered against the assessee by the tribunal order in assessee's own case for the assessment year 2002-03 and the relevant para of the Tribunal order is para 13.4. Accordingly, this part of this ground is rejected. 2.4.2 He further submitted that the 2nd aspect of the matter is regarding the income of the assessee on account of insurance claim of Rs.8,13,129/- . He submitted that this aspect of the matter is covered in favour of the assessee by the decision of Special bench of the Tribunal rendered in the case of Nirma Industries Ltd. Vs ACIT as reported in 295 ITR 199 (Ahd.)(AT). Ld. D.R. could not point out any difference in facts in the present case and in the case of Nirma Industries Ltd.(supra). Hence, by respectfully following this decision of Special bench of the Tribunal, this aspect of the matter is decided in favour of the assessee. 2.4.3 He further submitted that the 3rd aspect of the matter is regarding income of the assessee on account of discount received of Rs.13,03,545/-. He submitted that it is reduction in purchase price and not in the nature of income and this aspect of the matter is covered in favour of the assessee by the same Tribunal order in assessee's own case for the assessment year 2002-03. He further submitted that the relevant para is para 13.6 of the tribunal order which is available on page 493 of the paper book.

2.4.3.1 We have considered rival submissions and on merit, the assessee has a case for items no. 2 & 3 i.e. Insurance Claim and Discount Receipt but the A.O. has disallowed deduction u/s 80IB on this basis that mandatory Form No. 10CCB was not submitted even before completion of assessment proceedings and this issue is raised by Revenue in Gr. 1 of its appeal and hence no deduction is allowable to assessee u/s 80IB if the Revenue succeeds in Gr. 1 of its appeal. Otherwise, the A.O. should allow deduction for these two items. Held accordingly. 2.4.4 Regarding ground No.6, it was submitted that these repairs are in the nature of replacement of worn out parts of the building such as replacement of old tiles, fabrication and leveling charges etc. He drawn our attention to para 5.3 of the tribunal order in the assessee's own case for the assessment year 2001-02 and 2002-03 which is available on page 500 of the paper book. Ld. D.R. supported the orders of authorities below.

2.4.5 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the tribunal decision rendered in the assessee's own case for the assessment year 2002-03. In that year also, in respect of repairs to building, the claim of the assessee was regarding PVC carpet flooring, repairs and replacement of old tiles, carpeting of LPG area etc and in that year, this issue was decided against the assessee. Accordingly, in the present year also, we do not find any reason to interfere in the order of Ld. CIT(A) and hence, this ground of the assessee is rejected.

2.5 Ground No.7, 7.1 and 7.2 are in respect of distribution of free cells. The brief facts of the case till the assessment stage of this issue are noted by Ld. CIT(A) in para 7 and 7.1 of his order which are reproduced below:

> "7. Ground No. 6 relates to the disallowance of quantity discount u/s 40A(2)(b).
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> 7.1 It was stated by the Assessing Officer that quantity record attached with the BCD report u/s 44AB along with the return of income shows that assessee has given quantity of free dry cells as per their sales scheme. The assessee was asked to give details of free cells given to its distributors. It was stated by the assessee that free cell scheme was given to the distributors on the basis of the performance. The assessee company has submitted details of free ceils given to its distributor M/s Lakhanpal P. Ltd. M/s Lakhanpa! P. Ltd is also an associate concern covered u/s 40A(2)(b) of the Act. On perusal of replies received from M/s Lakhanpal P. Ltd does not take these free cells received under the scheme of free cells in their stock register and ail the free ceils are passed on to their stockist on pro-rata basis. It was stated by the Assessing Officer that the assessee has not submitted evidences relating to monitoring of the free ceils given to M/s Lakhanpal P. Ltd being a persons covered u/s 40A(2)(b) though free cells given to other distributors to pass on to the respective stockists are proved by these parties. Therefore, free cells given to M/s Lakhanpal P. Ltd numbering 71,01,456 valuing Rs.3,00,39,158/- on the basis of average sale cost of cells amounting to 4.234 per cell was disallowed by the Assessing Officer and added to the total income."

2.5.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) but without success and now, the assessee is in further appeal before us.

