IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'J' MUMBAI

ITA Nos.5514/Mum/2007
Assessment Year: 2002-2003

TECH NOVA IMAGING SYSTEMS (P) LTD
LAXMI MILLS ESTATE, OFF DR E MOSES ROAD
MAHALAXMI, MUMBAI-400011
PAN NO:AAACT2165J

Vs

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE-7(3), AAYAKAR BHAVAN, MUMBAI

ITA No.5527/Mum/2007
Assessment Year: 2002-2003

DEPUTY COMMISSIONER OF INCOME TAX
7(3), AAYAKAR BHAVAN, MUMBAI

Vs

TECH NOVA IMAGING SYSTEMS (P) LTD
MAHALAXMI, MUMBAI-400011

CO No.292/Mum/2007
ITA No.5527/Mum/2007
Assessment Year: 2002-2003

TECH NOVA IMAGING SYSTEMS (P) LTD
MAHALAXMI, MUMBAI-400011

Vs

DEPUTY COMMISSIONER OF INCOME TAX
7(3), AAYAKAR BHAVAN, MUMBAI

D K Agarwal, JM and Pramod Kumar, AM

Dated: April 8, 2011

ORDER

Per: D K Agarwal:

These cross appeals by the assessee and the Revenue are directed against the order dated 14.6.07 passed by the ld. CIT(A) for the A.Y. 2002-03. Against the Revenue's

appeal, the assessee has also filed the C.O. Both these appeals and C.O. are disposed of by this common order for the sake of convenience.

2. Briefly stated facts of the case are that the assessee company is engaged in the business of manufacturing offset printing etc., filed return declaring total income at Rs.69754140/-. However, the assessment was completed at an income of Rs.71587760/- after making certain disallowances including the part of disallowance of deduction u/s 80HHC vide order dated 28.2.2005 passed u/s 143(3) of the Income Tax Act, 1961 (The Act). On appeal the ld. CIT(A) partly allowed the relief.

3. Being aggrieved by the order of the ld. CIT(A), the assessee and Revenue both are in appeal before us.

ITA 5514/Mum/07 (Assessee's appeal)

4. Ground No. 1 is against the sustenance of disallowance of 1% u/s 14A of the Act.

5. Ground No. 1 in Revenue's appeal in ITA No. 5527/M/2007 for the same A.Y. 2002-03 is against the relief allowed by the ld. CIT(A) out of disallowance made u/s 14A.

6. Since the issue involved is common, both these grounds are considered as common ground for the sake of convenience and disposed of accordingly.

7. Briefly stated facts of the case are that the A.O. observed that the assessee company has shown dividend income of Rs.4027520/- otherwise exempt u/s 10(33) of the Act. Besides, the A.O. also found that major investment of Rs.202.21 lacs has been made in acquisition of shares of three subsidiary and other companies namely M/s Technova Graphics Pvt. Ltd. Rs.167.59 lacs, M/s Sun Paper Ltd., Rs.5.00 lacs & M/s Technova Imaging Systems USA Rs.28.67 lacs. The A.O. further observed that the assessee company has claimed interest of Rs.563.99 lacs in the P&L a/c. The assessee was asked to explain as to why the interest as allocable to the investment should not be disallowed. The assessee company was also asked to prove the nexus of funds utilised for making investment. In reply, the assessee filed its written submissions which has been summarised by the A.O. at page No. 10 of the assessment order as under:

(i) Investments were not made out of borrowed funds

(ii) No expenditure was incurred to earn dividend

(iii) Alternatively the interest amount proportionate to dividend income should have been considered rather than the total value of investments.

(iv) The investments yielded benefits by way of various services and quotas. The income by way of dividend was therefore business income;

(v) The direct nexus of payments with regard to investments made was established with bank entries and balance as on that particular day of investment.

However, the A.O. after considering the assessee's submissions and the appellate order for the Asst. Years 2000-01 and 2001-02 in assessee's own case, restricted the disallowance to Rs.1,87,660/- i.e being 5% of Rs.37,53,211/- of the amount earned as dividend excluding dividend received from Technova Graphics Private Limited, Saraswat Co-Op. Bank and interest received on National Saving Certificate and hence added Rs.187660/- to the income of the assessee.

