Gujarat Ambuja Cotspin Ltd, Ahmedabad vs Assessee on 21 June, 2012

IN THE INCOME TAX APPELLATE TRIBUNAL,
"A " BENCH, AHMEDABAD
Before Shri A. K. GARODIA, ACCOUNTANT MEMBER
and Shri KUL BHARAT, JUDICIAL MEMBER

I.T.A. No.113 / Ahd/1999
(Assessment year 1993-94)

Gujarat Ambuja Cotspin Ltd., Ambuja Tower, Op. Memnagar Fire Station, Post Navjivan Navrangpura, Ahmedabad -14 Vs. ACIT, Central Circle 1(2), Ahmedabad

I.T.A.No. 203/Ahd/1999 (assessment year 1993-94)

ACIT, Central Circle 1(2), Ahmedabad Vs. Gujarat Ambuja Cotspin Ltd. Ambuja Tower, Opp. Memnagar Fire Station, Post Navjivan, Navrangpura, Ahmedabad

I.T.A.No.1944/Ahd/2000(assessment year 1995-96)
I.T.A.No. 1964/Ahd/2009 (assessment year 2004-05)
I.T.A.No. 202/Ahd/1999 (assessment year 1993-94)
I.T.A.No. 1965/Ahd/2009 (assessment year 2005-06)

JCIT, SR-8, Ahmedabad Vs. Gujarat Ambuja Exports Ltd Ambuja Tower, Opp. Memnagar Fire Station Ahmedabad

I.T.A.No. 204/Ahd/1999 (assessment year 1993-94)
I.T.A.No. 2003/Ahd/2008 (assessment year 1993-94)

DCIT, Central Circle 1(2), Ahmedabad Vs. Gujarat Ambuja Proteins Ltd. Opp. Membagar Fire Station, Navrangpura, Ahmedabad

I.T.A.No. 1860/Ahd/2000 (assessment year 1995-96)
I.T.A.No. 1539/Ahd/2009 (assessment year 2005-06)
I.T.A.No. 1538/Ahd/2009 (assessment year 2004-05)

Gujarat Ambuja Exports Ltd., Ambuja tower, Opp. Memnagar Fire Station, Navrangpura, Vs. ACIT, Central Circle 1(2), Ahmedabad

Ahmedabad
PAN/GIR No. :

(APPELLANT) .. (RESPONDENT)

Appellant by: Shri S N Soparkar, AR
Respondent by: Shri Anil Kumar, DR

Date of hearing: 21.06.2012
Date of pronouncement: 20.07.2012
ORDER

PER SHRI A. K. GARODIA, AM:-

Out of this bunch of 11 appeals, seven appeals are in the case of Gujarat Ambuja Exports Ld. This includes one appeal of the revenue for the assessment year 1993-94 and cross appeals of the assessee and the revenue for the assessment years 1995-96, 2004-05 and 2005-06. The remaining four appeals include two cross appeals of the assessee and the revenue for the assessment year 1993-94 in the cases of Gujarat Ambuja Cotspin Ltd. and two appeals in the case of Gujarat Ambuja Proteins Ltd., one in quantum and one in penalty. All these appeals were heard together and are being disposed off by way of this common order for the sake of convenience.

2. It was agreed by both the sides that the appeal of the revenue in the case of Gujarat Ambuja Exports Ltd. for the assessment year 1993-94 is the lead matter and this should be decided first and thereafter the other appeals can be decided and on related issues, this order in the case of Gujarat Ambuja Exports Ltd. can be followed in other appeals. We I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 therefore, take up this appeal of the department i.e. I.T.A.No. 202/Ahd/1999.

3. Grounds raised by the revenue in this appeal are as under:

> "1. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of loss of Rs.45,60,792/- totally ignoring the evidences relied upon by the assessee.
>
> 2. CIT(A) has erred on facts and in law in deleting the disallowance of loss of Rs.23,10,255/- made by A.O. totally disregarding the facts and circumstances as narrated by the A.O.
>
> 3. CIT(A) has erred on facts and in law in deleting the disallowance of Rs.91.46 lacs on account of godown hire charges without appraising the evidences discussed by the A.O. in the order.
>
> 4. CIT(A) has erred on facts and in law in giving relief in regard to deduction u/s 80HHC of Rs.65,57,776/- which is in facts contrary to the facts and circumstances of the case.

> 5. CIT(A) ought to have appreciated the facts and circumstances of the case and should have confirmed the order of the A.O. in disallowing the loss of Rs.95.55 lacs which was nothing but subterfuge adopted by the assessee for reducing his taxable income."

3.1 Regarding ground No.1, brief facts till the assessment stage are noted by Ld. CIT(A) in para 4.2 of his order which is reproduced below:

"4.2 The fats of the case are that the appellant and its group concerns have claimed /declared below mentioned loss/profit in the transaction of sale & purchases within the group companies. Gujarat Ambuja Exports Ltd. Rs.45,60,792/- (loss) Gujarat Ambuja Proteins Ltd. Rs.98,78,546/- (loss) Gujarat Ambuja Cotspin Ltd., Rs.1,44,39,338/- (Profit) The loss claimed by the appellant company and Gujarat Ambuja Proteins Ltd. has been disallowed in the respective assessments on the ground that the transactions within the group are' non-genuine and on paper only, For the same reasons^ the income declared by Gujarat Ambuja Cotspin Ltd. has been held in its assessment order to be not proved from these transactions hut taxed as income from other sources. In the appellant's case the facts of the case and the reasons for the disallowance have been dealt with in detail by the Assessing Officer on pages 3,4 and 5 of the assessment order. The I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Assessing Officer while disallowing the loss in respect of transactions in SOYA DOC has followed the directions of the DCIT u/s 144A given by the DCIT in respect of transactions in Wheat, losses suffered by the appellant from which are also subject matter of this appeal in ground No.5. The loss on transactions in SOYA DOC has been disallowed for the reasons summarily mentioned below :-

> (1) The sale^& purchase transactions are between the group concerns only and they are non-genuine and on paper only. (2) No Incidental expense like transportation etc. in respect of these transactions have been debited in the books of accounts (3) Alternatively, the loss/profit from these transactions is required to be considered as speculative in nature as the transactions are not supported by actual delivery of goods. (4) The transactions have simply been shown to reduce tax liability."

3.1.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) who has deleted this disallowance and now, the revenue is in appeal before us.

3.1.2 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A). He also submitted that the details of purchase, sales and stocks are available in the paper book on pages 62- 105, 106-128 and 129-146 respectively. He also pointed out that the directions of Addl. CIT u/s 144A is available on page 208 of the paper book.

3.1.3 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) as per para 4.5.1 to 4.5.6 and 4.6 of his order which are reproduced below:

"4.5.1 I have considered the facts of the case, the observations of the Assessing Officer in the assessment order as well as in his remand report and the submissions of the appellant- company very carefully. It is true that the transactions of SOYA DOC are amongst the group companies arid on such transactions I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 the appellant-company has shown to have incurred a loss of Rs. 45,60,792/- and Gujarat Ambuja Cotspin Ltd. has shown a profit on such transactions. It is also true that the profit earned by Gujarat Ambuja Cotspin Ltd. has been shown in its balance sheet as well as in the return of income for the very same assessment year. All these three companies i.e. the appellant company, Gujarat Ambuja Cotspin Ltd. and Gujarat Ambuja Proteins Ltd. are assessed by the same assessing Officer. The main contention of the A.O. while disallowing the loss is that these transactions are found to be non-genuine and on paper only. He has further stated that the transactions are with a view to reduce the taxable income. He has placed heavy reliance on the directions issued u/s 144A, pertaining to trading in wheat by the group concerns because according to him the impugned transactions in SOYA DOC are identical with that of trading in wheat in assessment year 91-92 wherein the issue has already been decided against the company in the case of Gujarat Vita Pharma Ltd.

4.5.2 Coming to the impugned transactions as it is, it is clear that the respective companies hove recorded in their books of account, the impugned transactions, the shareholders of the companies have approved the accounts/ which include the impugned transactions of purchase and sale or each of the three companies and the payments for the purchase by the respective companies have been made by account payee cheques and recorded in their books of accounts. This is supported by the copies of accounts of Gujarat Ambuja Proteins Ltd- and Ambuja Agro Industries Ltd. which were filed and are placed on page Nos. 153 to 169 and 203 to 206 of the paper book. These are the two parties from whom the impugned purchases of Soya DOC were made by the appellant company. Copy of accounts of Gujarat Ambuja Cotspin Ltd. was also filed, which is placed on page Nos. 179 to202 of the paper book, to whom soya DOC was sold by the appellant company. Copy of the sales tax assessment order has also been made available at page No.147 to 152 of the paper book. From these documents, it is absolutely clear that the transactions are duly recorded in the books of accounts of the respective companies, they have? 'been followed by actual payments and they are also shown in the sales tax returns filed by the appellant company. sales tax returns also provide independent contemporary evidence of genuineness of the transactions Thus it. can not be said that the transactions were only on paper as claimed by the I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Assessing Officer. Not only this, xerox of the purchase book pertaining to SOYA DOC sales book as well as stock register were also made available, which are placed on pages Nos. 62 to 146 of the paper book. From the perusal of the said documents, it is absolutely clear that the transactions are also recorded in the sales and purchases registers as well as in the stock register. In the stock register the date wise position of stock in quantity of SOYA DOC is also

indicated, from a perusal of which it is clear that on the date of sale there were sufficient quantities available with the appellant company. It is also important to note here that all these documents were sent to the A.O. but in his remand - report, he has simply reiterated his arguments as made in the assessment order that such transactions are only on Paper, which is not correct in view of above mentioned facts and documentary evidences.