2.5.2 It was submitted by the Ld. A.R. that the assessee has distributed free dry cells in the form of quantity discount as per incentive scheme to various distributors including M/s. Lakhanpal Pvt. Ltd. He further submitted that the A.O. has invoked the provisions of Section 40A(2b) and applied notional sale price to the quantity of free cells and worked out the addition. It was further submitted that Section 40A(2b) can be applied in case of claim for expenditure and not to discount allowed on sale and in the present case, there is no expenditure incurred by the assessee. He also submitted that in the earlier years, the department has accepted the claim of the assessee and there is no change in the facts in the current year as compared to past several years. This was also submitted that the scheme is universal and the assessee has offered such scheme to other distributors also and all the

distributors including parties covered u/s 40A(2b) were allowed quantity discount under identical terms. The A.O. has presumed that free cells distributed to M/s. Lakhanpal have to be distributed by the said party and therefore, disallowance was required to be made in the hands of the assessee. Reliance was placed on the following judicial pronouncements in support of this contention that discount on sale is not the expenditure.:-

(a) EWAC Alloys Ltd. Vs DCIT 42 ITD 218 (Bom)
(b) Vikshara Trading & Investment (P) Ltd. v. DCIT 61 TTJ 6 (Ahd.)
(c) CIT VS A K Subbaraya Chetty & Sons 123 ITR 592 (Mad.)
(d) CIT Vs Udhoji Shrikrishnadas 139 ITR 827 (MP)
(e) United Exports Vs CIT 229 CTR 93 (Del.)
(f) ACIT Vs Grandprix Fab (P) Ltd. 128 TTJ 60 (Del.)

2.5.3 As against this, Ld. D.R. supported the orders of authorities below. 2.5.4 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the various judgements cited by the Ld. A.R. of the assessee. We find that a clear finding is given by Ld. CIT(A) in para 7.3 of his order that as per the scheme, discount is to be passed on to the stokist but on verification, the A.O. found that all other distributors have submitted details of free cells distributed by them but reply received from M/s. Lakhanpal P. Ltd. stated that they had not taken free cells in the stock although passed on the same to the stokists. He has also noted in the same part that as per the circular issued by the assessee on 31.12.2002, for the claim for the month of Jan 2003, it was stated that the free cells scheme is on the basis of sales at the point of stokist and, therefore, details of free cells passed on to various stokists is necessary to determine whether free cells were actually passed on or not. Regarding this argument of the assessee that distribution of free cells is by way of quantity discount and, therefore, the same is not covered u/s 40A(2b), it was decided by Ld. CIT(A) that the assessee has claimed costs in respect of distribution of free cells in the P & L account and, therefore, it amounts to claim of expenses. Now, we examine the applicability of various judgements cited by the assessee in the facts of various cases as noted above.

- The first decision cited by the Ld. A.R. is the Tribunal decision rendered in the case of EWAC Alloys Ltd. Vs DCIT (supra). The facts of this case are that the terms and conditions of the agreement between the assessee and LT were approved by the Government of India. Under these facts, it was held that there was no justification in that case for taking the view that the terms and conditions of the agreement approved by the Government of India were unreasonable and therefore they were to the disadvantage to the shareholders of the assessee company. The facts of the present case are different and hence, this judgement is of no help to the assessee in the present case.

- Reliance was also placed on the judgement of Hon'ble Madras High Court rendered in the case of CIT Vs A K Subbaraya Chetty & Sons (supra). As per the facts of this case, it was the case of the revenue that partners of two firms were closely related and sales by one firm to another was found to be at lower price and for difference between actual price and the price at which goods were sold it was held that this is not an expenditure which can be disallowed. In the present case, there is no dispute regarding sale price. The dispute is regarding free samples given by the assessee to related pay along with other parties which were not related and such free cells were to be passed on to the

stockists. All other parties who were not related to the assessee had furnished full details regarding passing on of such free cells to the stockists but the related party has not provided those details and it was simply stated by that party that such free cells were not taken into stock by the related party and hence, they cannot provide the details regarding passing on the same to the stockists. Since the facts in the present case are different, this judgement of Hon'ble Madras High Court is also not of any help to the assessee in the present case. In the present case, more than this aspect that such free cells were given to the related party, such addition is called for even if such cells are given to a non related party because the terms & conditions are not fulfilled by that party and no details are brought on record to show that the terms and conditions are fulfilled by this party because in that situation, it has to be accept4ed that the assessee failed to establish that such free cells were given for business consideration. Hence, this judgement is also not applicable.

- The next decision cited by the Ld. A.R. is the judgement of Hon'ble MP High Court rendered in the case of CIT Vs Udhoji Shrikrishnadas (supra). In that case, the assessee appointed sole selling agent for bidies on payment of commission and it was the case of the revenue that apart from paying the commission to this sole selling agent, bidies sold to him were at less than market price. Under these facts, it was held that profit earned by the selling agent by sale of bidies is not additional commission and the expenditure incurred by the assessee. In the present case, this is not the case of the revenue that the sale price charged by the assessee is lower than the market rates and hence, this judgement is also not applicable in the present case.

