IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'L' Mumbai
Before Shri. T R Sood (AM) and Shri R S Padvekar (JM)

I.T.A.NO.7626/Mum/2005
(Assessment Year: 2002-03)

Deputy Commissioner of Income-tax, Circle 6(1), Mumbai	Vs.	M/s BASF India Limited Rhone Poulene House, S.K.Ahire Marg, Worli, Mumbai 400 025 PAN NO.AAACB4599E

ITA No. 195/Mum/2006
(Assessment Year 2002-03)

M/s BASF India Limited Rhone Poulene House, S.K.Ahire Marg, Worli, Mumbai 400 025 PAN NO.AAACB4599E	Vs.	Deputy Commissioner of Income-tax, Circle 6(1), Mumbai

Department by: Shri. Narendra Singh
Assessee by: Shri. T.Pooran & Ms.Heena Doshi.

ORDER

Per: T R Sood, AM:

These cross appeals are directed against CIT (A)'s order dated 25-10-2005 for the A.Y 2002-03. They are heard together and disposed of by this common order.

2. I.T.A.No.7626/M/05 (revenue's appeal): The revenue has raised the following two grounds-

1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the Assessing Officer to exclude the amount of sales-tax and excise duty from the total turnover for the purpose of computation of deduction u/s.80HHC of the Act relying upon the decision of the Bombay High Court in the case of Sudarshan Chemicals Industries Ltd. (245 ITR 769) which has not been accepted by the department and contested by way of filing SLP.

2. On the facts and in the circumstances of the case and in law, the CIT (A) erred in directing the Assessing Officer not to deduct 90% of miscellaneous receipts by way of recovery of R&D expenses, recovery of octroi and freight brokerage, sales tax set off, technical service fees, write back of creditors and interest received from sundry debtors,

as provided for by explanation (baa) while computing the deduction u/s.80HHC without appreciating that the same had no nexus with the business profits derived from the business of exports.

3. Ground No.1: After hearing both the parties, we find that this issue is squarely covered by the decision of the Hon'ble Apex Court in the case of Laxmi Machine Works 290 ITR 667**.** In this case, the Hon'ble Supreme Court has held as under:

> "*The principle reason for enacting a formula in section 80HHC of the Income Tax Act, 1961, is to disallow a part of the concession thereunder when the entire deduction claimed cannot be regarded as relating to exports. Therefore, while interpreting the words "total turnover" in the formula in section 80HHC one has to give a schematic interpretation. The various amendments made therein show that receipts by way of brokerage, commission, interest, rent, etc., do not form part of business profits as they have no nexus with the activity of export. The amendments made from time to time indicate that they became necessary in order to make the formula workable. If so, excise duty and sales tax also cannot form part of the "total turnover" under section 80HHC (3): otherwise the formula becomes unworkable*."

Respectfully following the above decision, we decide this issue against the revenue.

4. Ground No.2: Before us the ld. DR submitted that the issue raised in this ground pertained to exclusion of 90% of the receipts in terms of clause (baa) of Sec.80HHC (4C) and is now covered in favour of the revenue by the decision of the Hon'ble Supreme Court in the case of K. Ravindranathan Nair 295 ITR 228.

5. On the other hand, the ld. counsel of the assessee submitted that nature of expenses has not been examined by the AO in detail and some of the items are simply reimbursement of expenses and/or recovery of expenses incurred earlier and, therefore, she will have no objection if the whole issue is re-examined.

6. After considering the rival submissions, we find that the nature of expenses has not been examined by the lower authorities. Therefore, in the interests of justice, we set aside this issue to the file of the AO with a direction to re-examine the nature of expenses and then decide the same in the light of the decision of the Hon'ble Supreme Court in the case of K. Ravindranathan Nair (supra), as well as the decision of the Hon'ble Bombay High Court in the case of CIT vs. Dresser Rand India Pvt. Ltd. 323 ITR 423

7. In the result, revenue's appeal is partly allowed for statistical purposes.

8. I.T.A.No.195/M/06 (assessee's appeal): In this appeal, assessee has raised the following grounds;

1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) has erred in confirming that the adjustment made on account of

excess price as compared to Arm's length price was liable to be made to the extent of Rs.14,01,776. He ought not to have done so.

2. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) has erred in directing the assessing officer to re-compute the deduction u/s.80HHC(3)(a) after setting off of the business loss brought forward from the earlier assessment. He ought not to have done so.

9. Ground No.1: After hearing both the parties, we find that during assessment proceedings it was noticed that the assessee had made certain purchases from Associated Enterprises (AE) and, therefore, the matter was referred to Transfer Pricing Officer (TPO) u/s.92CA(1).

