IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA Nos.4308 & 4309/Mum/2015
(Assessment Years: 1999- 2000 & 2003-04)

M/s Prashanth Projects Limited 406-408, Plot No. 57, Hermes Atrium, Sec.-11, CBD Belapur, Navi Mumbai – 400 614	Vs.	Dy. Commissioner of Income-tax 10(3), Aayakar Bhavan, Mumbai.
PAN – AABCP2387F		
(Appellant)		**(Respondent)**

Appellant by: Shri Ajay R. Singh, A.R
Respondent by: Ms. Anita Hardasani, D.R

Date of Hearing: 25.01.2019
Date of Pronouncement: 12.04.2019

O R D E R

PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the consolidated order passed by the CIT(A)-24, Mumbai, dated 02.04.2015 for A.Y 1999-2000 and A.Y 2003-04, which in turn arises from the respective orders passed by the A.O under Sec. 143(3) r.w.s 254 of the Income Tax Act, 1961 (for short 'I.T Act'), dated 08.03.2013. As the issues involved in the aforementioned appeals are inextricably interlinked and interwoven, therefore, the same are being taken up and disposed off together by way of a consolidated order. We shall first advert to the appeal of the assessee for A.Y. 1999-2000. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

"Deduction u/s 80HHB of the Act.

1. *The Ld. CIT (A) erred in rejecting the claim of the assessee in regards to sec. 80HHB of the Act of Rs.1,12,50,900/ without appreciating the fact that the assessee has fulfilled/satisfied all the condition required as per the provision of the Act, namely execution of a foreign project therefore the claim ought to have been allowed.*
2. *The Ld CIT(A) failed to appreciate that the assessee had raised the alternate claim u/s sec 8OHHB before the Hon'ble ITAT which was accepted vide order dt: 20/05/2011, and the matter was set aside before A.O for considering the said claim of the assessee, therefore the claim ought to have been considered accordingly. Rejecting the claim on mere technicalities is not justified.*
3. *The Appellant craves leave to add, amend, alter or delete any or all the above grounds of appeal."*

2. Briefly stated, the assessee company which during the year under consideration was engaged in the business of undertaking jobs for construction of tanks/vessels for storage of chemicals on labour basis and/or on turnkey basis had filed its return of income for A.Y 1999-2000, declaring total income of Rs.89,98,120/- after claiming deduction under Sec. 80HHC of Rs.2,22,81,996/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the I.T Act. Subsequently, the A.O observed on a perusal of the records that the assessee company was not engaged in the business of manufacturing or trading of any commodity/product and was only undertaking jobs for construction of tanks/vessels for storage of chemicals on labour basis and/or on turnkey basis. In the backdrop of his aforesaid observations the A.O holding a belief that the assessee was not eligible for claim of deduction under Sec.80HHC reopened its case under Sec.147 of the I.T Act. The reopened assessment was completed on 28.12.2006 and after disallowing the claim raised by the assessee under Sec.80HHC the income of the assessee company was assessed at Rs.3,12,80,080/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) not being persuaded to subscribe to the contentions advanced by the assessee upheld the order of the A.O and dismissed the appeal. Further, the appeal filed by the assessee before the ITAT, Mumbai was disposed off by the Tribunal vide a consolidated order for A.Y 1999-2000, A.Y 2003-04 & A.Y 2004-05. The Tribunal in its aforesaid order observed that the assessee was not eligible for claim of deduction under Sec. 80HHC. Insofar the fresh and the alternate claim raised by the assessee for deduction under Sec.80HHB of the I.T Act was concerned, the tribunal restored the matter to the file of the A.O for considering the same after affording an opportunity of being heard to the assessee. The tribunal while restoring the matter to the file of the A.O relied on its earlier order for A.Y 2000-01 viz. M/s Prashant Projects Ltd. vs. ACIT, Circle 10(3), Mumbai (ITA No. 6252/Mum/2004, dated 30.05.2007), wherein the A.O was specifically directed to give opportunity to the assessee to create the necessary reserve account as per the provisions of Sec. 80HHB. The A.O in the course of the 'set aside' proceedings declined to allow the claim of deduction under Sec.80HHB and vide his order passed under Sec.143(3) r.w.s 254, dated 08.03.2013 assessed the total income at Rs. 3,12,80,080/-.

4. The assessee being aggrieved with the aforesaid order passed by the A.O under Sec. 143(3) r.w.s 254, dated 08.03.2013, carried the matter in appeal before the CIT(A), who vide his order dated 02.04.2015 upheld the view taken by the A.O and dismissed the appeal.