- Reliance was also placed on the tribunal decision rendered in the case of Vikshara Trading & Investment (P) Ltd VS DCIT (supra). We find that this judgement is also not applicable in the present case because the facts are different. In that case, the assessee purchased export quality detergent supplied by M/s. Green Products, one of the sister concerns of the assessee company and necessary evidence were filed before the A.O. but the authorities mistook the goods of a local/inferior quality of detergent supplied and compared the prices. Since the facts are different to that of the present case, this judgement is also not applicable in the present case.

- The next judgement cited by the assessee is the decision of the Tribunal in the case of ACIT Vs Grandprix Fab (P) Ltd. (supra). The headnotes of this decision are as under:

> "Business expenditure--Disallowance under s. 40A(2)--Trade discount allowed to sister concern--Discount allowed by assessee worked out to about 9.97 per cent of total sales--AO allowed discount only to the extent of 5 per cent and disallowed the remaining amount under s. 40A(2) --Not justified--Similar disallowance has been deleted by the CIT(A) and the Tribunal in the earlier years--Moreover, this is a case of trade discount allowed to a sister concern on sale made to it, and not a case of any business expenditure paid to sister concern, and as such, provisions of s. 40A(2)(a) are not applicable--Also the AO has not been able to prove that the discount allowed by the assessee to the sister concern was excessive or unreasonable having regard to / the commercial practice prevailing in the market--Disallowance rightly deleted by CIT / (A)-United Exports vs. CIT (2009) 28 DTR (Del) 315 followed."

In the present case, the dispute is for free cells and not trade discount. Hence, this judgement is not applicable.

- The next judgement cited by the Ld. A.R. is the judgement of Hon'ble Delhi High Court rendered in the case of United Exports Vs CIT (supra). The headnotes of this case are as under:

> "Business expenditure--Disallowance under s. 40A(2)--Trade discount--A discount of 11 per cent was allowed in earlier year when the sales to sister concern was Rs. 2.09 crores as compared to Rs. 8.30 crores made to others--In the current assessment year the sales to sister concern was Rs. 11.11 crores and to others it was Rs. 2.09 crores--Further, it is not unknown in trade circles to give bulk discount for bulk sales--There was also no rationale or basis or any logic of the authorities below in unilaterally deciding a disallowance by reducing the entitlement from 11 per cent as claimed by the assessee to 3 per cent (by the AO), 8 per cent [by the CIT(A)] and 5 per cent (by the Tribunal)--That apart, trade discount is not an expenditure and therefore s. 40A(2) was not attracted at all."

In the present case also, the dispute is for free cells and not trade discount. Hence, this judgement is also not applicable. Hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. These grounds are rejected.

2.6 Grounds No.8, 9, 9.1, 9.2 and 9.3 are connected with disallowance of royalty of Rs.4,45,53,651/- by invoking the provisions of Section 40A(2b) of the Income tax Act, 1961.

2.6.1 It was submitted by the Ld. A.R. that the TPO has made addition on account of payment of royalty on the ground that the assessee did not provide details of cost of development of technology by the separate enterprise and the information relating to payment of royalty by other group companies. He further submitted that this matter may be restored back to the file of the TPO for afresh decision. Ld. D.R. supported the orders of authorities below.

2.6.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this is the admitted position of facts that various details called for by the TPO were not submitted by the assessee before him. Ld. CIT(A) has also noted that the relevant information asked for by TPO were not submitted by the assessee before T.P.O. but he has not mentioned anything on this aspect that the information called for by the TPO was submitted before him.. It is submitted by the Ld. A.R. that these documents were furnished before Ld. CIT(A) as per page 391-400 of the paper book. When we examined these pages of the paper book, we find that on page 391 is a letter dated 15.6.2009 whereas the order of Ld. CIT(A) is dated 3.11.2008 and hence, this cannot be submitted before Ld. CIT(A). On page 391 also is the letter dated 21.07.2009 and on page 398 is the letter dated 21.7.2009. On pages 393-397 are the enclosures to letter dated 21.07.2009 available on paged 392 of the paper book and similarly on pages 399-400 are the attachments to letter dated 21.07.2009 available on page 398 of the paper book and hence, none could have been submitted before the Ld. CIT(A) because the order was passed by Ld. CIT(A) on 03.11.2008 i.e. well before the dates of these letters as noted above. Before

us also, these documents are not submitted properly as fresh evidence by complying with the relevant Tribunal Rules i.e. sub- rule (4) of Rule 18 of the Appellate Tribunal Rules 1963 and there is no application made for admission of additional evidence before us and hence, these documents being additional evidence are not admitted.