4.5.3 Coming to the directions of the DCIT u/s 144A of the Act on the basis of which the loss has been disallowed by the A.O. my attention was drawn to the said directions, placed on page Nos. 208 to 209 of the paper book, from which it is absolutely clear that the said directions were issued by the DCIT, pertaining to trading in wheat by the concerns of the group and the same was not pertaining to the transactions in SOYA DOC. Moreover, the amounts of profit and loss mentioned in the said directions were also pertaining to wheat and not pertaining to SOYA DOC. Since the disallowance of loss in the trading of wheat has also been challenged by the appellant in this appeal, this issue is separately considered in this appellate order, and, has been discussed in para 5.5 relating to loss on transactions in wheat as has been held in this para, even in respect of wheat, the facts of the case and the transactions in assessment year 1993-94 are materially different from the facts of the case and the transactions in wheat in assessment year 1991-92 in Gujarat vita Pharma Ltd. In fact, I nay 1993-94, the facts of the case and the transactions are similar in wheat and SOYA DOC as has also been held by the A.O.. therefore, the A.O. was wrong in relying upon assessment order and appellate order for assessment year 1991-92 in the case of Gujarat Vita Pharma Ltd., for disallowing the impugned loss.
4.5.4 One of the observations of the A.O. was that such transactions were done with a view to reduce the taxable income. For this, a specific query was raised to the authorized I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 representative of the appellant in response to which my attention was drawn to the submission dated 22nd December, 1997, which has been filed during the course of appeal hearing. It was the claim of the appellant that these transaction were not with any intention to reduce the taxable income as is clear from the fact that even by ignoring the loss and the profit in SOYA DOC and wheat, the taxable income of all the four group companies taken together will be increased only by an amount of Rs.25,979/-, which will have a tax effect of only Rs.13,446/- @ 51.75%, including surcharge. This was because the returned income, which was after considering the transactions in SOYA DOC and wheat, was for the positive income and even if the profit /loss on such transactions are ignored there remains taxable income with a minor change of Rs.25,979/- due to negative other income in the case of Gujarat Vita Pharma Ltd. Thus the argument of the A.O. that these transactions were with a view to reduce the taxable income finds no support from the factual position.

4.5.5 The appellant company which has suffered loss of Rs.45,60,792/- and Gujarat Ambuja Proteins Ltd., which has suffered loss of Rs.98,78,546/- are both public limited companies as is the company Gujarat Ambuja Cotspin Ltd. which has earned

profit of Rs.1,44,39,338/-. It would therefore, have not been possible for the companies suffering losses to have been a party to any non-genuine transaction resulting into loss for their share holders.

4.5.6 Coming to the alternative finding of the A.O. that the impugned loss of Rs.45,60,792/- is a speculative loss as it is not supported by actual delivery of the goods, this finding is also not correct, as the appellant company has already filed the documentary evidences showing delivery of the stock, the transactions being recorded in the stock register and the impugned sales and purchases having been shown in the sales tax return and it cannot be said that such transactions were without actual delivery and, therefore, the impugned transactions cannot be considered as speculative in nature. It has also been brought to my notice during the course of appeal hearing that the transactions cannot be speculative in nature in view of the fact that the purchases and sale were from different companies and since the purchases and sales were not to the same company it is not possible to term the transactions as speculative in nature and without actual delivery. In the absence of actual delivery, the I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 stock could not have been passed on from one company to the other company. Reliance placed by the A.O. on certain case laws in his remand report are found to be not relevant to the issue on hand as they are different on facts.

4.6 Thus, in view of the facts and in view of my observations as drawn above, the said transactions in SOYA DOC are required to be considered as genuine transactions, not on paper only and not with a view to evade tax and they cannot be considered as speculative in nature. Therefore, the loss incurred by this appellant company of Rs.45,60,792/- on such transactions of SOYA DOC is required to be allowed as deduction and the addition made by the A.O. is hereby directed to be deleted. So this ground of appeal is allowed."

3.1.4 From the above paras of the order of Ld. CIT(A), we find that a clear finding is given by Ld. CIT(A) that these transactions were not with the intention to reduce taxable income because even if the loss and profit in Soya DOC and wheat are ignored, the taxable income of all the four group companies taken together will increase only by an amount of Rs.25,979/- which will have the tax effect of Rs.13,446/- only. This finding is also given by Ld. CIT(A) that the company Gujarat Ambuja Export Ltd. and Gujarat Ambuja Proteins Ltd. which had suffered losses, are both public limited companies and hence, it would have not been possible for these companies to be a party of any non genuine transaction resulting into loss for their shareholders. Regarding the alternative finding of the A.O. that this is a speculative loss, a clear finding is given by Ld. CIT(A) that assessee has already furnished documentary evidence showing delivery of stocks and the transactions were recorded in the stock register and these purchases and sales were shown in the sales tax return. These findings of Ld. CIT(A) could not be controverted by the Ld. D.R. and hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 3.1.5 In the result, ground No.1 is rejected.

3.2 Regarding ground No.2 of the revenue, brief facts till the assessment stage are noted by Ld. CIT(A) in para 5.2 of his order which is reproduced below:

> "5.2 The facts of the case are that the appellant and its group concerns have claimed/declared below mentioned loss/profit in the transactions of sales and purchases within the group companies:
>
> Gujarat Ambuja Exports Ltd. Rs. 23,10,255 (loss) Gujarat Ambuja Cotspin Ltd. Rs. 1,09,726 (Profit) Gujarat Ambuja Proteins Ltd. Rs. 21,74,516 (Profit) Gujarat Vita .Pharma Ltd. Rs. 26,013 (Profit) The loss claimed by the appellant has been disallowed on the ground that the transactions within the group are non-genuine and on paper only. For the same reasons the income declared by other 3 concerns mentioned above has been held in their assessment order to be not proved from these transactions but taxed as income from other sources-

It appears from the assessment order in the case of the appellant' that in making the above addition the Assessing Officer has followed the assessment orders in this group of cases for the earlier assessment years 91-92 and 92-93 wherein it was held that the trading in wheat amongst the group concerns was not genuine and was only on paper. It also appears from the assessment order that the appellant sought directions from the DCIT u/s 144A and latter issued directions to the Assessing Officer in all the cases of the group. Perusal of the DCIT's order u/s 144A dated 7.3.96 in the case of the appellant placed at pages 208 and 209 of the paper book shows that the DCIT has based his decision on the assessment s in the case of Gujarat Vita Pharma Ltd. for the assessment year 1991-92 and Gujarat Ambuja Cotspin Ltd. for the assessment year 1992-93 and confirmation of all these assessments by CIT(A) XII. In the letter it is mentioned that the detailed discussion is given in the order u/s 144A for assessment year 93-94 in the case of Gujarat Ambuja Proteins Ltd- end! directed the Assessing Officer to disallow loss in wheat trading in the case of the appellant company. The perusal of the order u/s 144A in the case of- Gujarat Ambuja Proteins Ltd shows that paras 9 and 10 of the order read as under :

> I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009
>
> 9. In view of the above discussion I direct that since the concerns of GAPL GACL and Gujarat Vita Pharma Ltd. have shown profit from wheat trading, the same has to be brought to tax as income from undisclosed/ unexplained sources as held by the Assessing Officer in earlier assessment order in the case of GAPL and confirmed by the CIT(A).
>
> 10. similarly the loss shown in the hands of GAEL, it is agreed by the assessee that the transactions of wheat trading are not genuine and exist on paper only. Hence, the loss has to be disallowed.

Following the said directions, the Assessing Officer made above mentioned addition. Following these direction the Assessing Officer disallowed the loss from transactions in wheat in the case of the appellant and treated the incomes from these transactions declared by the other 3 concerns as income from other sources."

3.2.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) who has deleted this disallowance and now, the revenue is in appeal before us.

3.2.2 Ld. D.R. supported the assessment order where as Ld. A.R. supported the order of Ld. CIT(A). He also submitted that the basis of the order of Addl. CIT u/s 144A is this that the assessment order on this issue in the case of GAPL was confirmed by Ld. CIT(A). He submitted that the order of Ld. CIT(A) in the case of GAPL has been set aside by the Tribunal in I.T.A.No. 3740/ahd/1995 dated 28.02.2007 and he submitted a copy of this Tribunal decision. He further submitted that nothing is brought on record by the revenue to show that again this issue was decided against the assessee by Ld. CIT(A) and the Tribunal . He also submitted that like the first ground, for this issue also, the tax effect is negligible i.e. Rs.13,446/- if these transactions are ignored in all the group companies.

3.2.3 We have considered the rival submissions perused the material on record and have gone through the orders of authorities below. This issue I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 has been decided by Ld. CIT(A) as per para 5.5.9, which is reproduced below:

> "5.5.9 Thus, the impugned transactions cannot be considered as non-genuine and with a view to reduce the taxable income. The modus operandi of the other assessees in other assessments cannot be made applicable to the impugned transactions as the findings and circumstances of the transactions carte totally different and the transaction are followed by the actual delivery duly confirmed by the respective buyers and suppliers which are being different parties. In view of the above facts, the loss claimed by the appellant company of Rs.23,10,255/- on the transactions of wheat is required to be allowed as deduction. The A.O. is directed to allow loss of Rs.23,10,255/-. The other observations of the A.O. that alternatively the loss is speculative nature is also not correct as the transaction are supported by actual delivery in view of the evidences furnished."

3.2.4 From the above para of the order of Ld. CIT(A) we find that a clear finding is given by him that the transactions are followed by actual delivery confirmed by respective buyers and suppliers which are different parties and therefore, the modus operandi of other assessees' in other assessments cannot be made applicable in the present case. This is also noted by Ld. CIT(A) in his order that if the total transaction of 5th December and onwards are ignored in the hands of all the four group companies, the tax effect is very small of Rs.13,446/- only. If the transaction is held to be bogus in the hands of this company which has incurred loss on account of such transaction, it has to be held as bogus in the hands of other companies also which is showing income on account of the same transaction and hence, the total impact has to be seen which is very marginal. Since evidence has been furnished regarding delivery duly confirmed by respective buyers and suppliers and since these

findings of Ld. CIT(A) could not be controverted by Ld. D.R., we are of I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 the considered opinion that no interference is called for in the order of Ld. CIT(A) on this issue also. Ground No.2 is also rejected. 3.3 Regarding ground No.3, the facts till the assessment stage are noted by Ld. CIT(A) in his order in para 7.1 & 7.2 which are reproduced below for the sake of ready reference:

> "7.1 The Ground No. 7 relates to the disallowance of Rs.91,46,000/- being payment of godown hire charges. The facts as per the assessment order are that on verification of the P & L account, the Assessing Officer noticed that the appellant had debited Rs.91.46 lacs as godown rent for the first time in this assessment year, payable to M/s. Coastal Roadways Ltd., which was having its Head Quarters at Calcutta and Regional Office at Mumbai. The 'appellant's explanation wan that the godown rent wag payable to the said CRL as per agreement dated 22.6.1992. for a period of 9 months from July, 1992 to March, 1993 for providing ware-housing facilities/godowns at Porbandar, Kanda-la, Dwarka and Ahmedabad. The charges payable by the appellant, as per the said agreement were Rs. 4/- per sq. ft. as service charges, which included provision for godowns/warehouses, space, loading, unloading, thappi, verai, at stacking of bags, supervision, no- ordination with local parties, cleaning & maintenance etc. It was also stated that the payment of service charges was compulsory, irrespective of the utilization of godown space and allied services. The Assessing Officer examined the said agreement in detail and extracted some details on pages 9& 10 of the assessment order. It appears that in connection with this claim of the appellant, the statement of one Shri M.L.Pareek, Sr. Regional Manager of CRL was recorded u/s 131. The details of such statement are given on pages 10 & 11 of the assessment order. Enquiries seem to have been made at Calcutta office of CRL also, the result of which is narrated on page 14 of the assessment order. From the said enquiries, the Assessing Officer found that the appellant has not been able to establish the necessity and business expediency of hiring of large scale godowns, that the godowns itself were not existence and hence, the agreement could not be validly accepted in the eye of law, that this was only a paper transaction that this was merely an after thought with a view to reduce the tax liability of the appellant company and, therefore, the claim cannot be allowed as genuine business expenditure as no I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 services were utilized during the course of business* The assesses was accordingly served with a show cause notice as to why claim of deduction of godown rent & service charges as mentioned in the agreement should not be disallowed and added to the total income. The appellant filed its reply vide letter dated 20.3.96, the main contentions of which have been reproduced at page 13 of the assessment order, which is reproduced below:
>
> (a) There is no question of disallowance of above expenditure of Rs. 91.46 lacs, as the same is fully supported with all the necessary documents.