5. The assessee assailing the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee took us through the facts of the case. It

was submitted by the ld. A.R that in the first round of appeal the tribunal after considering the contentions advanced by the assessee in the backdrop of the facts of the case, had after referring to its earlier order passed in the case of the assessee for A.Y 2000-01 restored the issue as regards the assessee's claim of deduction under Sec.80HHB to the file of the A.O for fresh adjudication. The ld. A.R submitted that the tribunal in its order for A.Y 2000-01 which was followed by it while disposing off the appeal of the assessee for the year under consideration viz. A.Y 1999-2000, had specifically directed the A.O to give opportunity to the assessee to create the necessary reserve account as per the provisions of Sec. 80HHB. The ld. A.R took us through the order passed by the Tribunal in the case of the assessee for A.Y. 2000-01. Further, the ld. A.R submitted that the Tribunal had in its aforesaid order observed that the assessee had entered into a composite contract with M/s National Oil Company, Tanzania for supply of specific items and installation of storage tanks. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that the observations of the A.O in his order passed under Sec. 143(3) r.w.s 254 for the year under consideration viz. A.Y 1999-2000 for declining the assesses claim for deduction under Sec. 80HHB was clearly in contradiction of the findings of the tribunal. It was submitted by him that the tribunal while disposing off the appeal of the assessee had given specific findings in its order about the nature of the business of the assessee. The ld. A.R took us through the definition of the term "Foreign Projects" as envisaged in Sec. 80HHB(2)(b). Insofar the requirement contemplated in Sec.80HHB(3)(ii) for creation of reserve by the assessee viz. "Foreign Projects Reserve" which was thereafter to be utilised for the purpose of its business other than for distribution by way of dividend or profits was concerned, it was submitted by the ld. A.R that needful was done by the assessee pursuant to the

restoring of the matter by the tribunal to the file of the A.O. The ld. A.R submitted that the assessee had furnished the requisite details as regards the creation of the reserve with the A.O during the course of the set aside proceedings. In sum and substance, it was submitted by the ld. A.R that the lower authorities had failed to appreciate the observations and the specific directions of the Tribunal in the right perspective. Further, the ld. A.R in order to buttress the eligibility of the assessee towards claim of deduction under Sec.80HHB also took support of the judgment of the Hon'ble Supreme Court in the case of Continental Construction Ltd. and Anr. Vs. UOI & Others (1990) 185 ITR 230 (SC).

6. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as the assessee had failed to satisfy the requisite conditions envisaged in Sec.80HHB, thus the lower authorities had rightly concluded that it was not eligible for claim of deduction under the said statutory provision. It was submitted by the ld. D.R that as no infirmity did emerge from the order of the CIT(A) who had rightly declined the assesses claim of deduction under Sec.80HHB, therefore, the appeal of the assessee which was devoid of any merit was liable to be dismissed.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material and judicial pronouncements relied upon by them. Admittedly, the assessee in its return of income had claimed deduction under Sec.80HHC of the I.T Act, which however was declined by the A.O. As observed hereinabove, the A.O was of the view that as the assessee was not engaged in manufacturing or trading of any commodity/product and was only undertaking jobs for construction of

tanks/vessels for storage of chemicals on labour basis and/or on turnkey basis, therefore, it was not eligible for claim of deduction under the aforesaid statutory provision. On appeal, the CIT(A) upheld the disallowance of deduction claimed by the assessee under Sec. 80HHC and dismissed the appeal. Further, on appeal by the assessee the tribunal vide its consolidated order for A.Y 1999-2000, A.Y 2003-04 and A.Y 2004-05, dated 20.05.2011, had after sustaining the observations of the lower authorities as regards the ineligibility of the assessee towards claim of deduction under Sec. 80HHC, restored the matter as regards the alternate claim of the assessee for deduction under Sec.80HHB to the file of the A.O for necessary verification. In fact, the tribunal while restoring the matter to the file of the A.O had relied upon its earlier order passed in the assesses own case for A.Y. 2000-01 viz. ITA No. 6252/Mum/2004, dated 30.05.2007. We find that the A.O pursuant to the directions of the Tribunal had declined to allow the claim of deduction under Sec.80HHB to the assessee. A perusal of the order passed by the A.O under Sec. 143(3) r.w.s 254, dated 08.03.2013 reveals that the assesses claim for deduction under Sec.80HHB was declined by the A.O for the following reasons :

"(i) The assessee has not claimed any deduction u/s 8OHHB in the original return of income.

(ii) No deduction u/s 80HHB was either claimed or allowed during the assessment proceedings u/s 143 r.w.s 147.

(iii) No Form No. 1OCCAH was filed alongwith return of income.

(iv) This alternate claim was made during the appellate proceedings before the Hon'ble ITAT and the Hon'ble ITAT has restored the matter to the file of the A.O. for fresh verification after giving reasonable opportunity of being heard to the assessee. In response to the opportunity given the assessee has only filed revised computation and new Form No. 1OCCAH.

(v) The assessee has not explained as to how it is fulfilling all the conditions mentioned u/s 80HHB of the I.T. Act.

(vi) The assessee has failed to establish that whether the entire amount shown in the P & L Account as receipts is from a foreign project and the assessee also failed to establish that the entire net profit shown in the P & L Account and on which the assessee has claimed deduction u/s 80HHB is earned out of foreign projects.