2.6.3 It is also submitted in the chart submitted by the Ld. A.R. that data in respect to ALP regarding payment of royalty is also submitted during the appellate proceeding as per the documents available on pages 415-430 of the paper book. These documents on pages 415-430 of the paper book are dated 31.10.2008 and the order of Ld. CIT(A) is dated 03.11.2008. There is no covering letter available in the paper book indicating that these documents were submitted before Ld. CIT(A). There is no mention in the order of Ld. CIT(A) regarding these documents and we have already seen that the documents on pages 391-400 of the paper book claimed to have been submitted before Ld. CIT(A), could not have been submitted before Ld. CIT(A) because those documents are of June-July 2009 and these documents on pages 415-430 are dated 31.10.2008 i.e. before the date of the order passed by Ld. CIT(A) on 03.11.2008 but in the absence of the evidence regarding actual submission of these documents before Ld. CIT(A), it cannot be accepted that these documents were submitted before Ld. CIT(A). The assessee could have brought out evidence on record in this regard by bringing certified copies of the documents if available in the file of Ld. CIT(A) but no such attempt has been made by the assessee. Under these facts, we do not find that any case has been made out by the Ld. A.R. for restoring the matter back to the file of Ld. CIT(A). Additional evidence filed before us are not admitted by us because the same is not in compliance with the relevant Tribunal Rules 1963 as mentioned above and therefore, we do not find any reason to interfere in the order of Ld. CIT(A) on his issue because the claim of the assessee was rejected by TPO on this basis that the required evidences were not produced before him and, therefore the order of TPO/A.O. was confirmed by Ld. CIT(A) on this basis that TPO has rightly asked for these documents and since the same were not furnished before him, disallowance was rightly made by him because it is the onus of the assessee to prove that the transactions are at ALP and if the assessee is not able to prove the same, there is no reason for not making the adjustment. Before us also, apart from making these submissions that necessary documents were filed before Ld. CIT(A), no other argument is made to justify interference in the order of Ld. CIT(A) and we have already seen that this claim of assessee is not correct that those documents were furnished by the assessee before Ld. CIT(A) and before us also, these documents are not submitted by way of compliance of the relevant Tribunal rules and, therefore, the same are not admitted by us and hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. These grounds of the assessee are rejected. 2.7 Ground No.10 is as under:

> "10 The learned CIT(A) erred in fact and in law in confirming action of the AO in adding sale of scrap generated from manufacturing activities amounting to Rs. 18,66012/- in total turnover for computing deduction u/s. 80HHC of the Act."

2.7.1 It was submitted by the Ld. A.R. that the Tribunal in assessee's own case has followed the judgement of Hon'ble Apex Court rendered in the case of CIT vs K Ravindranathn Nair as reported in 295 ITR 228 and decided that the assessee is not eligible for deduction u/s 80HHC but it would be included in formula for the purpose of computation of deduction u/s 80HHC. In this regard, it was pointed out that para 5 of the tribunal order for assessment year 1998-99 is relevant.

Accordingly, in this year also, we hold by respectfully following this judgement of Hon'ble Apex Court rendered in the case of K Ravindranathan Nair (supra) that assessee is not eligible for deduction u/s 80HHC of the Income tax Act, 1961 in respect of sales of scrap. The A.O. should decide this issue afresh as per the Tribunal direction given in assessment year 1998-99. This ground of the assessee stands partly allowed for statistical purposes.

2.8 Ground No.11 is as under:

> "11. The learned CIT(A) erred in fact and in law in confirming action of the AO in reducing 90% of the following amounts from the profit of the business for the purpose of computing deduction u/s. 80HHC of the Act on the ground that they do not constitute business income despite the fact that the AO has considered these amounts while computing total turnover of the appellant.
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> PARTICULARS AMOUNT (in Rs.) Interest received from customers on 1,24,60,000 overdue Interest on Staff Loan 1,66,417 Interest on NSC 2,030 Interest on FDR 13,35,843 Interest on Income Tax Refund 70,63,203 Refund of Brokerage on investment 5,15,007 TOTAL 2,15,42,500 2.8.1 It was submitted by the Ld. A.R. that this issue is the same as ground No.8 of the assessee's appeal for the assessment year 2002-03 and in that year, this issue was decided against the assessee as per para 12 of the Tribunal order and accordingly, in the present year also, this issue is decided against the assessee. Ground No.11 of the assessee is rejected. 2.9 Ground No.11.1 is as under:
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> "11.1 The learned CIT(A) erred in fact and in law in confirming action of the AO in holding that gross amount of interest and other income is required to be excluded from the profits for the purpose of computing deduction u/s. 80HHC and no deduction should be granted for expenses incurred for earning the said income."

2.9.1 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the decision of Hon'ble Supreme Court rendered in the case of ACG Associated Capsules Pvt. Ltd. Vs CIT 247 CTR 372 (S.C.), wherein netting is allowed. He further submitted that this issue may be restored to the file of the A.O. for a fresh decision regarding netting in the light of this judgment of Hon'ble Apex Court. Ld. D.R. supported the orders of authorities below.