(b) similar question arose in the case of Gujarat Ambuja Proteins Ltd. in A.Y, 1992-93 for payment made to coastal Roadways Ltd. On identical facts the Hon'ble C-I.T.(A) has removed the disallowance on the ground of business expediency.

(c) The agreement was entered for hire of godown as & when required.

(d) M/s Coastal Roadways Ltd. had enough contact and openings in Western Regions of India who could provide the godown facility anywhere in Gujarat & Maharashtra as & when required.

(e) M/s Coastal Roadways Ltd. has been paid the above amount which is not disputed. You have also verified all the bills and therefore, there is no question of any after-thought idea.

(f) The Coastal Roadways Ltd. had provided services narrated in the above agreement, which has been confirmed by Mr. M/s. Pareek in his statement.

(g) As regards the business expediency test, it has been submitted that the export turnover of the assessee about 25,000 tonnes in aggregate to the required large scale storage space at the four places, and therefore, the agreement was made.

7.2 The Assessing Officer rejected all the above contentions of the appellant for the detailed reasons given on page 13 to '16 and came to the following conclusion:

In the facts ft circumstances of the case discussed above/ it is held that the assessee entered into a sham agreement with CRL with an only view to reduce the tax liability. The assesses also failed to establish the necessity of hiring large scale godown space. The I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 assessee also failed to establish the business expediency for claiming the rent payable as business expenditure. Therefore/ the claim of the assessee for deduction of rent payable or paid to CRL as per the agreement dated 22.6.92 is disallowed and added to its total income.

In corning to the above conclusions/ the Assessing Officer has relied on several High Courts' decisions/ more specifically the decision of the Gujarat High Court in CIT Vs-Narayan cotton & silk Mills, 135 ITR 546."

3.3.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) who has deleted this disallowance and now, the revenue is in appeal before us.

3.3.2 Ld. D.R. supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A). He further submitted that the rent was paid for the period from July 1992 to March 1993 and it was paid to M/s. Costal Roadways Ltd. He further submitted that agreement is on pages 288 to 292 of the paper book.

3.3.3 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) in para 7.6 of his order which is reproduced below:

"7.6 I have considered the facts of the case of the relevant issue/ observations of the Assessing Officer as well as the submissions of the appellant company. At the outset, the facts of the present expenditure for godown rent of Rs.91.46 lacs are identical to that of similar payment of godown rent of Rs.72.48 lacs by GAPL for the A.Y. 1992-93. The said addition has already been deleted, by the CIT (A) in his order dated 25.7.95, Apart from this/ it has been claimed by the appellant company that the company was engaged in the business of export of SOYA DOC and oil extractions and this was the first year of export in the case of appellant company. Thus it has been claimed by the appellant company that in view of the need for warehouse and godowns which could arise in future in the normal course of the business an agreement had been executed I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 on 22*06.92. In the assessment proceedings it had not been proved by the Assessing Officer that the agreement was either bogus or not in existence. The Assessing Officer's finding that no services was availed by the appellant under said agreement could not to be any ground to decide the business expediency. For the actual expenditure, bills has been raised giving the location, rate and the month. These bills have been raised on the basis of agreement and as per the agreement the appellant company were required to make payment for each month irrespective of the fact that the services have not been utilized. Thus it has been claimed that there was business necessity and company has entered into the agreement for availing warehouse facility and thus the payment was for the business expediency. It has also been claimed that the transaction was genuine. Reliance has also been placed on the various court judgement by the appellant company."

3.3.4 From the above para of the order of Ld. CIT(A), we find that a clear finding is given by Ld. CIT(A) that it cannot be proved by the A.O. that the agreement was bogus or not in existence. He has also given a finding that the A.O.'s finding that no services were availed by the assessee under the said agreement cannot be any ground to decide the business expediency. Regarding business expediency, it is noted by Ld. CIT(A) that assessee company was engaged in the business of export of SOYA DOC and oil extraction and this was the first year of export in the case of the assessee company. It was claimed before Ld. CIT(A) by the assessee company that in view of the need for warehouse and godowns, which could arise in future in the course of export business, the agreement has been executed on 22.06.1992. If that be so then it has to be accepted that hiring of godown and warehouse for the purpose of export is very much for the business purpose and even if such godown was not ultimately required to be used for the purpose of export, which were kept ready for such purpose, expenditure incurred on such hiring of godown has to be allowed as business expenditure on the basis of I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 business expediency. In the light of these facts, we do not find any reason to interfere in the order of Ld. CIT(A). Regarding the tribunal decision rendered in the case of ACIT vs Gujarat Ambuja Proteins Ltd in I.T.A.No. 4119/Ahd/1995 assessment year 1992-93, dated 25.01.2012, we find that this

tribunal decision is not applicable in the present case because the facts are different because in that case, the Tribunal decision is on the basis that the assessee has not brought any material to show the procurement plan and places from where the procurement was to be made and the storage period, volume to be procured at a time and quantity to be kept at a time etc. In the present case, on page 371 - 384, assessee has furnished the copy of outward register showing details of export with parties' names, vessels name, item, quantity, weight along with Despatch date and name of port being Porbandar, Dwarka, Kandla, Okha, Jamnagar etc. and the same is during Sep 1992 to March 1993 for export of SOYA DOC etc. Since the facts are different, this tribunal decision is not applicable in the present case. In the present case, the assessee has not only given the agreement for rent and evidence for payment of rent, evidence is also placed on record regarding actual export during relevant period from different places for which warehouse and godowns were hired and hence, in the light of these facts, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue also. Ground No.3 is also rejected.

3.4 Regarding ground No.4, the facts are noted by Ld. CIT(A) in para 9.1 of his order which is reproduced below:

> " Ground No.9 is to the effect that the A.O. erred in not granting deduction under section 80HHC of Rs.65,57,776/-". In the Assessment order, this issue is discussed on page 20. At the outset, the A.O. had held that since the computation under the head income from business or profession is a Ions/ the assessee will not I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 get the deduction claimed u/s BQ-HHC, in view of the provisions of section 80AB of the Act, in absence of business profits. The Assessing Officer, then worked out the turnover for the purpose of computation of deduction u/s 80--HHC on the same page and stated that the total turnover of the business shown by the assessee at Rs.51,04,85,747/- will be reduced by the amount of Rs. 20,67,56,623/- being trading with group concerns In wheat and SOYA DOC, treated as non-genuine and on paper only and, therefore, the real turnover will be only to. 30,37,29,124/-. He then observed that in view of this position, the indirect cost attributable to export sales in proportion to total sales would go up and thereby the figure or, export profit will be reduced to Rs.40,31,535/- and this would, at the most, be the deduction u/s 80 HHC to which the appellant would have been entitled instead of Rs.65,57,776/- claimed but since, according to him as the report in Form No. 10 CCAC is for Rs.65,57,776/- as claimed and not for Rs.40,3l,535/- as maximum allowable, the deduction u/s 80-HHC was not granted."

3.4.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) who has allowed relief to the assessee and now, the revenue is in appeal before us.

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

3.4.3 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) as per para 9.4 of his order which is reproduced below:

"9.4 I have considered the facts of the case submitted by the appellant as well as observations of the Assessing Officer in his assessment order as well as in remand report. The Assessing Officer in the assessment Order has clearly mentioned that even on the basis of his calculation, the assessee is entitled for deduction of Rs.40,31,535/- u/s 80-HHC as against the claim made by the appellant company of Rs.65,57,776/-. However, even the said deduction as worked out by the Assessing Officer at Rs.40,3l,535/- has not been allowed as the report in Form No. 10 CCAC is treated as not correct as therein deduction claimed was for Rs.65,57,776/-

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Opposing this the appellant has relied upon the Judgement of Delhi I TAT in the case of shriram Pistons K Rings Vs. CIT, reported in 81 Taxman 164, wherein it has been held that report of accountant, as contemplated in sub-section (4), is required for limited purpose of making a valid claim for deduction and, therefore, the assesses is not required to furnish the revised report for allowance of deduction on profits from export business1as computed by the Assessing Officer. The Hon'ble Bombay ITAT has also made similar observations as reported in 35 TTJ 259. Thus, the assessing Officer was not correct in disallowing the deduction u/s 80-HHC as worked out by him of Rs.40,31 ,535/-. Thus, at the outset, the appellant company is entitled to a deduction of Rs.40,31,535/- u/s 80-HHC even on the basis of calculation of the assessing Officer as is apparent from the assessment order. This leads to the other argument of the appellant company that the appellant is entitled for a deduction of Rs.65,57,776/- u/s 80-HHC as claimed in the return of income on the basis that turnover pertaining to Wheat & SOYA EOC has wrongly been excluded by the Assessing Officer from the total turnover as such transactions ware genuine. Further it hag been claimed by the appellant company that deduction u/e 80-HHC is available upto the profit derived from the export business as calculated on pro- rats basis as per formula given in sub-section (3) of section 80- HHC. I have already held above in para 4.6 to 5.5 that the transactions pertaining to SOYA DOC and who has undertaken by the appellant company with other group companies/were genuine and therefore, the fco4w*l turnover of such transactions cannot be ignored for the computation of exports profits within the meaning of section 80HHC/ The Assessing Officer is, therefore, directed to consider such transactions for the purpose of working the amount of total turnover, 09 against exclusion made by him in the assessment order.