8. On appeal, the learned CIT(A) while observing that for earning dividend there is no requirement of expenditure restricted the disallowance to 1% of the income so earned on the ground that the administrative expenses like sending a person to the bank, telephonically enquiry about the shares and getting the updates or the feed back about the activities of the company or the status of the dividend cannot be ruled out and hence part relief was allowed as aforesaid.

9. At the time of hearing, the learned counsel for the assessee submits that the issue stands covered in favour of the assessee by the decision of the Tribunal in assessee's own case in *Tech Nova Graphics Vs. ACIT and vice versa in ITA No.4036, 4700/Mum/04* and C.O. No.75/Mum/05 for the Asst. Year 2000-01 Dt.27.07.2007 wherein the Tribunal while observing that own fund of the assessee in the form of share capital and reserves and surplus is much in excessive, upheld the order of the learned CIT(A) in deleting the disallowance made by the A.O. He also placed on record the copy of the order of the Tribunal.

10. On the other hand, the learned D.R. while relying on the order of the A.O. submits that in view of the provisions of section 14A, some reasonable disallowance is called for and the A.O. after considering the facts and circumstances of the case has rightly disallowed 5% of the amount earned as dividend, therefore, the same be restored and the relief allowed by the learned CIT(A) be reversed.

11. Having carefully heard the submissions of the rival parties and perusing the material available on record, we find that the facts are not in dispute. We further find that recently the Hon'ble jurisdictional High Court in *Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT and Another (2010) 328 ITR 81 (Bom)* has held (page 138) :

" …… (v) The provisions of Rule 8D of the Rule which have been notified w.e.f. 24.3.2008, shall apply with effect from Asst. Year 2008-09. (vi) Even prior to the Asst. Year 2008-09 when Rule 8D was not applicable, the A.O. has to enforce the provisions of sub-section (1) of section 14A. For that purpose, the A.O. is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The A.O. must adopt a reasonable basis or method consistent with all the relevant facts and circumstances…."

Respectfully following the ratio of the above decision, we are of the view that some disallowance is called for under section 14A and the decision of the Tribunal (supra) relied on by the learned counsel for the assessee is not applicable in view of the decision of the Hon'ble jurisdictional High Court (supra). Considering the totality of the facts and circumstances of the case, we are of the view that the learned CIT(A) was fully justified in restricting the disallowance at 1% of such income so earned. We hold and order accordingly. The grounds taken by the assessee and revenue are, therefore, rejected.

12. Ground Nos.2(a) to 2(e) read as under :

2(a) The learned CIT(A) erred in holding that the documentation charges reimbursed by the dealer bore the stamp of receipt referred to in clause (baa) in the Explanation to section 80HHC of the Act.

The appellant contends the reimbursals do not represent income or receipt within the mischief of clause (baa) of Explanation to section 80HHC of the Act and the direction of the CIT(A) be set aside.

(b) The learned CIT(A) erred in holding that the receipts by way of sale of scrap (Rs.12,513) and Annual Maintenance Contracts (Rs.155,23,367) should "not be included in the profits of the business" by ascribing to these receipts the character of receipts described in clause (baa) in the Explanation to section 80HHC of the Act.

The appellant prays that the direction which proceeds from misconception and truncated reading of the provisions of clause (baa) in the Explanation to section 80HHC of the Act be set aside.

(c) The learned CIT(A) erred in directing that for the cash discount (Rs.74,21,521) to be eligible for inclusion in profits and gains of business should "have been received with regard to the purchases of raw materials used for manufacture of items that had been exported" and in absence of such correlation that cash discount be treated as any other receipt referred to in clause (baa) in the Explanation to section 80HHC of the Act. The appellant prays the direction of the CIT(A) which flows from erroneous reading of section 80HHC of the Act be set aside.

(d) The learned CIT(A) erred in holding that the sundry credit balances written back (Rs.804,591) "would not form part of any profit of the export business unless the same has been claimed against purchases related to export only." The appellant prays the direction of the CIT(A) based on erroneous interpretation of section 80HHC of the Act be set aside.

(e) The learned CIT(A) erred in holding that the amount represented by insurance claim (Rs.652,405) had to be treated as "any other receipt and undergo the treatment envisaged in the Explanation (baa)."

The appellant prays the direction of the CIT(A) be set aside insofar as it directs treatment of income under section 80HHC for exclusion of the amount to the extent of 90% from the profits and gains of business."