(vii) The assessee has failed to establish the relation between the exported goods and the foreign project carried out by it.

(viii) The assessee has failed to produce any details to establish that the foreign project carried out by it is covered within the definition of foreign project for the purpose of section 80HHB of the I.T. Act.

(xi) The assessee failed to submit any details in light of which the assessee's revised claim can be examined.

(x) In view of the Hon'ble ITAT's directions opportunity was given to the assessee and assessee's obligation to provide complete details, rational and evidences, to support its claim of deduction u/s 80HHB of the I.T. Act. The assessee has failed to discharge the onus cast upon it."

8. Further, on appeal the assessee assailed the observations of the A.O on the basis of which its entitlement for claim of deduction under Sec.80HHB was declined by him in the course of the 'set aside' proceedings. However, the explanation of the assessee did not find favour with the CIT(A) who rejected the same. The observations of the A.O for concluding that the assessee was not eligible for deduction u/s 80HHB, alongwith the submission filed by the assessee before the CIT(A) in rebuttal of the same are briefly culled out as under :

Sr. No.	Reason cited by AO for rejection of claim u/s 80HHB	Our explanation
i.	The assessee has not claimed any deduction u/s 80HHB in the original return of income	In the original return of income , we were of belief that we are eligible for deduction under Section 80HHC accordingly we had claimed the deduction u/s 80HHC. The disallowance of 80HHC on the conclusion by various authority that our is a composite contract for supply, transportation and actual installation of the project at Tanzania and direction by ITAT that we can alternatively claim deduction u/s 80HHB we came to know that we are eligible fully for deduction u/s 80HHB. Hence, question of our claiming 80HHB in original Return does not arise.
ii.	No deduction u/s 80HHB was neither claimed the assessment	During the proceeding u/s 143 r.w.s 147 question of our claiming deduction does not arise because based on para (i) we

	proceedings u/s 143 r.w.s 147	were in belief that we are eligible for deduction u/s 80HHC and not 80HHB accordingly we had claimed deduction U/s 80HHC. Hence, this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
iii.	No Form No. 10CCAH was filed along with return of income.	As stated in para above, when we filed our return of income, are under belief of claim u/s 80HHC and accordingly, filed Form 10CCAC. After direction of Hon'ble ITAT when our case heard, we had obtain Certificate in Form 10CCAH duly signed and certified by Mr. Rajendra Trivedi, Chartered Accountants dated 08.11.2011 and submitted it along with revised computation of income vide our letter dated 8th November, 2011 filed on 9th November, 2011 with ACIT 10(3) (copy of letter is attached in paper book at Sr. No. 58-60). The same were in line with case of Continental Construction Ltd. & Another V/s Union of India & others, 274 ITR 470 (SC), Hence this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
(iv)	This alternate claim was made during the appellate proceedings before the Hon'ble ITAT and the Hon'ble ITAT has restored the matter to the file of the A.O for fresh verification after giving reasonable opportunity of being heard to the assessee. In response to the opportunity given the assessee has only filed revised computation and new Form No.10CCAH	Sir, after given us opportunity we had filed all the required details as called for vide our various submission dated 23rd February, 2012, 8th November, 2011, 10th October, 2011 etc. (Copies of all these are annexed with Paper Book at Sr. No. 32-34) Further as our was case of section 254 all the other routine relevant details were filed during the assessment proceeding completed u/s 143(3) r.w.s. 147. Hence, respectfully we again say that this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
(v)	The assessee has not explained as to how it is fulfilling all the condition mentioned u/s 80HHB of the Income Tax Act.	Sir, we had fulfilled all the condition mentioned u/s 80HHB of the Income Tax Act. As per order passed by the Hon'ble DCIT 10(3) wherein he himself has incorporated Sec. 80HHB at Para 7 of the Order (Copy of Order is annexed with paper book at Sr. No. 21-31). We reproduce the conditions with our explanation to support that all the conditions to claim deduction u/s 80HHB are duly fulfilled by appellant. (3) The deduction under this section shall be allowed only if the following conditions are fulfilled, namely:- (i)the assessee maintains separate accounts in respect of the profits and gains derived from the business of the execution of the foreign project, or, as the case may be of the work forming part of the foreign project undertaken by him and, where the assessee is a person other than an Indian company or a cooperative society, such accounts have been audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed from 10CCA duly signed and verified by such accountant. Appellant maintain separate ledger accounts in respect of the