Coming to the-argument of the assessee that deduction u/s 8QHHC is-to be given to the extent of Export profits* which are included in the gross total income subject to maximum deduction under Chapter VIA being not more than gross total income, I find merit in the argument what section 80 AB stipulates in to restrict the deduction-under chapter VIA to the extent of the nature of income stated in relevant section viz. the export profits & not the particular head of income, viz. business I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 income etc. Hence, I direct the Assessing Officer to allow deduction u/s 80-HHC to the

> extent of export profits as claimed subject to total deduction under Chapter VIA not exceeding gross total income may be recomputed by the Assessing Officer in view of other directions in this order.
>
> As regards interest, no deduction under section 80HHC will be allowable to the appellant as interest income has been held as income from other sources.
>
> The A.O. is directed to recalculate the deduction u/s 80HHC in view of the above directions and discussions made and hence, this ground of appeal is disposed off accordingly."

3.4.4 From the above para of the order of Ld. CIT(A) it is seen that it was decided by Ld. CIT(A) that even the A.O. has calculated this deduction as allowable to the assessee u/s 80HHC to the extent of Rs.40,31,535/- but he has not allowed deduction even for this amount on this basis that the report in Form 10CCAC is treated as not correct because in that report, deduction claimed was Rs.65,57,776/-. It is held by Ld. CIT(A) that under these facts, the deduction computed by the A.O. of Rs.40.31 lacs was clearly allowable and it cannot be disallowed in any case. For the balance amount of deduction claimed by the assessee, Ld. CIT(A) has directed the A.O. to recalculate deduction u/s 80HHC without ignoring the transaction of the assessee pertaining to SOYA DOC and Wheat because it is held by Ld. CIT(A) that the same are not bogus. This direction is also given by Ld. CIT(A) that A.O. should allow deduction u/s 80HHC to the extent of export profit subject to this that total deduction under Chapter VIA should not exceed gross total income as to be recomputed by the A.O. in view of his earlier direction in this order. Considering the facts of the case, we do not find any good reason to interfere in the order of Ld. CIT(A) on this issue also. This ground of the revenue is also rejected.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 3.5 Regarding ground No.5, the facts till the assessment stage are noted by Ld. CIT(A) in para 11.2 to 11.3 of his order which are reproduced below:

> "11.2 The facts as per the assessment order, where this issue is discussed in great details at pages 21 to 27, are that the appellant purchased 19,809 M.T. of SOYA DOC, (yellow) Ext. for Rs.11.90 Crores Rs.6010/- per M.T. from Gujarat Ambuja Proteins Ltd., a group concern of the appellant and these very goods were sold to Uniplas India Ltd. (UPL) for to. 10.05 Crores @ Rs.5,482/- per M.T. It was also seen that GAPL from whom the appellant purchased these goods purchased the said goods for Ps. 11.88 Crores @ Rs.6,000/- per M.T. The said transaction of purchase from GAPL and sale to UPL had resulted into a loss of Rs.1.05 Crores to the appellant. The A.O. asked the appellant to explain the reasons for the loss by producing some cogent evidence in support of sale to UPL on reduced rates. The appellant produced copies of letter dated 27.09.92 along with purchase order dated 24.09,92 and confirmation dated 26.03.96 from the said UPL, according to which the appellant agreed to sell 20,000 M.T. SOYA DOC as under:-

1. 8,200 M.T. to be supplied during Oct.,1992 @ Rs.5,900/- per M.T.

2. Balance to be supplied before 31.03.1993 at prices to be mutually agreed as per market price. It was stated by the appellant that as per letter dated 15.10.92 from the appellant to UPL, the appellant proposed to prefix the prices for supplies in advance instead of fixing the prices from month to month, for the period Nov., 1992 to Feb., 1993. According to the appellant, the month wise prices were fixed as agreed by both the parties at Rs.5,500/- per M.T. for Nov., 1992, to. 5,300/- for Dec., 1992, Rs.5,000/- for Jan., 1993 and Rs.4,950/- for February, 1993. The submission of the appellant before the A.O. was that since, the goods were sold to UPL as per the terms and conditions agreed upon in the purchase order and as proposed in the letter dated 15.10.1992, the loss incurred on the sales should be allowed. The Assessing Officer, from the letter, purchase order and confirmation of UPL noticed that the sale was not in accordance with either the purchase order or the prevailing market rate. He observed that the assessee earned huge interest income exceeding Rs.3 I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Crores during that year under consideration which was credited to the profit and loss account as such and by selling the goods to UPL at reduced rates, the assesses arranged to incur the said loss for getting adjustment of the same against the other taxable income with a view a to reduce the tax liability. He, therefore, issued show cause notice to the-appellant to show cause as to why the said loss should, not be disallowed. The appellant vide letter dated 27.3.96 explained the reasons, which are reproduced by the A.O. on pages 23 to 24 of the assessment order. In brief the explanations were to the following effect :--

(i) As the appellant vas a now entrant, to the business they wanted to play safe and, therefore, the prices were prefixed considering the trend of prices in the market from year to year.

(ii) The appellant knew that the person who makes the most of the marketing in SOYA COC got huge business and a.

firm, footing in the industry and, therefore, they were on the look out for: ?. major party like UPL and it was considered to :

be prestigious to be associated with it ; and when the appellant got the order of supply of 20,000 M.T., it was considered to be major achievement for the new entrant i.e. the appellant.

(iii) The appellant did not want to take the risk, of fluctuation in the market prices later on and did not want to loose its business if the prices were not agreeable later on and, therefore, it agreed to the prices, as agreed in advance.

(iv) Generally, the normal trend in the market of SOYA DOC was reduction in price- but due to two big co-op.

societies which GRAFFE-D AND NAFED entering the market and making a buying spree, there was an artificial scarcity which did not bring down the price. In fact, even GRAFF ED & NAFED also suffered huge losses in SOYA trading.

(v) It is not a general rule that the assessee should always earn profit only. In the year under consideration due to market conditions, which were beyond its control and which It had not expected while fixing the selling prices in advance, the assesses had suffered a loss end in this background there cannot be any suspicion that, the transactions have been arranged to reduce the taxable income by way of adjustment against other income.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 11.3 However, in the opinion of. the A.O., the above contentions were not, acceptable because according to him the company had acted against the term and conditions of purchase order dated 24.09.1992, which a prudent business- man would not have done, particularly, when the goods were purchased £ at a higher rate from its own group company from month to month and they very goods worn sold it at lower rates to UPL in the very same month. The A.O. also observed that the appellant had credited to its profit and loss account a sizeable interest income exceeding Rs.3 Crores and it was quite clear that the assessee had purchased a big loss, so that the same can be adjusted against the said interact income/ with a clear intention to reduce the taxable income. In support of this view, the A.O. further observed that the delivery of goods were neither taken by Gujarat Ambuja Proteins Ltd. from the supplier nor by the assesses but were directly (supplied by the supplier M/s. Dwarka Cement Works Ltd. to UPL and hence, there was no necessity to involve the assessee group in these transactions. In further support, the A.O. also relied upon sales of SOYA DOC to 3 other parties at lesser rates, which was explained by the assesses as supplied against H Form, which entitled the assessee to get some benefits in compensation of the price difference, which amounted to the assessee getting the market value on the sale, whereas the goods sold to UPL was at less than market price and without getting any export benefits. The A.O. also noted that in the month of Oct., 1992, goods to the extent of 8,200/- M.T. was agreed to be supplied by the assessee in the initial stage but the assessee has also supplied 82312.500 M.T. @ 5,900/- as per the terms and condition of the said purchase order. The A.O., therefore, considered that at the most the loss incurred in this particular transaction can be allowed, which worked out to Rs.9,05,410/-. In his opinion, the balance of Rs.95,55,520/- could not be allowed as the same was not in accordance with the terms and conditions o the purchase order. He thus disallowed the loss of Rs.95,55,520/-."

3.5.1 Being aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) who has deleted this disallowance and now, the revenue is in appeal before us.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 3.5.2 Ld. D.R. supported the assessment order whereas Ld. A.R. supported the order of Ld. CIT(A).

3.5.3 We have considered the rival submissions and perused the material on record and have gone through the orders of authorities below. We find that a clear finding is given by Ld. CIT(A) that there is no dispute about sale rates and loss were made at the price agreed upon in advance. Regarding purchase price, it is noted by him that the details of market price prevailing at the time of such transactions were also furnished which cannot be proved to be wrong by the A.O. in the remand report although all these evidences were also forwarded to him. On this basis, finding is given by CIT(A) that under this situation, it cannot be said that it is an arranged loss and that the transactions are not genuine. These findings of Ld. CIT(A) could not be controverted by the Ld. D.R. This finding is also given by CIT(A) that had the sale orders being not executed in stipulated time, the assessee company would have to pay damages for the breach of contract and such damage for breach of contract is an eligible deduction u/s 37(1) and therefore, such loss is also a business loss and allowable as deduction. In support of this contention, Ld. CIT(A) has noted various judgements of various High Courts and also of Hon'ble Apex Court and considering all these facts, we do not find any good reason to interfere in the order of Ld. CIT(A) on this issue also. This ground is also rejected.

3.6 In the result, this appeal of the revenue is dismissed.

4. Now, we take up cross appeals for the assessment year 1993-94 in the case of Gujarat Ambuja Cotspin Ltd., in I.T.A.No. 113 and 203/Ahd/1999.

4.1 First we take up the assessee's appeal in I.T.A.No. 113/Ahd/1999. Although, the assessee has raised as many as six grounds of appeal but I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 the grievances of the assessee are only two. The first grievance is regarding disallowance of interest expenditure of Rs.6,99,954/- and the second grievance is regarding disallowance of prior year expenditure of Rs.12,68,671/-.

4.1.1 Regarding ground No.1, it is submitted by the Ld. A.R. that this issue is decided by Ld. CIT(A) as per para 6 on page 9 of his order. He submitted that this finding is given by Ld. CIT(A) that interest pertaining to term loan from Bank of Baroda although it is pertaining to 4th quarter of financial year 1991-92 but the same was reported in the books of account only in the month of April 1992 as the exact amount of interest could be quantified only after finalization of books of account for the financial year 1991-92 for the reason that there was a dispute about the rate of interest. He submitted that the amount in dispute was paid in the present year and, therefore, even if it is pertaining to the preceding year, the same is allowable in the present year as per Section 43B. 4.1.2 Ld. D.R. supported the orders of authorities below. 4.1.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this finding is given by Ld. CIT(A) that the amount of interest pertaining to interests on term loan from Bank of Baroda. This is also stated by the A.O. on page 12 of the assessment order that the amount of Rs.6,99,954/- is in respect of term loan interest. On page 110 of the paper book is the copy of the ledger account as per which, 4 amounts each of Rs.5.05 lacs totaling Rs.20.20 lacs was paid during this year against which an amount of Rs.6,99,954/- was adjusted in respect of interest for the preceding year. Hence, it is seen from the records that the payment of this interest was made during this year and, therefore, deduction is I.T.A.No. 1860,1944/Ahd/2000

I.T.A.No.1538,1539,1964,1965/Ahd/2009 allowable in the present year u/s 43B. Therefore, this disallowance is deleted.