13. Brief facts of the above issue are that the assessee company has claimed that the receipt of the following items should not be reduced to the extent of 90% for the purpose of computing profits of the business in view of clause (baa) of Explanation to section 80HHC of the Act:-

	Amount Rs.
Recovery of documentation charges	17,67,357
Sale of miscellaneous scrap.	12,513

Services and AMC for sale of equipments	1,55,23,367
Cash discount	74,21,521
Sundry balances w/off	8,04,591
Insurance Claim	6,52,405
Total :	**2,61,81,754**

However, the A.O. while computing the deduction under section 80HHC has added the above receipts to the total turnover of the assessee for the purpose of computing deduction u/s 80HHC of the Act.

14. On appeal, the learned CIT(A) has discussed the above issues as under :

(i) As regards to the recovery of documentation charges of Rs.17,67,357, he observed and held that in the above item, there is no sale element to give it a colour of turnover. However, the amount shall be taken as 'any other receipts' unless it is explicitly and categorically established by the appellant that the same had direct nexus with the export activity. Once it is found that it is any other receipt, then the natural consequences of reduction as given in the clause (baa) of Explanation to section 80HHC would follow.

(ii) As regards the issue of sale of miscellaneous scrap of Rs.12,513, he held that sale of miscellaneous scrap of Rs.12,513 would not be included in the profits of the business.

(iii). As regards services and AMC for sale of equipments of Rs.1,55,23,367, he held that the same logic applies to the other receipts like services and AMC for sale of equipments.

(iv). As regards the cash discount of Rs.74,21,521, he observed and held that the discount received by no stretch of imagination is a turnover, as the Assessing Officer has considered, decided the issue in favour of the assessee subject to the production of evidence before the Assessing Officer that the entire discount had been received with regard to the purchases of raw materials used for manufacture of items that had been exported and in the absence of same, the amount shall be taken as other receipt and clause (baa) of Explanation to section 80HHC will apply.

(v). As regards to the sundry balances written off of Rs.8,04,591, the ld. CIT(A) observed and held that the same was liability written off and had profit element in it but in no way was the part of the turnover. However, this again would not form part of any profit of the export business unless the same has been claimed against purchases related to export only, directed the Assessing Officer to verify the same, otherwise it would become other receipts and would suffer the treatment envisaged in clause (baa) of Explanation to section 80HHC.

(vi). As regards the insurance claim of Rs.6,52,405, the learned CIT(A) observed and held that the amount received from the damages of goods on transit cannot be taken as the turnover of the business. However, it would definitely come under 'any other receipts' and would suffer the treatment envisaged in clause (baa) of Explanation to section 80HHC of the Act.

15. At the time of hearing, the learned counsel for the assessee submits as under :

(i) With regard to the documentation charges of Rs.17,67,357, he submits that the issue is covered against the assessee by the decision of Hon'ble Bombay High Court in the case of *CIT Vs. Dresser Rand India P. Ltd. (2010) 323 ITR 429 (Bom)*

(ii) With regard to sale of miscellaneous scrap of Rs.12,513, he submits that the issue is covered in favour of the assessee by the decision of Tribunal in the case of *ACIT Vs. Pan Glatt Pharma Technologies Pvt. Ltd. In ITA Nos.4816, 4820/Mum/08* and C.O. Nos.1 & 2/Mum/09 for A.Ys 2003-04 and 2004-05 order Dt.9.9.2009. He also placed on record the copy of the order of the Tribunal.

(iii) With regard to the services & AMC for sale of equipments of Rs.1,55,23,367, he submits that the issue is covered against the assessee by the decision of Hon'ble jurisdictional High Court in Dresser Rand India P. Ltd. (supra).

(iv) With regard to cash discount of Rs.74,21,521, he submits that the above issue is covered in favour of the assessee by the order of the Tribunal in Pam Glatt Pharma Tehcnologies Pvt. Ltd. (supra).