		profits and gains derived from the business of the execution of the Foreign projects. (Copy of Contract Agreement Between National Oil (Tanzania) Limited and Appellant dated 16th July 1998 and 3rd June 1999 as submitted to AO vide Letter dated 23rd February 2012 is annexed to paper book at Sr. No. 32-57). Our is a Company and accounts are duly Audited by Chartered Accountants M/s Kamlesh B. Mehta & Co as per Companies Act and same were annexed in paper book at Sr. No. 119-134) (ia) the assessee furnishes, along with his return of income, a certificate in the prescribed form 10CAH from an accountant as defined in the Explanation below sub-section (2) of Sec. 288, duly signed and verified by such accountant, certifying that the deduction has been correctly claimed in accordance with the provisions of this section;] The appellant after direction from Hon'ble ITAT submitted vide letter dated 8th November 2011 Certificate in the prescribed Form 10CCAH duly signed and verified by Mr. Rajendra Trivedi, Chartered Accountant, certifying that the deduction has been correctly claimed. The same were submitted in line with case of continental Constitution Ltd. & Another v/s Union of India & Others, 264 ITR 470 (SC) (ii) an amount equal to [such (50) percentage of the profits and gains as is referred to in sub-section (1) in relation to the relevant assessment year] is debited to the proit and loss account of the previous year in respect of which the deduction under this section is to be allowed and credited to a reserve account 9tobe called the "Foreign Projects Reserve Account") to be utilised by the assessee during a period of five years next following for the purposes of his business other than for distribution by way of dividends or profits: The foreign Project reserve required to be created under section 80HHB(3) was created during the financial year 2006-07 subsequently to the year of claim after direction by Hon. ITAT and the same were brought to notice of AO vide our letter dated 10th October, 2011 and with this we had filed Audited Balance Sheet reflecting necessary reserve for claiming deduction u/s 80HHB (Copy of letter is attached with paper books at Sr. No. 61, Copy of Foreign Projects Reserve at Sr. No. 33-34). Further our company had never distributed any dividend the same facts can be verified by A.O with balance sheet filed along with income tax return for various assessment year. (iii) an amount equal to [such (50) percentage of the profits and gains as is referred to in sub-section (1) in relation to the relevant assessment year] is brought by the assessee in convertible foreign exchange into India, in accordance with the provisions of [the Foreign Exchange Management Act, 1999 (42 of 1999)]and any rules made there under, within a period of six

		months from the end of the previous year referred to in clause (ii) or, [within such further period as the competent authority may allow in this behalf]: The required amount of convertible foreign currency has been brought in India which was certified by Chartered Accountant in his certificate in Form 10CCAH date 08/11/2011. Further we had also obtained Export Realizations Certificate from our banker Union Bank of India dated 29th September, 2003 reflecting dated wise realization of foreign currency from national Oil (Tanzania) Ltd. between 03.11.1998 to 25.10.1999 (copy of certificate with details of billing and realization from national Oil (Tanzania) attached with paper book at Sr. No. 93-97) In view of the above we submit that we had fulfilled all the condition mentioned u/s 80HHB and the same were on record at A.O. Hence, respectfully we again say that this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
(vi)	The Assessee has failed to establish that whether the entire amount shown in the P & L account as receipts is from a foreign project and the assessee also failed to establish that the entire net profit shown in the P & L account and on which the assessee has claimed deduction u/s 80HHB is earned out of foreign projects.	Sir, with due respect we further submit that this reason of rejecting our claim was also unjustified and absurd. We had submitted Certificate in Form 10CCAH duly signed and verified by Chartered Accountants wherein in Annexure of Form full working of profits derived from eligible foreign projects, Foreign exchange brought into India and deduction under Sec.80HHB etc is given and the same were submitted to A.O vide our Letter dated 8th November, 2011 (Copy of same also attached in annexure of paper book at SR. No. 58-60) Further our audited profit and loss Accountant at Schedule 7 of Sales & Export duly reflects the Domestic sales and Export Sales (Schedule annexed with P & L account at Paper book Sr. No. 130)
(vii)	The assessee has failed to establish the relation between the exported goods and the foreign projects carried out by it.	Sir, from very inception we are claiming that we had exported the goods and claimed deduction U/s 80HHC. The Foreign projects, realisation in foreign currency etc were never in dispute, however as the then AO who passed order u/s 143(3) r.ws. 147 not convinced with our contention and established that our is not export of goods or Commodities but composite contract for supply, transportation and actual installation of the project at Tanzania (Foreign project) and based on that our claim of 80HHC had been disallowed us to claim alternatively deduction u/s 80HHB. The all copies of agreements with foreign company also submitted: In view of the above we submit that we had very well explained our case to AO as well as various higher authorities. Hence, respectfully we again say that this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
(viii)	The assessee has failed to produce any details to establish that the foreign	Sri, Since, the inception of our case it was never in dispute that we had carried out foreign project. The dispute was that we had treated it as export while AO treated it as Foreign Project. Hence