4.2 Regarding the 2nd issue, it is submitted by the Ld. A.R. that while passing the assessment order for the assessment year 1994-95 u/s 143(3) on 25.03.1997, the A.O. disallowed this expenditure of Rs.12,46,671/- on this basis that it pertains to assessment year 1993-94 and, therefore, this ground has been taken in the present year as additional ground. Ld. CIT(A) has decided this issue against the assessee on this basis that since these expenses were not claimed in the returned income or during assessment proceedings, this cannot be allowed in the course of appellate proceedings.

4.2.1 Ld. A.R. placed reliance on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT Vs Symphony Comfort Systems Ltd. in tax appeal No.97/2010 dated 29.11.2011. He submitted a copy of this judgment of Hon'ble Gujarat High Court. Ld. D.R. supported the orders of authorities below.

4.2.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgment cited by the Ld. A.R. In this judgement, Hon'ble Gujarat High Court has considered the judgment of Hon'ble Apex Court rendered in the case of Goeth India Ltd. Vs CIT as reported in 284 ITR 323 wherein it was held that the restriction is limited to the powers of the A.O. and it doe not impinge upon powers of the Tribunal. Under this legal position, it has to be accepted that when this issue is raised by the assessee in the present year, the same has to be decided as per law. This is not in dispute that this expenditure was disallowed by the A.O. in assessment year 1994-95 on this basis that the same pertains to the earlier year i.e. assessment year 1993-94. Therefore, there is no reason for not allowing I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 this deduction in the present year. We, therefore, decide this issue in favour of the assessee in the present year but the same should not be claimed and allowed in assessment year 1994-95 and if any ground is raised by the assessee in that year, the same should be withdrawn. 4.3 In the result, this appeal of the assessee is allowed.

5. Now, we take up the revenue's appeal for the same assessment year in the same case of Gujarat Ambuja Cotspin Ltd. in I.T.A.No. 203/Ahd/1999. The grounds raised by the revenue in this year are as under:

> "1) the Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.109 lacs made by the A.O. in respect of wheat transactions.
>
> 2) Ld. CIT(A) has erred on facts and in law in reducing the addition made by the A.O. u/s 80HHC despite the act that the certificate of the C.A. was not reliable.
>
> 3) Ld. CIT(A) has erred on facts and in law in deleting the profits in respect of transactions with group concerns amounting to Rs.1,44,39,338/- irrespective of the fact that it was rightly done so by the A.O.

4) The Ld. CIT(A) erred in law and on facts in directing the A.O. to give deduction u/s 80-I without deduction u/s 80HH from the total income.

5) The Ld. CIT(A) erred in law and on facts in deleting the addition of Rs.14.45 lacs and Rs.5.34 lacs on account of purchase price of wheat from group concerns."

5.1 Regarding all these grounds, Ld. D.R. supported the assessment order whereas Ld. A.R. supported the order of Ld. CIT(A). Regarding ground No.4, he placed reliance on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT Vs Amod Stamping as reported in 274 ITR 176.

5.1.1 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 judgement cited by the Ld. A.R. in respects of ground No.4. Regarding ground No.1 of the revenue's appeal, we find that Ld. CIT(A) has decided this issue by following his own order in the case of Gujarat Ambuja Exports Ltd. for the assessment year 1993-94. Against this order of the CIT(A) also, appeal was filed before us and the same has been decided by us in above para. Similar issue was decided by us in that case in favour of the assessee and the ground raised by the revenue in that case was rejected. Since no difference in the facts could be pointed out by the Ld. D.R., we do not find any reason to take a contrary view in the present case. Hence, in line with our decision in the case of Gujarat Ambuja Exports Ltd. for the assessment year 1993-94, ground No.1 of the revenue's appeal is rejected in this case also.

5.2 Regarding ground No.2 of the revenue's appeal, the same is identical to ground No.4 of the revenue's appeal in the case of Gujarat Ambuja Exports Ltd. in assessment year 1993-94. In that case, this issue was decided by us in favour of the assessee and the ground of the revenue was rejected. Since no difference in the facts could be pointed out by the Ld. D.R. in the present case, this ground of the revenue is also rejected. 5.3 Regarding Ground No.3 of the revenue's appeal, we find that this issue was decided by Ld. CIT(A) by following his own order in assessment year 1993-94 in the case of Gujarat Ambuja Exports Ltd. and while deciding the appeal of the revenue in that case, this issue was decided by us in favour of the assessee. Ld. D.R. could not point out any difference in the facts in the present case and hence, in the present case also, this issue is decided in favour of the assessee in line with our decision in that case. This ground is also rejected. 5.4 Regarding ground No.4, we find that Ld. CIT(A) has decided this issue as per para 12.3 of his order wherein he has directed the A.O. to I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 verify the assessee's working after making addition in respect of disallowance if any relating to new industrial unit as confirmed and then work out the deduction allowable to the assessee u/s 80HH and 80-I. The ground of revenue is not regarding this aspect. The ground of the revenue is that Ld. CIT(A) has erred in giving direction to allow deduction u/s 80- I without reducing the deduction u/s 80HH from the total income. On this aspect, the matter is now covered in favour of the assessee by the judgement of Hon'ble Gujarat High Court cited by Ld. A.R. and hence by respectfully following the same, we decline to interfere in the order of Ld. CIT(A) on this issue. Ground no.4 is rejected.

5.5 Regarding ground No.5, we find that this issue was decided by Ld. CIT(A) as per para 6.6 of his order, which is reproduced below:

> " I have considered the facts of the case and observations of the A.O. as well as the submissions made by the appellant. At the outset from the nature of transactions it is very clear that these transactions of purchases from the associate concerns are not pertaining to transaction of purchases and sales considered by the Assessing Officer separately in the assessment order, pertaining to which the Assessing Officer disallowed the loss- In these transactions the loss and corresponding profits were same amongst the associate concerns. Further, there was no evidences with the Assessing Officer to indicate that it was a part of the same transactions- Had it been a part of the same transactions there would have been difference- to thin extent between the profit & loss of the group concern in the total Wheat transactions. Further, it is pointed out to me that corresponding sales of such purchases have been duly recorded in the books of account, and, therefore, Department is required to take Into account the purchases as in absence? of purchase there cannot be sales. It is pointed out to me that there was a bonafide mistake in considering the purchase in the original return of income which were covered by filing the relevant return of income. Xerox of the bills etc. were filed which are placed in the paper-book, papers showing stock statement position were also filed. However, the Assessing Officer could not point out in his remand report could not point out in his remand I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 report how the claim of the appellant on the basis of these evidences were not correct. The A.O. simply stated that submission is actually incorrect. It is also seen that the associate concerns who have made sales to the appellant have recorded them in their books of accounts and included the income therefrom in the books of accounts as well as returns filed by them. Therefore, there is no justification for not allowing deduction for the corresponding purchases in the hands of the appellant. Therefore, the deduction claimed by the appellant for the purchases of Rs.19,79,940/- pertaining to the two purchase bills is required to be allowed from the total income of the appellant. This addition is, therefore, deleted. So this ground of appeal is allowed."

5.5.1 From the above para of the order of Ld. CIT(A), we find that a clear finding is given by Ld. CIT(A) that the A.O. could not point out in his remand report as to how the claim of the assessee on the basis of these evidences were not correct. This finding is also given by Ld. CIT(A) that the associate concern who had made sales to the assessee had recorded it in the books and recorded the income therefrom in the books of accounts as well as in the return filed by them. Ld. D.R. could not controvert this finding of Ld. CIT(A) and therefore, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue also. This ground is also rejected.

5.6 In the result, this appeal of the revenue is also dismissed.

6. Now, we take up the appeal of the revenue in the case of Gujarat Ambuja Proteins Ltd. for the assessment year 1993-04 in I.T.A.No. 204/Ahd/1999. We want to note that there was cross appeal

of the assessee also for this very year in the case of this very assessee but it was submitted by both the sides before us that the same was already disposed off by the tribunal as per order dated 28.11.2006 and the issue involved in this appeal was totally different.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 6.1 The grounds raised by the revenue are as under:

> "The Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs.1.25 crores totally disregarding the evidences collected and relied upon by the assessee.
>
> 2. The CIT(A) on facts and in law- ought not to have given relief in regard to addition made by the AoOS in respect of dividend on shares and debentures as on; the basis of the evidences collected by the A.O. the same was required to be tax rd as income from other sources only,
>
> 3. The CIT(A), in facts and on law has erred in giving the relief in regard to speculation loss of Rs.1.25 crores in total dis- regard of the evidences and facts and circumstances of the case
>
> 4. The C1T(A) has erred in law and on facts in holding that deduction u/s 8O-I should be given without deduction u/s 80-HB of the Act.
>
> 5. The GIT (A) has erred in facts and on law in giving relief to the addition of Rs.2l.74 lakhs which he ought to have confirmed in view of the facts and the circumstances and the evidences collected and discussed by the A.O. in the Assessment Order.
>
> On the facts and in the circumstances of the ease, the Id. DCIT (A)/CIT (A) ought to have upheld the order of the A.O. It is therefore, prayed that the order of the Id. DCIT (A) / CIT (A) may be set aside and that of the order of the A.O. be restored to .the above extent."

6.1.1 Ld. D.R. supported the assessment order whereas Ld. A.R. supported the order of Ld. CIT(A). He further submitted that in respect of grounds 1, 3-5, Ld. CIT(A) has followed his own order in the case of Gujarat Ambuja Exports Ltd. for the ay1993-94 and these three issues can be decided on similar lines as per the decision in that case. 6.1.2 Regarding ground No.2, he placed reliance on the judgment of Hon'ble Gujarat High Court rendered in the case of CIT Vs Sphere Stock Holdings Pvt. Ltd. as per tax appeal No.2583/2009 dated 23.08.2011. He submitted a copy of this judgment of Hon'ble Gujarat High Court.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Regarding ground No.4, he placed reliance on the judgment of Hon'ble Gujarat High Court rendered in the case of CIT Vs Amod Stamping as reported in 274 ITR 176. He also submitted that this issue as per ground no.4 in this case is identical to ground no.4 of the revenue's appeal in the case of Gujarat Ambuja Cotspin Ltd. and, therefore, the same can be decided on similar lines.