2.9.2 We have considered the rival submissions, perused the material on record and we find that this is by now a settled position of law that netting can be allowed provided the assessee can establish nexus between the income and the expenditure incurred for earning this income. Hence, we set aside the order of Ld. CIT(A) on this issue and restore the mater back to the file of the A.O. for a fresh decision in the light of above discussion and by following the judgement of Hon'ble Apex Court rendered in the case of ACG Associated Capsules Pvt. Ltd. (supra). Needless to say, the A.O. should provide adequate opportunity of being heard to the assessee. This ground of the assessee is allowed for statistical purposes.

2.10 Ground No.12 is as under:

> "12 The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating export expenses of Rs.16,70,000/- in proportion of export turnover of trading goods to export turnover of manufactured goods, for the purpose of computing deduction u/s. 80HHC of the Act."

2.10.1 It was submitted by the Ld. A.R. that in assessment year 1998-99, as per para 11, the tribunal has set aside this issue to the file of the A.O. for verification of the claim of the assessee. Accordingly, in the present year also, we set aside the order of Ld. CIT(A) on this issue and restore the matter back to the file of the A.O. for a fresh decision after verification of the claim of the assessee. This ground is also allowed for statistical purposes.

2.11 Ground No.13, 13.1 and 13.2 are as under:

> "13. The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating indirect expenses of Rs.12,31,413/- instead of indirect expenses of Rs.1,40,249/- to export of trading goods as done by the appellant, for the purpose of computing deduction u/s. 80HHC of the Act.
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> 13.1 The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating indirect costs of sales depots and Pithampur units despite the fact that entire export of trading goods have taken place from Baroda.
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> 13.2 Without prejudice to above, the learned CIT(A) erred in fact and in law in confirming action of the AO in not reducing indirect expenses by 10% of Other income and interest income for working out deduction u/s. 80HHC on export of trading goods."

2.11.1 It was fairly conceded by the Ld. A.R. that this issue was decided against the assessee by the Tribunal vide para 10 of the tribunal order for the assessment year 1998-99. Accordingly, in the present year also, all these grounds are rejected.

2.12 In the result, this appeal of the assessee is partly allowed.

3. Now, we take up the revenue's appeal for the assessment year 2003-04 in I.T.A.No. 317/Ahd/2009.

3.1 Ground No.1 is as under:

> "1. On the facts and in the circumstances of the case, the learned CIT(A) erred in directing to allow the reduction u/s 80IB amounting to Rs.1,30,09,683/- overlooking the fact that the assessee failed to file mandatory form No. 10CCB with the return of income which was in violation of provisions of section 80IB(13) r.w.s. 80IA(7)."

3.1.1 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A). He also submitted that this issue was decided in favour of the assessee by the tribunal in assessee's own case for the assessment year 1998-99 and in this regard, he drawn our attention to para 7 of this tribunal order. He further submitted that it is a procedural lapse and the disallowance cannot be made on this ground. 3.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the Tribunal decision in assessee's own case for the assessment year 1998-

99. When we examined para 7 of the tribunal order in assessee's own case for the assessment year 1998-99, we find that as per this para of the tribunal order in that year, this aspect was decided by the tribunal that new unit has come into existence and, therefore, the assessee is entitled for deduction u/s 80-IA of the Income tax Act, 1961. In fact, in the present year, disallowance was made by the A.O. on this basis that the assessee has failed to file the required mandatory form 10CCB with the return of income. He has also noted that till the passing of his order i.e. assessment order, the assessee company has failed to submit form 10CCB. Hence, this tribunal order in the assessee's own case for the assessment year 1998-99 is not relevant in the present year. This disallowance was deleted by Ld. CIT(A) as per para 5.1 of his order. We find that there is no decision of Ld. CIT(A) on this aspect of the matter i.e. non filing of mandatory form 10CCB with the return of income. Regarding this argument of the Ld. A.R. that this is a procedural lapse, we find that in various cases, it was held by the tribunal and various High Courts that if such procedural lapse is rectified and made good before completion of assessment proceedings, no adverse inference should be drawn but in the present case, even before completion of the assessment proceedings, the mandatory form 10CCB was not submitted by the assessee and hence, in our humble considered opinion, this order of Ld. CIT(A) cannot be sustained because even if it was a procedural requirement and the assessee could not submit the same along with return of income for any reason, there could not be any reason for non submission of the same before the completion of the assessment proceedings and the assessee in the present case has not submitted the same even during assessment proceedings. We are of the considered opinion that disallowance was rightly made by the A.O. and the deletion of disallowance by Ld. CIT(A) cannot be sustained. We, therefore, reverse the order of ld. CIT(A) on this issue and restore that of the A.O. This ground of the revenue is allowed.