	project carried out by it is covered within the definition of foreign project for the purpose of Sec.80HHB of the I.T Act.	this contention of A.O now again is unjustified. However before we explain that our is foreign project, this we would like to reproduce definition of Foreign Project as put by AO himself in his body of Order: (b) "foreign project" means a project for: (i) the construction of any building, road, dam, bridge, or other structure out side India: (ii) the assembly or installation of any machinery or plant out side India; (iii) the execution of such other work (of whatever nature) as may be prescribed. We had under taken Turnkey Supply and erection of Petroleum Storage Terminal and Turnkey Supply and laying of onshore product transfer pipeline project at Tanzania and entered into Contract Agreement with National Oil (Tanzania) Limited which falls under above definition of foreign project, all these facts were on record by AO which clearly establish that we had carried out foreign project as covered within the definition of foreign project as covered within the definition of foreign project. Further in the order the Hon. ITAT Mumbai at para 3.3 clearly mention that there is no dispute that the assessee was doing the business of construction of Tanks/vessels for storage of Chemicals/fuels etc, on labour basis and/ or turn key basis in Tanzania. Hence, respectfully we again say that this allegation by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and uncalled for.
(ix)	The assessee failed to submit any details in light of which the assessee's revised claim can be examined.	Sir, based on Hon'ble ITAT Mumbai direction, we had received Notices from A.O calling details to allow alternate claim of 80HHB and we vide our various submission dated 23rd February, 2012, 8th November, 2011, 10th October, 2011 etc. (Copies of all these are annexed with paper book at Sr. No. 32-34, 58-60, 61) submitted the Revised Computation, Certificate from Chartered Accountants in Form 10CCAH, Copies of Contract with foreign party etc which in our opinion are sufficient details to establish the lights on which our revised claim be examined by AO. Further the same were submitted and claimed in line with case of Continental Construction Ltd. & Another v/s Union of India & Others, 264 ITR 470 (SC). Hence, respectfully we again say that this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.
(x)	In view of the Hon'ble ITAT's directions opportunity was given to the assessee and assessees obligation to provide complete details, rational and evidences to support its claim of deduction u/s 80HHB of the	In view of para (i) to (ix) as above appellant had submitted complete details, rational and evidence to support its claim of deduction u/s 80HHB of the I.T. Act and hence successfully discharge obligation and onus casted upon us to AO. Hence, respectfully we again say that this reason by Hon'ble DCIT 10(3) for rejecting the claim also unjustified and unreasonable.

	I.T Act. The assessee has failed to discharge the onus upon it.	

The CIT(A) after deliberating on the contentions that were advanced by the assessee to impress upon him that as all the requisite conditions envisaged under Sec. 80HHB had been satisfied by it, therefore, it was entitled for claim of deduction under Sec.80HHB, was however not persuaded to subscribe to the same. The CIT(A) upholding the view taken by the A.O concluded that the assessee was not eligible for deduction under the aforesaid statutory provision viz. Sec. 80HHB.

9. We have perused the orders of the lower authorities and shall deliberate upon the facts involved in the case before us, in the backdrop of the requisite conditions envisaged in Sec.80HHB for entitling an assessee to claim deduction under the said statutory provision. As regards the observations of the lower authorities that the assessee had failed to establish that the foreign project carried out by it was covered within the definition of "Foreign Project" for the purpose of Sec.80HHB, we are unable to find ourselves to be in agreement with the same. We find that the lower authorities had observed that mere supply of material and labour which constitute physical aspect of the project cannot by itself ensure execution or completion of the project, as the same has to be complemented by an equally important aspect of supply of designs, drawings and such other technical or technological inputs. In sum and substance, it is the observation of the lower authorities that as per the dictionary meaning a project includes not only the actual execution but also the planning, designing or devising the project or doing of such technical or technological ends which are incidental and necessary to put in place the physical aspect of the project. It is in the backdrop of the aforesaid observations that the lower authorities had concluded that in the case of the assessee as there was a simple supply of equipment on a job

work basis for laying tanks and pipelines, thus the same in the absence of any technical or technological aspect involved in execution of the contract undertaken by it could not be construed as execution of a "foreign project" as warranted by Sec.80HHB. We find that the aforesaid observations of the lower authorities are in clear contradiction of the findings recorded by the Tribunal while disposing off the appeal of the assessee for A.Y. 2000-01. In fact, the tribunal in its aforesaid order had after referring to the terms and conditions of the "Agreement" entered into by the assessee with National Oil (Tanzania) Ltd., had categorically observed that they admittedly specified that the installation of storage tanks was under taken by the assessee as a turnkey project. Subsequently, an amendment was made and the consideration for the entire project was bifurcated into two components viz. (i). for supply of equipment; and (ii). for the work of erection and commissioning. Further, it was observed by the tribunal that though the original contract was amended but the basic nature of the entire project i.e installation of storage tanks was not altered. It was observed by the Tribunal that the entire contract referred to several clauses as per which the contractor i.e the assessee company was to design, manufacture, install and complete the project with due care and diligence. Apart there from, it was also noticed by the tribunal that Clause XV of the contract agreement, dated 16.07.1998 mentioned that the copyright was to remain vested with the contractor i.e the assessee. We are of the considered view that in the backdrop of the aforesaid observations of the tribunal in the assesses own case for A.Y. 2000-01 i.e in context of the contract entered into between the assessee and National Oil (Tanzania) Ltd., which is under consideration before us, the lower authorities had grossly erred in concluding that the primary and essential

requirement of execution of the 'foreign project' had not been satisfied by the assessee.