6.1.3 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgements cited by the Ld. A.R. in respect of ground No.2 and ground No.4. We find that grounds no.1, 3 & 5 are identical to various grounds raised by the revenue in the case of Gujarat Ambuja Exports Ltd. for the assessment year 1993-94 and in the present case, Ld. CIT(A) has followed his own order in that case. Ld. D.R. could not point out any difference in the facts in the present case and, therefore, these three grounds of the revenue are rejected on the same lines as the same were rejected while deciding the case of Gujarat Ambuja Exports Ltd. for the assessment year 1993-94.

6.2 Regarding ground No.2, we find that this issue was decided by Ld. CIT(A) as per para 5.5 of his order which is reproduced below:

> "5.5 I find from the assessment order that the appellant has had income form capital gains. I also find from above submissions of the appellant that he appellant has large opening/closing stock in its share business and there have been large scale purchse4s and sales of shares as stock in trade. Therefore, a part of the income from dividend on shares and interest on debentures will pertain to shares /debentures held by the appellant as investment and the remaining part of the dividend / interest will pertain to the shares/debentures held as stock-in-trade. In view of this and in view of what I have held above in para 5.5.1, the A.O. is directed to obtain the requisite details and evidence form the appellant and work out the part of dividend/interest income taxable as income from other sources and the remaining part taxable as part of share business income of the I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 appellant. The appellant is expected to furnish the requisite details and evidence before the A.O.. This ground of appeal is, therefore, treated as decided accordingly."

6.2.1 From the above para of the order of Ld. CIT(A), we find that this is the decision of Ld. CIT(A) that a part of income from dividend on shares and interest on debentures will pertain to shares/debentures held by the assessee as investment and the remaining pat of dividend/interest will pertain to the shares/debentures held as stock in trade. Ld. CIT(A) has directed the A.O. to obtain the required details and evidence from the assessee and work out the part of dividend/interest income taxable as "income from other sources" in respect of shares and debentures held by the assessee as investment and the remaining part should be taxed as business income of the assessee. As per the judgment of Hon'ble Gujarat High Court cited by the Ld. A.R. having been rendered in the case of Sphere Stock Holdings Pvt. Ltd.(supra), it was held that if the shares were held by the assessee as stock in trade, it has to be accepted that dividend income is incidental to shares business and, therefore, irrespective of the provisions contained in Section 56 of the Income tax Act, 1961 and the explanation to Section 73, loss in shares trading should be adjusted against such business income on account of dividend from shares held as stock in trade. Respectfully following the judgment of Hon'ble Gujarat High Court, we decline to interfere in the order of Ld. CIT(A) on this issue also. Ground No.2 of the revenue's appeal is also rejected.

6.3 Regarding ground No.4, of the revenue's appeal, we find that the same is identical to ground NO.4 raised in the revenue's appeal in the case of Gujarat Ambuja Cotspin Ltd. as per ground No.4 and in that case, this issue was decided in favour of the assessee and the ground of the I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 revenue was rejected by following this very judgement of Hon'ble Gujarat High Court cited before us. On the same lines, in the present case also, this ground of the revenue is rejected.

6.4 In the result, this appeal of the revenue is also dismissed.

7. Now, we take up the appeal of the revenue in the case of Gujarat Ambuja Proteins Ltd. for the assessment year 1993-94 in respect of penalty proceedings u/s 271(1)(c) of the Act in I.T.A.No. 2003/Ahd/2008. The grounds raised by the revenue are as under:

> "1) The Ld. CIT(A) has erred in law and on the facts of the case in deleting the penalty of Rs.66,41,871/- levied u/s 271(1)(c).
>
> 2) On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the A.O.
>
> 3) It is, therefore, prayed that the order of the Ld . CIT(A) may be cancelled and that of the A.O. may be restored to the above effect.

7.1 Ld. D.R. supported the penalty order whereas the Ld. A.R. supported the order of Ld. CIT(A). He also placed reliance on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT Vs Secure Meters Ltd. as reported in 321 ITR 611 and also on the judgment of Hon'ble Apex Court rendered in the case of Reliance Petro Products Pvt. Ltd. as reported in 322 ITR 158.

7.2.1 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgements cited by the Ld. A.R. We find that in the present case, penalty was imposed by the A.O. u/s 271(1)(c) in respect of disallowance of Rs.1,44,38,852/- u/s 35D incurred on the issue of debentures. This penalty was deleted by Ld. CIT(A) as per paras 4, 4,1 and 4.2 of his order which are reproduced below:

> I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 "4. I have considered the submissions of the A.R. carefully. I have also gone through the case laws cited by the Id. A.R. I find that the issue of claim of the appellant u/s.35D of the Act in respect of debenture issue expenses is debatable. The appellant had claimed the same as revenue expenditure relying on the decision of Supreme Court in India Cements Ltd. Vs. CIT. However, the Hon'ble Tribunal has held that the issue expenses of convertible debentures are not allowable u/s.37(1) of the Act relying on the decision of I.T.A.T. Ahmedabad Bench in the case of Ashima Syntex Ltd Vs. ACIT 100 ITD 247 (Ahd)(SB) which was rendered on 24.3.2006 . The fact that the tax appeal of the appellant has been admitted before the Hon'ble Gujarat High Court shows that the issue is debatable.

4.1 I however don't agree with the contention of the A.R. that proper satisfaction has not been recorded in view of decision of Hon'ble Madras High Court in M. Sajjanraj Nahar 283 ITR 230(Mad) wherein it has been held that indication in the assessment order that penalty proceedings are initiated separately is sufficient to prove that the A.O. has satisfied himself that the assessee has concealed his income.

4.2 However as the appellant has disclosed the facts regarding the claim of this expenditure in the statement of income filed along with return of income and profit and loss account , there is no non-

disclosure of facts and there is no question of furnishing inaccurate particulars of income. It is basically a rejection of claim of the appellant and it is a debatable issue as there are conflicting decisions on the issue , therefore, in view of the various decisions relied upon by the A.R., I hold that it is not a fit case for levy of concealment of penalty. Accordingly, the penalty levied u/s.271(1)(c) is directed to be deleted."

7.2.2 We find that Ld. CIT(A) has decided this issue on this basis that this claim was made by the assessee on the basis of judgement of Hon'ble Apex Court rendered in the case of India Cements Ltd. Vs CIT. However, the tribunal in quantum proceedings has decided this issue against the assessee in respect of convertible debentures by relying on the decision of the Tribunal rendered in the case of Ashima Syntex Ltd. Vs I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 ACIT 100 ITD 247 (Ahd.)(SB) which was rendered on 24.03.2006. The return of income in the present case was filed by the assessee on 27.09.94 and, therefore, at that point of time, this decision of Special bench of the Tribunal was not available. Considering all these facts, we are of the considered opinion that even after confirming the disallowance by the Tribunal in the quantum proceedings, penalty in the present case is not justified because the issue was debatable at the time of filing of return of income and, therefore, we decline to interfere in the order of Ld. CIT(A) on this issue.

7.3 In the result, this appeal of the revenue is dismissed.

8. Now, we take up the cross appeals of the assessee and the revenue in the case of Gujarat Ambuja Exports Ltd. for the assessment year 1995- 8.1 First, we take up the revenue's appeal. The grounds raised by the revenue are as under:

"1) The Ld. CIT(A) /Dy. CIT(A) has erred in law and on facts in deleting the following additions:

i) On account of loss in inter group transactions Rs.5,413/-

ii) On account of short form capital loss through A Chhataria & Co. Rs.20,38,500/-

2) On the facts and in the circumstances of the case, the Ld. CIT(A) /Dy. CIT(A) ought to have upheld the order of the A.O.

3) It is, therefore, prayed that the order of the Ld. CIT(A) / Dy.

CIT(A) may be set aside and that of the order of the A.O. be restored to the above extent."

8.1.1 Ld. DR supported the assessment order whereas the Ld. A.R. supported the order of Ld. CIT(A).

8.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. Regarding I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 ground No.1, we find that this issue was decided by Ld. CIT(A) as per para 14 & 15 of his order which are reproduced below:

> "14. At the appellate stage, it is clarified that the appellant had actually earned a profit of Rs.5413/- on inter-group sales transactions and it was held to be not a real transaction by the department. In view of this, the appellant had reduced the book profit from the computation from the total income as in cases where loss had been claimed, the respective assessee had offered that loss to tax has not been real. The A.O. mis-understood the whole issue and has held the above to be loss of Rs.5413/- and has added the same to assessee's income. The A.O. is wrong in doing so, particularly in view of the fact that in his order, he has held that the loss is not real loss and, therefore, same analogy should be applied to the profits and hence, the profits should be reduced from the book profit.
>
> 15. In view of the clarification as given above, it is held that treatment given by the appellant in computation of statement of income, was correct. The A.O. had erred in disallowing so called loss which arose on admitted unreal transaction, when in fact the appellant had recorded profits of Rs.5413/- in the group trading transaction. Hence, the addition as made stands deleted."

8.1.3 From the above paras of the order of Ld. CIT(A), we find that disallowance was deleted by Ld. CIT(A) on this basis that the A.O. has committed a mistake in making addition on this basis that the assessee has incurred a loss of Rs.5413/- in respect of inter group sales transactions but the fact is this that the assessee had recorded profits of this amount in respect of such group transaction. This finding of fact could not be controverted by Ld. D.R. and hence, we do not find any reason to interfere in the order of Ld. CIT(A) on this issue. Accordingly, ground No.1 of the revenue's appeal is rejected.

8.2 Regarding ground No.2, we find that this issue is decided by Ld. CIT(A) as per para 28 of his order which is reproduced below:

> "28. To my mind here is a case where the Assessing Officer has gone by some suspicions alone. If the A.O. had any genuine I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 doubt, he could have made proper entries from the broker. However, no such attempt was made in spite of the fact that

identity, name and address of the broker was available and delivery numbers etc. were also on record. In this case, the Assessing Officer has reached the conclusion without causing proper enquiry and in a way has proceeded one sidedly. In the present case, the appellant had entered into different transactions and to support its claim of loss, the appellant had produced the relevant details. To incur the loss, the appellant had duly given and taken delivery of shares through the broker which fact had been duly acknowledged by the broker. The Assessing Officer could not prove that no delivery was involved and it was a mere accommodation given to the assessee by the broker. So much so that the broker through all transactions took place, was never examined and his sides of the story was not even considered. In nutshell, the Assessing Officer just made this disallowance on the basis of inferences which were not well placed as discussed above. There is nothing on record to prove that the loss was not genuine. On the rates involved in different transactions, there is no adverse inference drawn. Sine substantial loss was claimed, the disallowance w s perhaps restored to on unsupported inference. Since, there is nothing to prove that the loss was not genuine, the A.O. is directed to allow the same as claimed. This ground of appeal is therefore decided in favour of the assessee."