3.2 Ground No.2 is as under:

> "2. On the facts and in the circumstances of the case, the learned CIT(A) erred in directing the A.O not to reduce interest on overdue customers at Rs.45,92,754/- and on staff loan at Rs.28,261/- in the computation of eligible profit for arriving at the deduction u/s 80IB overlooking the ratio laid down by Apex Court in Sterling Foods Ltd 237 ITR 579 (SC)."

3.2.1 It was submitted by he Ld. A.R. that this issue is now covered in favour of the assessee by the judgement of Hon'ble Gujarat High Court rendered in the case of Nirma Industries Ltd. as reported in 283 ITR 402 and regarding interest on staff loan of Rs.28,261/-, it was submitted that this issue is not pressed and may be decided in favour of the revenue. Ld. D.R. supported the assessment order.

3.2.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgement of Hon'ble Gujarat High Court cited by the Ld. A.R. We find that there are two types of interest income covered in this ground of the revenue. One is overdue interest on customers of Rs.45,97,254/- and interest from staff loan of Rs.28,261/-. As per the A.O., both these amounts cannot be included for the purpose of computation of deduction allowable u/s 80-IB of the Income tax Act, 1961. In view of our decision in respect of ground No.1 of the revenue's appeal, this ground of the revenue, has become redundant because if deduction is not allowable to the assessee u/s 80-IB, individual item of income is not required to be examined for eligibility of deduction u/s 80-IB of the Income tax Act, 1961. In the result, appeal of the revenue stands allowed in terms indicated above.

4. Now, we take up the assessee's appeal No.46/Ahd/2009 for the assessment year 2004-05.

4.1 Ground No.1 in this year is general.

4.2 Regarding ground No.2 & 3, it was submitted by the Ld. A.R. in the remarks column of the chart that these two issues were decided against the assessee by the tribunal in assessment year 2002-03 and the relevant para of the tribunal order is para 6.3. Accordingly in the present year also, both these grounds of the assessee are rejected. 4.3 Grounds No.4, 5, 5.1 and 5.2 are regarding disallowance of royalty u/s 40A (2b) of Rs.3,72,73,513/-. It was submitted by the Ld. A.R. in the chart that these grounds are similar to grounds No.8 & 9 in the assessee's appeal in assessment year 2003-04. In that year, we have decided these issue against the assessee as per para 2.6.2above on this basis that the documents stated to have been submitted by the assessee before Ld. CIT(A) in that year were not in fact submitted before CIT(A) and these were also not submitted before the A.O. or TPO and before us also, these document we not submitted by complying with the requirements of Sub rule (4) of Rule 18 of the Appellate Tribunal Rules 1963. In the present yea also, it is noted by Ld. CIT(A) in para 9 of his order that the assessee neither demonstrated through any method that the royalty payment is at arms length price nor submitted the details and information which were available with the assessee group itself. Similar finding was given by Ld. CIT(A) in assessment year 2003-04 also and hence, it is seen that the facts in the present year are identical to the facts of assessment year 2003-04 and hence, on similar lines, in this year also, this issue is decided against the assessee and these ground of the assessee are rejected.

4.4 Grounds No.7 & 7.1 are in respect of the claim of the assessee regarding deduction disallowed by the A.O. u/s 80-IB in respect of interest on other income and alternative contention is regarding granting of netting. Consequential issue has been raised by the revenue also in its appeal for this year as per which it is the claim of the revenue that deduction u/s 80-IB is not allowable because Form 10CCB was not filed along with the return of income or in the course of assessment proceedings. But when we examined the assessment order para 14 & 15 where this issue has been decided by the A.O., we find that there is no mention regarding this aspect that the assessee has not submitted Form 10CCB along with the return of income for claming deduction u/s 80-IB of the Income tax Act, 1961. In fact, the A.O. has made disallowance on this basis that it was held in earlier years that no new industrial undertaking has come into existence and it was an expansion of the existing unit and, therefore, the deduction u/s 80-IB is not allowable. On this aspect, the Tribunal