10. Insofar the adverse inferences drawn by the lower authorities on the ground that the assessee had neither claimed any deduction under Sec. 80HHB nor filed the certificate in Form No. 10CCAH along with its return of income are concerned, we are unable to persuade ourselves to accept the same. As is discernible from the facts available on record, the assessee remaining under a bonafide belief that it was eligible for deduction under Sec.80HHC had claimed the same in its return of income. However, the claim of deduction raised by the assessee under Sec.80HHC was declined by the authorities below for the reason that as the assessee had executed a composite contract for supply, transportation and actual installation of the project at Tanzania, therefore, it was not eligible to claim deduction under the aforesaid statutory provision. In fact, it was only pursuant to the direction by the Tribunal which had restored the matter to the file of the A.O for considering the assesses alternate claim of deduction under Sec.80HHB, that the latter had became conversant of its entitlement under the said statutory provision. We find that the assessee in compliance of the requirement contemplated in Sec.80HHB(3)(ii) had obtained the certificate in Form 10CCAH, dated 08.11.2011 duly signed and verified by a Chartered Accountant and had submitted it along with a revised computation of income with the A.O in the course of the 'set aside' proceedings, vide its letter dated 08.11.2011. In our considered view as the filing of the certificate in Form No. 10CCAH is 'directory' in nature, therefore, in the backdrop of the aforesaid peculiar facts of the case the assessee could not have been divested of its entitlement towards deduction under Sec.80HHB merely on account of the said technicality i.e non-furnishing of the aforesaid certificate, despite the fact that it had satisfied the

substantive requirements contemplated under the said statutory provision. Our aforesaid view is fortified by the judgments of the Hon'ble High Court of Delhi in the case of Continental Construction Ltd.Vs. Union of India & Others (1990) 185 ITR 230 (Del) and CIT vs. Web Commerce (India) P. Ltd. (2009) 318 ITR 135 (Del). Apart there from, in our considered view that now when the tribunal following its earlier decision for A.Y 2000-01 in ITA No. 6252/Mum/2004, dated 30.05.2007, had restored the matter to the file of the A.O with a specific direction to give an opportunity to the assessee to create the necessary reserve account as per the provision of Sec. 80HHB, than the said observations would be rendered as redundant in case the A.O was to be allowed to draw adverse inferences as regards the eligibility of the assessee towards claim of deduction u/s 80HHB for the reason that the certificate in "Form 10CCAH" was filed by the assessee with the A.O only in the course of the 'set aside' proceedings. Be that as it may, we are of the considered view that in the totality of the facts of the case no adverse inferences as regards filing of the certificate in "Form 10CCAH" by the assessee in the course of the 'set aside' proceedings was liable to be drawn.

11. As regards the obligation cast upon the assessee to have maintained separate accounts in respect of the profits and gains derived from its aforesaid business of execution of the foreign project, we find that it is the claim of the assessee that it had maintained separate ledger accounts in respect of the profits and gains derived from execution of the foreign project. In fact, the claim of the assessee that it had maintained separate ledger accounts in respect of the profits and gains derived from the business of execution of the foreign project has not been controverted by the lower authorities. Apart there from, no contention has been advanced by the ld. D.R before us which could persuade us to conclude otherwise. Rather, the "profits derived

from eligible foreign project computed as per sub-section (3) of Sec. 80HHB" as are discernible from a perusal of "Form No. 10CCAH" duly signed and verified by a Chartered accountant, as filed by the assessee substantiates the said claim of the assessee. In the backdrop of the aforesaid facts, it can safely be concluded that the obligation cast upon the assessee of maintaining separate accounts in respect of its business pertaining to the 'Foreign project' of National Oil (Tanzania) Ltd. stands duly satisfied.

12. We shall now advert to the condition envisaged in Sec.80HHB(3)(ii), as per which the assessee was obligated to have debited an amount equal to 50% of its profit and gains for the year under consideration i.e A.Y. 1999-2000 to the 'profit and loss account' and credited the same to a reserve account viz. "Foreign Projects Reserve Account", which was to be utilised by it during the period of five years next following for the purpose of its business other than for distribution by way of a dividend or profits. Admittedly, the assessee who had remained under a bonafide belief that its profits and gains from the execution of its contract for supply, transportation and installation of the project at Tanzania was eligible for deduction under Sec.80HHC, had raised its claim for deduction under the said statutory provision in its return of income for the year under consideration i.e A.Y 1999-2000. As observed hereinabove, the disallowance of the assesses claim for deduction under Sec.80HHC was upheld by the Tribunal. However, the tribunal after deliberating on the alternate claim of the assessee towards deduction under Sec.80HHB restored the matter to the file of the A.O for fresh consideration. In fact, the assessee who remaining under a bonafide belief had been pursuing its claim for deduction u/s 80HHC, had became conversant about its entitlement towards deduction under Sec. 80HHB only after the matter was 'set aside' to the file of the A.O.