(v) With regard to sundry balances of Rs.8,04,591, he submits that the said issue is covered in favour of the assessee by the following decisions :

i) CIT Vs. Abdul Rehman Industries (293 ITR 475) (Mad)

ii) ACIT Vs. M/s. Diamond Dye Chem Ltd. (ITA No.3342/Mum/2006) (Page 2 Para7)

iii) Extrusion Process (P) Ltd. Vs. ITO (106 ITD 336) (Bom)

iv) Eastern International Hotels Ltd. Vs. DCIT (93 ITD 233) (Mum)

(vi) With regard to the insurance claim of Rs6,52,405, the learned counsel for the assessee submits that this issue is also covered in favour of the assessee by the following decisions :

i) CIT Vs. Pfizer Ltd.: (2011) 330 ITR 62 (Bom)

ii) Gujarat Alkalies Vs. DCIT (82 ITD 135) (Ahd)

iii) Eastern International Hotels Ltd. Vs. DCIT (93 ITD 233) (Mum)

16. On the other hand, the learned Departmental Representative while relying on the order of the Assessing Officer also relied on the decision of the Hon'ble Supreme Court in the case of *CIT Vs. K. Ravindranathan Nair (2007) 295 ITR 228 (SC)* in respect of sale of scrap. She therefore, submits that the order passed by the A.O. be upheld.

17. We have carefully considered the submissions of the rival parties and perused the material available on record. We decide the above sub-issues as under:-

(i) With regard to the applicability of clause (baa) of Explanation to section 80HHC to the documentation charges reimbursed, we find merit in the plea of the parties that the issue is covered against the assessee by the decision of Hon'ble Bombay High Court in Dresser Rand India P. Ltd. (supra) wherein it has been held -

" Held accordingly, that 90 per cent of recovery of freight, insurance and packing receipts amounting to Rs.49,14,076, sales tax set off/refund amounting to Rs.38,33,148 and service income of Rs.2,89,17,545 had to be excluded for the purpose of computation of special deduction under section 80HHC."

Since the reimbursement of documentation charges fall under the category of any other receipts of similar nature, therefore, we respectfully following the decision of the Hon'ble jurisdictional High Court in the case of Dresser Rand India P. Ltd. (supra) hold that 90% of the same has to be excluded for the purpose of computation of deduction u/s. 80HHC of the Act.

(ii) With regard to the sale of scrap, we observe that the computation u/s. 80HHC is made on the basis of profit earned which has been defined under the head 'profit and gains of business and profession' as reduced by 90% of such income such as interest, rent, commission or other income of similar nature. The scrap generation is part of the manufacturing activity and therefore income arising from scrap sales is an operational income of the company. Therefore, in our view the scrap sales has to be treated as part of the business profits and 90% of the same is not required to be excluded as per clause (baa) of Explanation to section 80HHC. This view also finds support from the decision of the Tribunal in Pam Glatt Pharma Technologie Pvt. Ltd. (supra) wherein it has been held that that the income generated from sale of scrap is very much part of the business income of the assessee and it does not fall within any of the exception mentioned in clause 1 of Explanation (baa) to section 80HHC of the Act. As regards the decision relied on by the learned Departmental Representative in the case of K. Ravindranathan Nair (supra), the said decision is on the issue of processing charges and not on the issue of sale of scrap. Therefore, the same is distinguishable and not applicable to the facts of the present case. We hold and order accordingly.

(iii) As regards, the AMC charges, we are of the view that this issue is admittedly covered against the assessee as per the decision of the Hon'ble jurisdictional High Court in the case of Dresser Rand India P. Ltd. (supra), therefore, this issue is decided against the assessee.

(iv). As regards, the issue of cash discount, we find merit in the plea of the learned counsel for the assessee that the same is covered in favour of the assessee by the decision of the Tribunal in the case of Pam Glatt Pharma Technologies Pvt. Ltd. (supra) wherein it has been held (para 18):-

".....that cash discount which the assessee received from its suppliers will go to reduce its cost of sale and thus intimately connected with the business of the assessee. It cannot be equated with the receipts in the nature of brokerage, commission, interest, rent, charges or any other receipts of similar nature referred to in clause 1 of Explanation (baa) to section 80HHC of the Act. We therefore direct that that 90% of the cash discount received by the assessee from suppliers should not be excluded from the profits of the business".

In the absence of any distinguishable features brought on record by the revenue, we direct the Assessing Officer to treat the cash discount as business profits and 90% of the same is not required to be excluded.