8.2.1 From the above para of the order of Ld. CIT(A), we find that a clear finding is given by Ld. CIT(A) that the addition was made by the A.O. on the basis of expenses allowed without bringing any adverse material on record and in fact, without making proper inquiry. This finding is also given by Ld. CIT(A) that there is nothing on record to prove that the loss was not genuine and the disallowance was made by the A.O. on unsupported inference. Ld. D.R. could not controvert these findings of Ld. CIT(A) and hence, we do not find any reason to interfere in the order of ld. CIT(A) on this issue also.

8.3 In the result, this appeal of the revenue is dismissed.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009

9. Now, we take up the appeal of the assessee in I.T.A.No. 1860/Ahd/2000. The assessee has raised various grounds but the only grievance of the assessee is that deduction was not allowed to the assessee u/s 80HHC properly and it was contended by the Ld. A.R. before us that this issue has to go back to the file of the A.O. for a fresh decision as per the amended provisions of Section 80HHC. Ld. D.R. supported the orders of authorities below.

9.1 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that in the present case, the assessment order was passed by the A.O. on 312.03.1998 and the order of CIT(A) is dated 05.06.2000 whereas substantive retrospective amendment has taken place in Section 80HHC by the taxation law amendment Act 2005 with retrospective effect from 01.04.1992. Hence, we feel that in the interest of justice, this entire issue regarding allowability and quantum of deduction allowable to the assessee u/s 80HHC should go back to the file of the A.O. for a fresh decision in the light of the amended provisions of Section 80HHC of the Income tax Act, 1961. Accordingly, we set aside the order of CIT(A) on this

issue and restore this entire matter back to the file of the A.O. for a fresh decision regarding allowability of deduction to the assessee u/s 80HHC and its quantum. The A.O. should pass necessary order as per law after providing adequate opportunity of being heard to the assessee. 9.2 In the result, this appeal of the assessee is allowed for statistical purposes.

10. Now, we take up the cross appeals of the assessee and the revenue in the case of Gujarat Ambuja Exports Ltd. for the assessment year 2004- I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 10.1 First, we take up the revenue's appeal in I.T.A.No. 1964/Ahd/2009. In this case, only grievance of the revenue is regarding exclusion of excise duty of Rs.1,21,18,095/- from total turnover for computation of deduction u/s 10B.

10.1.1 Ld. D.R. supported the assessment order whereas Ld. A.R. supported the order of Ld. CIT(A). He placed reliance on the Tribunal decision rendered in assessee's own case for the assessment year 2003-04 in I.T.A.No. 2511/Ahd/2007 dated 24.12.2010. He submitted a copy of this tribunal decision and drawn our attention to para 28 of this Tribunal decision.

10.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the decision cited by the Ld. A.R. in the assessee's own case for the assessment year 2003-04. We find that a similar issue was raised by the revenue before the tribunal in that year and the same was decided by the Tribunal in favour of the assessee in para 28 of the Tribunal decision which is reproduced below:

> " 28. We have carefully considered the arguments of both the sides and perused the material placed before us. We find hat the issue is also squarely covered in favour of the assessee by the decision of Hon'ble Apex Court in the case of CIT Vs. Lakshmi Machine Works, 290 ITR 667. In -this case, Then-Lordships held as under:
>
> "Section 80HHC of the Income-tax Act, 1961, is a beneficial section : it was intended to provide incentive to promote exports. The intention was to exempt profits relatable to exports. Just as commission received by the assessee is relatable to exports and yet it cannot form part of "turnover"

for the purposes of section 80HHC, excise duty and sales tax also cannot form part of "turnover". Just qs interest, commission, etc., do not emanate from the "turnover " so also excise duty and sales tax do not emanate from such turnover. Since excise duty and sales tax did not involve any I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 such turnover such taxes had to be excluded. Commission, interest, rent, etc., do yield profits, but they do not partake of the character of turnover and therefore they are not includible in the "total turnover". If so, excise duty and sales tax also cannot form part., of the "total turnover" under section 80HHC(3)."

Respectfully following the above decision, we uphold the order of the CIT(A) on this point and reject the Ground No.2 of the Revenue's appeal."

10.1.3 Since the issue involved in the present case is identical, we do not find any reason to take a contrary view in the present year and hence, by respectfully following the tribunal decision in assessee's own case for the assessment year 2003-04, we decide this issue in favour of the assessee.
10.1.4 In the result, this appeal of the revenue is dismissed.

11. Now, we take up the appeal of the assessee in I.T.A.No. 1538/Ahd/2009. The grounds raised by the assessee are as under:

> "1. The learned CIT (A) has erred in law and on facts in confirming the action of Id. A.O. in disallowing claim of deduction U/s. 35D of the Act amounting to Rs. 857760/-.
>
> 2. The learned GIT (A) has erred in law and on facts in confirming the action of Id, AO in holding that while calculating deduction / exemption U/s. 10B of the Act, unabsorbed depreciation has to be reduced from the eligible profits.
>
> 3. The learned CIT (A) has erred in law and on facts in confirming the Action of Id. AO in holding that while calculating deduction U/s. 80HHC of the Act, unabsorbed depreciation has to be reduced from eligible profits.
>
> 4. Both the- lower authorities have erred in law and on fats in not properly appreciating and considering various submission, evidences and supporting placed on records during the course-of the proceedings and not properly appreciating various facts and law in its proper perspective.
>
> 5. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in levying interest under section 234B / C of the Act.
>
> 6. The learned CIT (A) has erred in law and on facts in confirming the action of Ld. AO in initiating penalty proceedings I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 U/s. 271(l)(c) of the Act without recordings the satisfaction contemplated under the said section.
>
> The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal."

11.1 Regarding ground No.1, it was submitted by 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 2003-04 in I.T.A.No. 2137/Ahd/2007 dated 24.12.2010. He submitted a copy of this tribunal decision and drawn our attention to pages 17-19 of this Tribunal order. Ld. D.R. supported the orders of authorities below.
11.1.1 We have considered the rival submissions, perused the material on record and have g one through the orders of authorities below. We find that in assessment year 2003-04, similar issue was raised before the tribunal and it was pointed out before the Tribunal that this issue of disallowance of deduction u/s 35D arose for the first time in assessment year 1998-99 and the same is pending in

appeal before the tribunal. This was submitted by the assessee before the tribunal that the matter may be restored back to the file of the A.O. with the direction to follow the finding of the Tribunal in assessment year 1998-99. The issue was restored back by the Tribunal to the file of the A.O. with the same directions. Accordingly, in the present year also, we set aside the order of Ld. CIT(A) on this issue and restore the issue back to the file of the A.O. with the direction to readjudicate the same as per the finding of the Tribunal in assessment year 1998-99. Accordingly, ground No.1 is allowed for statistical purposes.

11.2 Regarding ground No.2, it was submitted by Ld. A.R. that this matter should also go back to the file of the A.O. for a fresh decision because it is not clear as to whether the brought forward depreciation is I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 from 10B business or some other business. Ld. D.R. supported the orders of authorities below.

11.2.1 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that this fact is not available on record as to whether the brought forward unabsorbed depreciation is in respect of 10B unit or some other unit. We are of the considered opinion that this issue regarding set off of brought forward unabsorbed depreciation from business income should be decided after ascertaining the factual position as to whether this brought forward unabsorbed depreciation is in respect of 10B industrial undertaking or some other unit because as per sub-section (4) of Section 10B, profits derived from export should be the amount which bear to the profits of business of undertaking, the same proportion as export turnover bear to the total turnover of the business carried on by the undertaking. In our considered opinion, for the purpose of giving effect to the sub- section (4) of section 10B, profit of 10B undertaking has to be worked out first and thereafter, the allowable deduction has to be worked out in proportion to export turnover to total turnover. To work out the profit of 10B undertaking, only the brought forward unabsorbed deprecation of 10B undertaking should be considered and not brought forward unabsorbed deprecation of any other unit. We, therefore, 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 in the light of above discussion after providing adequate opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

11.3 Regarding ground No.3, it was fairly conceded by the Ld. A.R. that this is covered against the assessee by the tribunal order in assessee's own case for assessment year 2003-04 in I.T.A.No. 2137/Ahd/2007 dated I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 29.12.2010. He drawn our attention to para 13 & 14 of this tribunal decision. Respectfully following the precedence, in the present year also, this issue is decided against the assessee. Ground No.3 of the assessee is rejected.

11.4 Ground No.4 is general.

11.5 Ground No.5 is regarding levy of interest u/s 234B and 234C which is consequential issue and ground No.6 is regarding initiation of penalty proceedings u/s 271(1)(c) which is premature. 11.6 In the result, this appeal of the assessee is partly allowed.

12. Now, we take up the cross appeals of the assessee and the revenue in case of Gujarat Ambuja Exports Ltd. for the assessment year 2005-06 in I.T.A.No. 1539 and 1965/Ahd/2009.

12.1 First, we take up the revenue's appeal in I.T.A.No. 1965/Ahd/2009. The grounds raised by the revenue are as under:

> "1) The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.l,54,96,6737- made on account of utilized CENVAT credit being in the nature of revenue receipt in view of decision of Hon'ble Supreme Court in the case of Chorangee Sales Bureau Pvt. Ltd. 87 ITR 542 and Sinclare Murray T Co. Pvt. Ltd. 97 ITR 615.
>
> 2) The Ld. CIT(A) has erred in law and on facts in deleting the addition in respect of unutilized CENVAT credit without considering the amendment in the form Section 145A, which mandates inclusion of sales tax and excise duty in purchase and sale and inventories for the purpose of computation of income.
>
> 3) The Ld. CIT(A) has erred in law and on facts in directing the Assessing Officer to treat expenses of Rs,1.74.98,64U- as revenue expenditure without considering the facts brought on record that such expenditure was capital in nature as entire technology of the D.G.Set was changed from HSD based Furnace Oil Based.
>
> 4) The Ld. CTT(A) has erred in law and on facts in directing the Assessing Officer to allow deduction u/s. 10B on surplus from Exchange Rate Fluctuation, without considering the legal position that the same is not "derived from" export of the goods and also I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 without verification as to whether the same has been received by the assessee within the prescribed time limit under the Act
>
> 5). On the facts and in the circumstances of the case and in law, the C1T (A) ought to have upheld the order of the A.O.
>
> 6) It is, therefore, prayed that the order of the CIT (A) be set aside and that of the A.O. be restored to the above extent."