We may herein observe that the tribunal while restoring the matter to the file of the A.O had relied on its earlier order in the assesses own case for A.Y 2000-01 in ITA No. 6252/Mum/2004, dated 30.05.2007, wherein involving identical facts the matter was restored by the tribunal to the file of the A.O for fresh consideration of the assesses claim of deduction under Sec.80HHB. On a perusal of the order of the Tribunal in the case of the assessee for A.Y. 2000-01 i.e M/s Prashant Projects Ltd. Vs. ACIT, Circle 10(3), Mumbai (ITA No. 6252/Mum/2004, dated 30.05.2007), we find that the Tribunal while restoring the matter to the A.O for necessary verification as regards the eligibility of the assessee towards claim of deduction under Sec.80HHB, had after taking support of the decision of the Hon'ble Supreme Court in the case of Karimjee P. Ltd. Vs. DCIT (2004) 271 ITR 564 (SC) directed the A.O to give opportunity to the assessee to create the necessary reserve account as per the provision of Sec.80HHB of the I.T Act. We find that the assessee in the backdrop of the aforesaid directions of the Tribunal created the "foreign project reserve" which was necessary for claiming deduction under Sec.80HHB. Further, the assessee had brought the fact as regards creation of reserve to the notice of the A.O, vide its letter dated 10.10.2011. We are of the considered view that as the assessee had in compliance to the aforesaid directions of the Tribunal created the necessary "foreign project reserve" as required under Sec.80HHB(3)(ii), therefore, it can safely be concluded that it had complied with the mandate of law as envisaged in the said statutory provision. We may herein observe that the creation of the aforesaid reserve has to be considered in the backdrop of the 'directions' of the Tribunal, which had while setting aside the matter to the file of the A.O for considering the assesses claim of deduction under Sec.80HHB directed him to give opportunity to the assessee to create the necessary reserve account as

per the provisions of Sec.80HHB. Be that as it may, even otherwise we find that now when the assessee had satisfied the substantive requirements for rendering it eligible for claim of deduction under Sec.80HHB, it thereafter could not be divested of its entitlement towards the said deduction merely on account of a technicality i.e. failure to create the reserve as contemplated under Sec. 80HHB(3), specifically when there were bonafide reasons for the said lapse on the part of the assessee. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Delhi in the case of Continental Construction Ltd. Vs. Union of India and Others (1990) 185 ITR 230 (Del). In the aforementioned case the Hon'ble High Court had observed that it would be extremely unfair not to give the benefit to the assessee under Sec.80HHB for the reason that the assessee had failed to satisfy the requirement of Sec.80HHB(3), despite the fact that it had executed 'foreign projects' which entitled it towards claim of deduction under the said statutory provision. It was observed by the Hon'ble High Court, as under :

> *"During the course of arguments, we were informed that, despite the contention of the Department that the case of the petitioner fell under section 80HHB still the benefit under the said provision has not been accorded to the petitioner. The reason for this is that the petitioner has not complied with the provisions of section 8OHHB(3). According to the petitioner, the conditions prescribed under section 80HHB(3) were not complied with because till the introduction of section 80HHB in the income tax Act, the petitioner was getting the benefit of Sec.80-O in terms of such types of agreements. The petitioner, therefore, did not create reserve accounts as contemplated by section 8OHHB(3) though foreign exchange was repatriated from abroad.*
>
> *In our opinion, it will be extremely unfair not to give the benefit to the petitioner under section 80HHB. The petitioner admittedly, has executed projects which would entitle it to the benefit of section 80HHB and there was bonafide reason for the petitioner in not complying with the provisions of section 80HHB(3) because the Central Board of Direct Taxes had accorded approval to the agreements under Sec.80-O and therefore, the petitioner naturally expected that relief would be granted under section 80-O. We have, however, held that, on*

the facts of the present case, the petitioner was entitled to the relief not under section 80-0 but under section 80HHB and this is what in fact was argued before us by learned counsel for the Department. This being so, the Income-tax Department should not stand on mere technicalities and must give an opportunity to the petitioner to fulfil the requirements of section 80HHB(3) and, on such compliance within a reasonable time, it should grant the benefit to the petitioner under that provision."