(v) As regards the issue of sundry credit balance, we find merit in the plea taken by the learned counsel for the assessee that the same is covered in favour of the assessee by the decision of the co-ordinate Bench of the Tribunal in Diamond Dye Chem Ltd. (supra) wherein it has been held that the written back suppliers and right back customers cannot be considered as a receipt by way of brokerage, commission, interest, rent charges or any other receipt of similar nature. All these items are connected with the operations of the assessee. Respectfully following the same, we hold that the receipt of sundry credit balance has to be treated as part of the business profit and 90% of the same is not required to be excluded as per clause (baa) Explanation to section 80HHC.

(vi). As regards insurance claim, we find merit in the plea of the learned counsel for the assessee that this issue is also covered in favour of the assessee by the decision of Hon'ble jurisdictional High Court in the case of Pfizer Ltd. (supra) wherein it has been held that the claim on account of insurance for the stock in trade did not constitute a receipt of similar nature within the meaning of Explanation (baa), not liable to be reduced to the extent of 90%. Respectfully following the same, deduction u/s. 80HHC is allowed on this issue. We hold and order accordingly. The grounds taken by the assessee are, therefore, partly allowed.

18. Ground No.3 read as under :

" The learned CIT(A) erred in holding that 90% of the following receipts though arising from the appellant's conduct of business both local and export, had to be reduced from the profits and gains of business to arrive at the profits of business defined in clause (baa) of section 80HHC of the Act.

a)	Interest received.	Rs. 36,54,644
b)	Interest on staff loan	Rs. 2,500
c)	Rent/Lease rent	Rs. 12,74,950
d)	S. Tax Refund	Rs. 24,53,983
e)	Commission	Rs. 2,20,606
f)	Sales Tax Set Off	Rs.1,35,53,629
		Rs.2,11,60,312

The appellant prays that the decision which contemplates dedicated organization for export activity alone does violence to section 80HHC(3) of the Act be set aside."

19. At the time of hearing, the learned counsel for the assessee submits as under :

a) With regard to the interest received on credit facilities to dealers and customers Rs.29,87,762 and interest on loan from staff Rs.6,66,882 aggregating to Rs.36,54,644 to be reduced @ 90% in view of clause (baa) of Explanation to section

80HHC, he submits that this issue is covered in favour of the assessee by the following decisions :

i) CIT Vs. Alfa Laval India 295 ITR 451 (SC)

ii) ITAT Order for A.Y. 2001-02 in assessee's own case in ITA No.1413-2416/Mum/05) (Para 6 Pg No.5-6)

iii) CIT Vs. Sociedade de Fomento Industrial Ltd. (ITA 20 of 2003)(Bombay).

b) With regard to the interest on loan from staff of Rs.2,500/- he submits that the issue is covered in favour of the assessee by the decision of Hon'ble Bombay High Court in Sociedade de Fomento Industrial Ltd. (supra).

c) With regard to the rent/lease rent Rs.12,74,950, he submits that the issue is covered against the assessee by the order of the Tribunal in the assessee's own case in Tech Nova Imaging Systems Pvt. Ltd. for the Asst. Years 2000-01 and 2001-02 in ITA 1413 & 2416/Mum/2005 dated 19.3.2009 and ITA Nos.4036 & 4700/Mum/04 C.O. No.73/Mum/05 order dated 27.7.2007 (supra). He also placed on record the copy of the said orders of the Tribunal.

d) With regard to the sales tax refund of Rs. 24,53,983/-, he submits that the issue is covered in favour of the assessee by the order of the Tribunal in *ACIT Vs. M/s. KSB Pumps Limited in ITA Nos. 5566 &5567/Mum/05* and in *M/s. KSB Pumps Limited vs. ACIT in ITA Nos. 5540 & 5541/Mum/05* for the assessment years 2000-01 and 2001-02 Dt.7.10.2008 and in *ACIT Vs. M/s. Diamond Dye Chem Ltd. in ITA No.3342/Mum/06 for A.Y. 2002-03 order Dt.27.1.2010*. He also placed on record the copy of the said orders of the Tribunal.

e) With regard to the commission of Rs.2,20,606, learned counsel for the assessee very fairly submits that the issue is covered against the assessee by the order of the Tribunal in assessee's own case for the Asst. Years 2000-01 and 2001-02 (supra).

f) With regard to the sales tax set off of Rs.1,35,53,629, he submits that the issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of *CIT Vs. Alfa Laval India 295 ITR 451 (SC)* and the order of the Tribunal in assessee's own case for the Asst. Year 2001-02 (supra).