In respect of certain items, it was found by the TPO that the price paid by the assessee was higher than arm's length price and, therefore, an adjustment was made for a sum of Rs.34,32,620/- for various items.

10. On appeal, addition in respect of item Lipoderm Liquor, was deleted by the ld. CIT(A) because he found that there was sale to only one other party by the AE but the same was for a bulk quantity. Similarly, addition in respect of Capro Tablets was also deleted, because AE has supplied the above consignment through a public sector undertaking i.e. M/s Project Engineering Company Ltd, and the same was not comparable. The revenue has not filed an appeal in respect of these two transactions.

11. As far as the other transactions are concerned, the addition has been confirmed by the ld. CIT(A).

12. Before us, the ld. counsel of the assessee submitted that as far as item regarding Prestogen D is concerned, the difference was because of placement of orders at different points of time and, therefore, there was a valid reason for the difference. As far as item Luwax OA Pastille is concerned, the same was supplied by the AE to the other importer at a price charged at 1.03 Euro per unit, whereas the same was supplied to the assessee at 1.05 US $. Since the value of Euro is much higher than the US dollar, therefore, price charged to the assessee was justified. As far as the other two items i.e. Amdea 05 and Butyl, Acrylate are concerned, in both these cases, the difference in price is about 4% which is less than 5% and thus, no adjustment could have been made because 2nd proviso to sub-sec.(2) of sec.92C clearly provides that if variation between the arms length price determined by the authorities and the price at which the transaction took place does not exceed 5%, then the actual price shall be taken to be the arms length price.

13. On the other hand, the ld. DR strongly supported the order of the CIT (A).

14. We have considered the rival submissions carefully and find that as far as item Prestogen D is concerned, it was clearly found by the lower authorities that assessee has purchased the same at US dollar 1.99 per unit in comparison to US dollar Rs.1.65 per unit at which the supplies were made to other customers. Though it was stated that this is

because of the difference at the point of time when the order was placed, but no evidence was filed before us, and when a specific query was raised in this regard, ld. counsel of the assessee showed her inability to produce any evidence. Therefore, clearly the price paid by the assessee in respect of these items is on higher side and TPO has correctly determined the arms length price and accordingly we confirm the addition in respect of this item.

15. As far as item Luwax OA Pastille is concerned, it is clear that to other parties the price charged was 1.03 Euro whereas the price charged to the assessee was 1.05 US dollar.

Firstly, since different currencies are involved, these prices are not comparable. In any case, the value of one Euro is definitely much more than the value of one US dollar during the relevant period and even today, therefore, the price charged to the other parties seems to be higher and accordingly no adjustment could have been made. Therefore, in respect of this item, we set aside the order of the ld. CIT (A) and delete the addition.

16. As far as last two items i.e. Amdea 05 and Butyl, Acrylate is concerned, we agree with the submissions of the ld. counsel of the assessee. Second Proviso to sec. 92C(2) reads as under:

> "*Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price*."

The above clearly shows that if the difference is less than 5% then the actual price paid should be considered as arm's length price. The TPO as well as CIT (A) have clearly observed that difference in respect of these two items is 4% and, therefore, same has to be reckoned in terms of second proviso. Similar view was taken in the case of Sony India vs. Dy. CIT by Delhi Bench of the Tribunal (114 ITD 448).

Accordingly, we set aside the order of the ld. CIT (A) and delete the addition in respect of these two items. Thus, this ground is partly allowed.

17. Ground No.2: The ld. counsel of the assessee fairly admitted that this issue is covered against the assessee in view of the decision of the Hon'ble Supreme Court in the case of Ipca Laboratories Ltd. vs. Dy. CIT (266 ITR 521) wherein it was held that deduction u/s.80HHC (1) could be allowed only if there was a positive profit. Further, sec.80AB has to be given an over riding effect and accordingly losses have to be reduced before giving deduction u/s.80HHC. The Hon'ble Supreme Court again in the case of CIT vs. Shirke Construction Equipment Ltd. (291 ITR 380) has further held as under:

"*Section 80AB of the Income-tax Act, 1961, specifying that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the purposes of the deduction under section 80HHC.*
In determining business profits for the deduction under section 80HHC the unabsorbed business losses of earlier years under section 72 should be set off."

Respectfully following the above decision, we decide this issue against the assessee.

18. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on this 16th day of July, 2010.

Sd/-	Sd/-
(T. R. Sood)	(R. S. Padvekar)
Accountant Member	Judicial Member

Copy of the order forwarded to:-

Assessee.
DCIT, Mumbai
CIT(A)
CIT
The DR, ITAT, Mumbai.