12.1.1 Ld. D.R. supported the assessment order whereas Ld. A.R. supported the order of Ld. CIT(A). He further submitted that the issue raised by the revenue in grounds NO.1 & 2 is covered in favour of the assessee by the judgement of Hon'ble Apex Court rendered in the case of CIT Vs Indo Nippon Chemicals Co. Ltd. as reported in 261 ITR 275 and also by the judgement of Hon'ble Gujarat High Court rendered in the case of CIT Vs Unique Industries as reported in 307 ITR 350. Regarding ground No.3, he placed reliance on the judgement of Hon'ble Karnataka High Court rendered in the case of CIT & Another Vs Sagar Talkies as reported in 325 ITR 133 and regarding ground No.4, he placed reliance on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT Vs Amba Impex as report ed in 282 ITR 144.

12.1.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgements cited by the Ld. A.R. Regarding grounds No.1 & 2, we find that this issue is covered in favour of the assessee by both the judgements cited by the Ld. A.R. and hence, by respectfully following these two judgements, we decide this issue in favour of the assessee and accordingly, these two grounds of the revenue's appeal are rejected. 12.2 Regarding ground No.3, we find that the issue in dispute is regarding expenses incurred by the assessee on renovation of D. G. Set which was converted into furnace oil from HSD. This issue was decided by Ld. CIT(A) in favour of the assessee by following various judgements I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 of various High Courts and the judgement of Hon'ble Apex Court rendered in the case of Empire Jute Co. Vs CIT as reported in 124 ITR

01. Before us, reliance was placed by the Ld. A.R. on the judgement of Hon'ble Karnataka High Court rendered in the case of Sagar Talkies (supra). In para 7.2 of his order, Ld. CIT(A) has noted these submissions of the assessee that the assessee has not purchased any new genset and not enhanced the installed capacity of the existing genset. The assessee has merely changed the input requirement of DG set from HSD to furnace oil because of business expediency since import price of HSD shot up from US$24 to US$44-48/barrel and, therefore it was not advisable to continue with HSD as fuel for generation of electricity and for this reason, the genset was renovated and converted into genset running with furnace oil as input. Ld. CIT(A) has also given his finding in para 7.3 of his order that the A.O. has not controverted the claim of the assessee that after change of fuel input, the capacity of genset did not alter. Ld. CIT(A) has questioned the assessee and noted that the assessee has not acquired new capital or enhanced existing capacity and, therefore, expense incurred is not capital expenditure. This finding of CIT(A) could not be controverted by the Ld. D.R. Various judgements followed by Ld. CIT(A) are also supporting the case of the assessee. Hence, we do not find any good reason to interfere in the order of Ld. CIT(A) on this issue. 12.2.1 Ground No.3 of the revenue is also rejected. 12.3 Regarding ground No.4, we find that this issue was decided by Ld. CIT(A) as per para 10.6 of his order by following the judgement of Hon'ble Gujarat High Court rendered in the ca se of CIT Vs Amba Impex Ltd. as reported in 282 ITR 144. He has also considered the Tribunal decision in the case of ITO Vs Gyani Exports as reported in 94 TTJ 557 wherein, it was held that gain from foreign exchange fluctuation as I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 eligible for deduction u/s 80HHC. No contrary decision was brought to our notice by Ld. D.R. and hence, on this issue also, we decline to interfere in the order of Ld. CIT(A). Ground No.4 is also rejected. 12.4 Grounds N.5 & 6 are general.

12.5 In the result, appeal of the revenue is dismissed.

13. Now, we take up the assessee's appeal in I.T.A.No. 1539/Ahd/2009.

13.1 Ground No.1 is as under:

> "1. The learned CIT (A) has erred in law and on facts in confirming the action of Id. A.O. in disallowing deduction U/s. 10B of the Act in the sum of Rs. 2,23,09,295/- in respect of Cotton Yard Division."

13.1.1 It was fairly conceded by the Ld. A.R. that this issue has to be decided against the assessee because the period of ten consecutive assessment years for the purpose of benefit u/s 10B was over in assessment year 2004-05. Accordingly, this ground of the assessee is rejected.

13.2 Ground No.2 & 3 are as under:

> "2. The learned CIT (A) has erred in law and facts in confirming the action of Id. AO in not granting deduction U/s. 10B of the Act on Cotton Yarn Division on the income from commission on ocean freight Rs. 7,15,225/- Misc. income Rs. 6,57,491/-, Interest income Rs. 2,33,64,787/- and exchange fluctuation gain Rs. 8,47,31,260/-.
>
> 3. Alternatively and without prejudice, only the net and not gross income from commission on Ocean freight, Misc. income, Interest income and exchange fluctuation gain from Cotton Yarn Division can be reduced while calculating deduction / exemption U/s. 1 OB of the Act on Cotton Yarn Division."

13.2.1 It was submitted by the Ld. A.R. that if the ground No.1 of the assessee is rejected, then these two grounds become of academic interest.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 Accordingly, these two grounds are also rejected being of academic interest only.

13.3 Ground NO.4 is as under:

> "4. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in including excise duty and sales tax to the total turnover while calculating deduction / exemption U/s. 1 OB of the Act on Cotton Yarn Division."

13.3.1 It was submitted by the Ld. A.R. that this issue is covered in favour of the assessee by the judgement of Hon'ble Apex Court rendered in the case of CIT Vs Laxmi Machine Works as reported in 290 ITR 667 (S.C.). Ld. D.R. supported the orders of authorities below. 13.3.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. By respectfully following this judgment of Hon'ble Apex Court, we decide this issue in favour of the assessee. In earlier year i.e. assessment year 2003-04 in assessee's own case in I.T.A.No. 2511/ahd/2007 also, similar issue was decided in favour of the assessee. Accordingly this ground of the assessee is allowed.

13.4 Ground no.5 is as under:

> "5. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in holding that while calculating deduction / exemption U/s. 10B of the Act on Cotton Yarn Division, unabsorbed depreciation has to be reduced from the eligible profits."

13.4.1 It was submitted by the Ld. A.R. that this issue is identical as ground No.2 in assessee's own case for assessment year 2004-05 and therefore, this issue should go back to the file of the A.O. for a fresh decision on similar lines. Ld. D.R. supported the orders of authorities below.

I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 13.4.2 We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below. We find that a similar issue was raised by the assessee in assessment year 2004-05 i.e. in I.T.A.No. 1538/ahd/2009 as per ground No.2. While deciding this appeal we have set aside the order of Ld. CIT(A) and restored the matter back to the file of the A.O. as per para 11.2.1 above. Accordingly, in the present year also, the order of Ld. CIT(A) is set aside and the matter is restored back to the file of the A.O. for a fresh decision with similar direction given by us in assessment year 2004-05. This ground is allowed for statistical purposes.

13.5 Grounds No.6 & 7 are as under:

> "6. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in not granting deduction U/s. 10B of the Act on kadi Division on the income from Commission on Ocean fright Rs. 50,062/-, Misc. income Rs. 3,15,256/- and exchange fluctuation gain Rs. 7,94,732/-
>
> 7. Alternatively and without prejudice, only the net and not the gross income from Commission on Ocean -.freight, Misc. income, and exchange fluctuation gain from Kadi Division can be reduce while calculating deduction 7 exemption U/s. 10B of the Act on Kadi Division."

13.5.1 Ld. A.R. submitted that this ground is not pressed because one part i.e. regarding exchange fluctuation gain was decided by Ld. CIT(A) in favour of the assessee and for the remaining aspect i.e. commission from ocean freight and miscellaneous income, there is no merit in the assessee's ground., accordingly, these two grounds i.e. grounds no.6 & 7 are rejected as not pressed.

13.6 Ground No.8 is as under:

> "8. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in holding that while calculating deduction / exemption U/s. 10B of the Act on Kadi Division, I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 unabsorbed depreciation has to be reduced from the eligible profits."

13.6.1 It was submitted by the Ld. A.R. that Ld. CIT(A) has followed his own order for assessment year 2004-05. He submitted that in the present year also, this issue should go back to the file of the A.O. for a fresh decision after finding as to whether brought forward unabsorbed depreciation belonging to 10B unit or not. In assessment year 2004-05, we have set aside the order of Ld. CIT(A) and restored back this issue to the file of the A.O. for a fresh decision as per para 11.2.1 above. Accordingly, in the present year also, the order of Ld. CIT(A) on this issue is set aside and the matter

is restored back to the file of the A.O. for a fresh decision with similar direction given by us in assessment year 2004-05. This ground is allowed for statistical purposes. 13.7 Ground No.9 is as under:

> "9. The learned CIT (A) has erred in law and on facts in confirming the action of Id. AO in denying set off of unabsorbed depreciation of Rs.7,18,74,648/- of earlier years."

13.7.1 It was submitted by the Ld. A.R. that this issue should also go back to the file of the A.O. because it is consequential to the final decision in assessment year 2004-05. In assessment year 2004-05, we have restored this mater back to the file of the A.O. for a fresh decision after examining this aspect as to whether the brought forward unabsorbed depreciation is in respect of 10B unit or other unit and we have held that only brought forward unabsorbed depreciation of 10B unit should be adjusted against the business profit of 10B undertaking. Hence, in the present year also, we set aside the order of Ld. CIT(A) on this issue and restore this matter back to the file of the A.O. for a fresh decision in the light of his final I.T.A.No. 1860,1944/Ahd/2000 I.T.A.No.1538,1539,1964,1965/Ahd/2009 decision on this issue in assessment year 2004-05. This ground is allowed for statistical purposes.

13.8 Ground No.10 is general and ground No.11 is regarding levy of interest u/s 234B and 234C which is consequential issue. Ground No.12 is regarding initiation of penalty proceedings u/s 271(1)(c) which is premature.

13.9 In the result, appeal of the assessee stands partly allowed in terms indicated above.

14. In the combined result, appeal of the assessee in I.T.A.No. 113/Ahd/1999 is allowed, the appeals of the revenue in I.T.A. Nos. 202, 203 & 204/Ahd/1999, 2003/Ahd/2008, 1944/Ahd/2000, 1964 & 1965/Ahd/2009 are dismissed and I.T.A.No.1860/ahd/2000 of the assessee is allowed for statistical purposes and I.T.A.Nos.1538 & 1539/Ahd/2009 of the assessee are partly allowed.

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

Sd./-	Sd./-
(KUL BHARAT)	(A. K. GARODIA)
JUDICIAL MEMBER	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
6. The Guard File

By order

AR,ITAT,Ahmedabad

I.T.A.No. 1860,1944/Ahd/2000

1. Date of dictation.....6/7

2. Date on which the typed draft is placed before the Dictating Member...17/7. 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 20/7

5. Date on which the fair order comes back to the Sr. P.S./P.S.20/7

6. Date on which the file goes to the Bench Clerk ...20/07/2012

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. .....