decision in assessment year 1998-99 i.e. the 1st year is in favour of the assessee and hence, this objection of the A.O. is not valid and, therefore, we have to examine the issue raised by the assessee on merits. As per Annexure 1 submitted by the Ld. A.R. along with the chart, it is stated by him that no such deduction is allowable in respect of interest on staff loan of Rs.24,165/- because this aspect of the matter was decided by the Tribunal against the assessee in the tribunal order for the assessment year 2002-03 as per para 13.4. Accordingly, this aspect of the matter is decided against the assessee. Regarding 2nd aspect i.e. insurance claim received by the assessee of Rs.7,18,461/- and discount received by the assessee of Rs.5,81,881/-, it was submitted by the Ld. A.R. in the chart that these two aspects are covered in favour of the assessee. Regarding receipt of insurance claim, it is submitted that this issue is covered in favour of the assessee by the tribunal decision rendered in the case of Nirma Industries Ltd (supra). The remaining aspect regarding discount received is said to be covered in favour of the assessee by the tribunal order in assessee's own case for the assessment year 2002-03 as per para 13.6 of the tribunal order of that year. Ld. D.R. could not show that these two aspects are not covered in favour of the assessee and, therefore, by respectfully following the judgements cited by the Ld. A.R., we decide these two aspects in favour of the assessee. Ground NO.7 is partly allowed and regarding ground No.7.1, we hold that it is not allowable because major issue in ground no.7 is allowed and it is not established by the Ld. A.R. that there is an expenditure incurred for earning this income of Rs.24,165/- on account of interest on staff loan and, therefore, no netting is allowable on this account. Hence, ground No.7 is partly allowed and ground No.7.1 is rejected.

4.5 Grounds No.8-10.2 are in respect of deduction u/s 80HHC, which are as under:

> "Deduction u/s. 80HHC:
>
> 8. The learned CIT(A) erred in fact and in law in confirming action of the AO in reducing 90% of the following amounts from the profit of the business for the purpose of computing deduction u/s. 80HHC of the Act on the ground that they do not constitute business income despite the fact that the AO has considered these amounts while computing total turnover of the appellant.

PARTICULARS	AMOUNT (in Rs.)
Interest on Staff Loan	1,42,046
Interest on NSC	1,831
Interest on FDR	12,45,245
Interest on Income Tax Refund	2,82,44,710
TOTAL	2,96,33,832

8.1 The learned CIT(A) erred in fact and in law in confirming action of the AO in holding that gross amount of interest and other income is required to be excluded from the profits for the purpose of computing deduction u/s. 80HHC and no deduction should be granted for expenses incurred for earning the said income.

9. The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating export expenses of Rs. 14,10,000/-

in proportion of export turnover of trading goods to export turnover of manufactured goods, for the purpose of computing deduction u/s. 80HHC of the Act.

10. The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating indirect expenses of Rs. 30,86,947/- instead of indirect expenses of Rs. 1,40,249/- to export of trading goods as done by the appellant, for the purpose of computing deduction u/s. 80HHC of the Act.

10.1 The learned CIT(A) erred in fact and in law in confirming action of the AO in allocating indirect costs of sales depots and Pithampur units despite the fact that entire export of trading goods have taken place from Baroda.

10.2 Without prejudice to above, the learned CIT(A) erred in fact and in law in confirming action of the AO in not reducing indirect expenses by 10% of Other income and interest income for working out deduction u/s. 80HHC on export of trading goods."

4.5.1 Regarding ground No.8, it was submitted that this is similar to ground No.8 in assessment year 2002-03. The Ld. A.R. has also furnished a chart on 4 different types of interest income and the deduction is claimed by the assessee u/s 80HHC and this is also pointed out in the chart that all these four issues were decided by the tribunal against the assessee in assessment year 1998-99 in para 14 of the tribunal order. Accordingly, in this year also, this issue is decided against the assessee and, therefore, ground No.8 is rejected.

4.5.2 Regarding ground No.8.1, it was submitted that netting has to be allowed as per the judgement of Hon'ble Apex Court rendered in the case of ACG Associated Capsules Pvt. Ltd. Vs. CIT as reported in 247 CTR 372 (S.C.). Since, the authorities below have not examined this aspect in the light of this judgement; we feel it proper to restore this matter back to the file of the A.O. for a fresh decision in the light of this judgement and the facts of the present case. The A.O. should pass necessary order as per law in the light of the facts of the present case after providing reasonable opportunity of being heard to the assessee. Ground No.8.1 is allowed for statistical purpose. We would like to make it clear that the burden on the assessee to show and establish nexus between the expenditure incurred for which the netting is claimed with the income earned against which netting claimed and netting is allowable only to the extent, such nexus is established by the assessee. Ground No.8.1 is allowed for statistical purpose.

4.5.3 Regarding ground No.9, it was submitted that in assessment year 1998-99, the tribunal has restored back this matter to the file of the A.O. for verification of the claim of the assessee and in this

regard, he drawn our attention to para 11 of the Tribunal decision. Accordingly, in the present year also, we set aside this issue and restore the matter back to the file of the A.O. for afresh decision in the light of the directions which are given by the tribunal in assessment year 1998-99. Ground No. 9 is allowed for statistical purposes.