20. On the other hand, the learned Departmental Representative supports the order of the Assessing Officer and ld. CIT(A).

21. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the facts are not in dispute. After considering the facts and circumstances of the case and the decisions relied on by the parties, we decide the above issues as under :

a) With regard to the interest income of Rs.29,87,762/- received on account of credit facilities to dealers and customers, we find merit in the plea of the learned counsel for the assessee that the above issue is covered in favour of the assessee in assessee's own case for the Asst. Year 2001-02 (supra) wherein it has been held vide para 6.5 of the order Dt.19.3.2009 as under :

" 6.5 After hearing both the sides, we find there is no dispute to the fact that the assessee has received an amount of Rs.34,45,239 as interest from the customers and dealers. According to the Revenue above interest from customers and dealers falls within the clause (baa) and therefore, 90% of the same should be excluded from the profits of the business. However, we find the Hon'ble Bombay High Court in the case of Alfa Laval (India) Ltd. Vs. DCIT reported in 266 ITR 418 has held that interest from customers and sales tax set off received by the assessee being assessed as part of the business profits; under the head "profits and gains of business or profession" the same could not be excluded while calculating deduction u/s. 80HHC of the Act. We find when the Revenue challenged the above decision of the Hon'ble Bombay High Court, the Hon'ble Supreme Court has dismissed the appeal filed by the Revenue which is reported in 295 ITR 451. We, therefore, set aside the order of the CIT(A) on this issue and the ground raised by the assessee is allowed."

In the absence of any distinguishable features brought on record by the revenue, we respectfully following the above, set aside the order passed by the CIT(A) and allow the ground raised by the assessee.

(b) With regard to the interest on loan from staff Rs.6,66,882 and Rs.2,500, we find that the above items of income of interest have no element of export turnover and are consequently liable to be excluded to the extent i.e. stipulated in clause (baa) of Explanation to section 80HHC. There is no discussion in the decisions relied on by the assessee on the issue of interest on loan from staff. Therefore, the said decisions relied on by the learned counsel for the assessee are distinguishable and not applicable to the facts of the present case. This being so and keeping in view the decision of the Hon'ble Supreme Court in the case of K. Ravindranathan Nair (supra) wherein it has been held that independent income like rent, commission, brokerage, etc though it formed part of the gross total income had to be reduced by 90% as contemplated in clause (baa) Explanation to 80HHC in order to arrive at business profits, we are of the view that 90% of interest on staff loan Rs. 666882 and Rs. 2500/- had to be excluded for the purpose of computation of special deduction u/s. 80HHC. We hold and order accordingly.

(c to f) With regard to the issue in sub ground (c), rent / lease rent Rs.12,74,950 (d) sales tax refund of Rs.24,53,983 (e) Commission of Rs.2,20,606 and (f) sales tax set off of Rs.1,35,53,629, we are of the view that the above items are squarely covered against the assessee by the decision of Hon'ble Supreme Court in K. Ravindranathan Nair (supra) and the recent decision of Hon'ble jurisdictional High Court in the case of Dresser Rand India P. Ltd. (supra) wherein it has been held -

" Held accordingly, that 90 per cent of recovery of freight, insurance and packing receipts amounting to Rs.49,14,076, sales tax set off/refund amounting to Rs.38,33,148 and service income of Rs.2,89,17,545 had to be excluded for the purpose of computation of special deduction under section 80HHC."

Accordingly, ground No.3 taken by the assessee is partly allowed.

22. Ground No.4 is against the sustenance of disallowance of depreciation on software treated as capital expenditure.

23. At the time of hearing both parties have agreed that this issue is squarely covered by the decision of the Special Bench of the Tribunal in *Amway India Enterprises vs. Dy. CIT (2008) 111 ITD 112 (Del.) (SB)*, therefore the issue may be set aside to the file of the Assessing Officer.

24. We have carefully considered the submissions of the rival parties and perused the material available on record. We find merit in the plea of the parties that the issue stands covered by the decision of the Special Bench of the Tribunal in *Amway India Enterprises vs. Dy. CIT (2008) 111 ITD 112 (Del.) (SB)* wherein it has been held vide para-59 appearing at page 170 of 111 ITD as under :

"59. Our conclusions on the issue under consideration thus can be summarized as under :-

(i) When the assessee acquires a computer software or for that matter licence to use such software, he acquires a tangible asset and becomes owner thereof as held above relying on the decision of Hon'ble Supreme Court in the case of TCS(supra).