4.5.4 Regarding ground No.10, 10.1 and 10.2, it is fairly conceded by the Ld. A.R. that these issues are covered against the assessee by the tribunal decision in assessment year 1998-99 and the relevant para of the tribunal order is para 10. Accordingly, in this year also, this issue is decided against the assessee and these grounds of the assessee are rejected.

4.6 In the result, appeal of the assessee is partly allowed.

5. Now, we take up the Revenue's appeal for the assessment year 2004-05 in I.T.A.No. 318/Ahd/2009.

5.1 Ground No.1 is as under:

> "1. On the facts and in the circumstances of the case, the learned CIT(A) I erred in directing to allow the reduction u/s 80IB amounting to Rs.90,07,020/- overlooking the fact that the assessee failed to file the mandatory form No. 10CCB with the return of income which was in violation of provisions of section 80IB(13) r.w.s. 80IA(7)."

5.1.1 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A).

5.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that the only objection of the Revenue as per this ground is regarding non filing of Form 10CCB for claiming deduction u/s 80-IB but when we go through the assessment order, we do not find any mention in the assessment order regarding this objection that assessee had not furnished requisite Form 10CCB for claiming deduction u/s 80-IB. Hence, this ground of the revenue is unfounded and, therefore, liable to be rejected. We, therefore decline to interfere in the order of Ld. CIT(A) on this issue. This ground of the Revenue is rejected.

5.2 Ground No.2 is as under:

> "2. On the facts and in the circumstances of the case, the learned CIT(A) I erred in directing the A.O not to reduce interest on overdue customers at Rs. 83,19,297/- and on staff loan at Rs. 24,165/- in the computation of eligible profit for arriving at the deduction u/s 80IB overlooking the ratio laid down by Apex Court in Sterling Foods Ltd 237 ITR 579 (SC)."

5.2.1 Ld. D.R. supported the assessment order whereas it is submitted by the Ld. A.R. that this issue is in respect of overdue interest form customers of Rs.83,19,297/- which is covered in favour of the assessee by the decision of Hon'ble Gujarat High Court rendered in the case of Nirma Industries

Ltd. (supra) and the 2nd aspect i.e. interest on staff loan of Rs.28,261/- can be decided in favour of the revenue. Accordingly, we hold that the revenue succeeds in respect of interest income of Rs.28,261/- in respect of interest on staff loan but no interference is called for in the order of Ld. CIT(A) in respect of overdue interest from customers of Rs.83,19,297/- because this issue is covered in favour of the assessee by the judgement of Hon'ble Gujarat High court rendered in the case of Nirma Industries Ltd. (supra). This ground of the revenue is partly allowed.

5.3 Ground No.3 is as under:

> "3. On the facts and in the circumstances of the case, the learned CIT(A) erred in deleting the addition made u/s 14A of Rs. 2,22,333/- overlooking the fact that the assessee had claimed dividend income of Rs.22,23,326/- exempt u/s 10(34) and expenditure attributable to earn it was not disallowed u/s 14A."

5.3.1 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A).

5.3.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this issue was decided by Ld. CIT(A) on this basis that since the A.O. has made addition on account of Section 14A without making discussion in assessment order such addition in computation of income cannot survive. When we go through the assessment order, we find that in fact, there is no discussion in the assessment order regarding this disallowance and, therefore, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. This ground of the revenue is also rejected. 5.4 In the result, appeal of the revenue is partly allowed.

6. In the combined result, both the appeals of the revenue as well as both the appeals of the assessee are partly allowed.

7. Order pronounced in the open court on the date mentioned hereinabove.

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        Sd./-                                              Sd./-
(G. C. GUPTA)                                    (A. K. GARODIA)
VICE PRESIDENT                                ACCOUNTANT MEMBER
Sp
Copy of the Order forwarded to:
   1.    The applicant
   2.    The Respondent
   3.    The CIT Concerned
   4.    The Ld. CIT (Appeals)
   5.    The DR, Ahmedabad                              By order
   6.    The Guard File
                                                        AR,ITAT,Ahmedabad
     1. Date of dictation.........06/11/12
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2. Date on which the typed draft is placed before the Dictating Member...07/11/2012. Other Member

.....

3. Date on which the approved draft comes to the Sr. P.S./P.S.

4. Date on which the fair order is placed before the Dictating Member for pronouncement ...30/11/2012

5. Date on which the fair order comes back to the Sr. P.S./P.S.30/11

6. Date on which the file goes to the Bench Clerk ...30/11/2012

7. Date on which the file goes to the Head Clerk .....

8. The date on which the file goes to the Assistant Registrar for signature on the order .....

9. Date of Despatch of the order. .....