(ii) Having regard to the fact that software becomes obsolete with technological innovation and advancement within a short span of time, it can be said that where the life of the computer software is shorter (say less than 2 years), it may be treated as revenue expenditure. Any software having its utility to the assessee for a period beyond two years can be considered as accrual of benefit of enduring nature. However, that by itself will not make the expenditure incurred on software as capital in nature and the functional test as discussed above also needs to be satisfied.

(iii) Once the tests of ownership and enduring benefit are satisfied, the question whether expenditure incurred on computer software is capital or revenue has to be seen from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business. In other words, the functional test becomes more important and relevant because of the peculiar nature of the computer software and its possible use in different areas of business touching either capital or revenue field or its utility to a businessman which may touch either capital or revenue field."

In para-60 it has been observed that after having laid down the criteria for determining the nature of expenditure on acquisition of software, whether capital or revenue the Tribunal restored the issue to the file of the Assessing Officer to examine the facts of the case in the light of the criteria laid down in para-59 of the order supra, and if the Assessing Officer comes to the conclusion that the expenditure is capital expenditure then he should allow due depreciation.

Respectfully following the above decision of the Special Bench of the Tribunal we set aside the order passed by the revenue authorities on this account and send back the matter to file of the Assessing Officer who shall decide the issue afresh in the light of the directions of the Tribunal (supra), and according to law after providing reasonable opportunity of being heard to the assessee. The ground taken by the assessee is, therefore, partly allowed for statistical purposes.

ITA 5527/M/2007, A.Y. 2002-03 (Revenue's appeal)

24. Ground No. 1 is against the relief allowed by the ld. CIT(A) out of disallowance made u/s 14A.

25. This ground has already been adjudicated by us in para Nos. 5 to 11 of this order wherein in para 11 of this order, we uphold the disallowance sustained by the ld. CIT(A). Accordingly, the ground taken by the revenue is rejected.

26. Ground No. 2 & 3 read as under:-

"2. On the facts and circumstances of the case and in law, the CIT(A) erred in holding that sale of scrap would not form part of total turnover without appreciating the fact that sale of scrap has direct link with the turnover.

3. On the facts and circumstances of the case and in law, the CIT(A) erred in holding that Services & AMC (Annual Maintenance Charges) for sale of equipments amounting to Rs. 1,55,23,367/- would not form part of total turnover without giving any specific findings."

27. These two grounds have already been adjudicated by us as ground No. 2(b) in assessee's appeal in para Nos. 12 to 17 of this order. For the reasons as stated in para 17(ii) and 17(iii) of this order, the ground No. 2 taken by the Revenue is, therefore, rejected and the ground No. 3 is allowed.

C.O. No. 292/M/2007 (By assessee).

28. Ground No. 1 is against the sustenance of disallowance out of disallowance made u/s 14A.

29. This ground has already been adjudicated by us in para Nos. 5 to 11 of this order in upholding the disallowance sustained by the ld. CIT(A). Accordingly, the ground taken by the assessee does not call for any fresh adjudication and hence rejected.

30. Ground No. 2 & 3 read as under:-

"2. The Respondent submits the learned CIT(A) on a consideration of the decisions and the provisions of Sec. 80HHC of the Act rightly held that the proceeds from sale of scrap amounting to Rs. 12,513/- are not includible in total turnover."

3. The Respondent submits the learned CIT(A) on a consideration of the decisions and the provisions of Sec. 80HHC of the Act rightly held that the receipts purely of service nature, being service and Annual Maintenance Charges of Rs. 1,55,23,367/-, are not includible in total turnover."

31. These two grounds have already been adjudicated by us as ground No. 2(b) in assessee's appeal in para Nos. 12 to 17 of this order. For the reasons as stated therein, the grounds taken by the assessee does not call for any fresh adjudication and hence rejected.

32. In the result, assessee's appeal stands partly allowed for statistical purpose, the Revenue's appeal is partly allowed and assessee's C.O. is dismissed.

(Order pronounced in the open court on 8.4.2011)