Apart there from, we find that the Hon'ble Supreme Court in the case of Karimjee P. Ltd. Vs. DCIT & Anr. (2004) 271 ITR 564 (SC) while deliberating on the entitlement of an assessee towards claim of deduction under Sec.80HHC (as was then available on the statute) for A.Y. 1987-88, had in the backdrop of a bonafide lapse on the part of the assessee leading to creation of reserve by an amount falling short of its entitlement towards the deduction under the said statutory provision viz. Sec.80HHC in the backdrop of the amount of profits as were assessed by the A.O, had in all fairness in the course of hearing of the appeal somewhere in the year 2002, allowed the assessee to meet out the said technicality and create the reserve for the deficit amount and bring the same at par with its entitlement towards deduction under the said section. In the backdrop of our aforesaid observations, we are of the considered view that as the creation of the "foreign project reserve" by the assessee was in conformity with the directions of the tribunal, thus on the said count alone it can safely be concluded that the requirement of creation of reserve as envisaged in Sec. 80HHB(3)(ii) was duly satisfied by the assessee. Alternatively, even otherwise in the backdrop of the aforesaid judgments as an assessee who on satisfaction of the substantive requirements would otherwise be eligible for claim of deduction under Sec. 80HHB or Sec.80HHC, cannot be divested of its entitlement towards such deduction on account of technicalities i.e non-creation of reserve or short creation of reserve as long as said lapse on its part is backed by

a bonafide belief, therefore, creation of the "foreign project reserve" by the assessee in the case before us on the said count also satisfies the obligation as stood cast upon it under the aforesaid statutory provision.

13. We shall now advert to the observations of the lower authorities that as the assessee had failed to bring 50% of the profits and gains as referred to in subsection (1) of Sec.80HHB in convertible foreign exchange into India in accordance with the provisions of [Foreign Exchange Amendment Act, 1999 (42 of 1999)], and any Rules made thereunder within a period of 6 months from the end of the previous year referred to in clause (ii) or, [such further period as the competent authority may allow in this behalf], therefore, it was not eligible for claim of deduction under the said statutory provision. We find that it is the claim of the assessee before the lower authorities that the required amount of convertible currency had been brought in India, which fact was certified by the Chartered Accountant in his certificate in "Form No. 10CCAH", dated 08.11.2011. Apart there from, it is the claim of the assessee that it had also obtained Export Realization Certificate from its banker viz. Union Bank of India, dated 29.09.2003 reflecting date wise realization of foreign currency from National Oil (Tanzania) Ltd. between 03.11.1998 to 25.10.1999. The ld. A.R in order to fortify his aforesaid claim had drawn our attention to the complete details of billing that was raised by the assessee on National Oil (Tanzania) Ltd., along with complete date wise details of realization of the respective amounts. In the backdrop of the aforesaid facts, we are of the considered view that the assessee had duly satisfied the condition envisaged in Sec. 80HHB(3)(iii) by bringing the stipulated amount in convertible foreign exchange in India within the time frame therein envisaged.

14. Insofar the observations of the lower authorities that the assessee had failed to establish that the amount shown in the 'profit and loss account' as receipts were from 'foreign project', and the 'net profit' there in shown on which deduction under Sec.80HHB was claimed was earned out of the foreign projects are concerned, we are unable to subscribe to the same. In fact, the lower authorities while concluding as hereinabove had lost sight of the fact that the assessee had filed a certificate in "Form No. 10CCAH" duly signed and verified by a Chartered accountant, wherein complete working of the profits derived from the eligible foreign project, foreign exchange brought into India and the deduction under Sec. 80HHB were given. Apart there from, the audited 'profit and loss account' of the assessee also divulged the complete details as regards the domestic sales and export sales of the assessee for the year under consideration. We are also not impressed with the observations of the lower authorities that the assessee had failed to establish the relation between the exported goods and the foreign project carried out by it. As a matter of fact, the assessee had submitted before the lower authorities the copies of the agreements with the foreign company viz. National Oil (Tanzania) Ltd. alongwith the other requisite details as regards the same, and had also explained the facts of its case before them.

15. In the backdrop of our aforesaid deliberations, we are of the considered view that as the assessee had duly satisfied the requisite conditions which therein rendered it eligible for claim of deduction under Sec. 80HHB, therefore, the lower authorities had erred in declining to allow the said claim of deduction on the basis of incorrect observations. We thus in terms of our aforesaid observations direct the A.O to allow the claim of deduction raised by the assessee under Sec. 80HHB of the I.T Act. The **Grounds of appeal No. 1 to 2** are allowed

in terms of our aforesaid observations. The **Ground of appeal No. 3** being general in nature is dismissed as not pressed.

16. The appeal of the assessee is allowed.

ITA No. 4309/Mum/2015
A.Y. 2003-04

17. We shall now advert to the appeal of the assessee for A.Y. 2003-04. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

"Deduction u/s 80HHB of the Act.

1. *The ld. CIT(A) erred in rejecting the claim of the assessee in regards to sec 80HHB of the Act of Rs.50,50,200/- without appreciating the fact that the assessee has fulfilled/satisfied all the condition required as per the provision of the Act, namely execution of a foreign project, therefore the claim ought to have been allowed.*
2. *The ld. CIT(A) failed to appreciate that the assessee had raised the alternate claim u/s sec 80HHB before the Hon ITAT which was accepted vide order dt: 20/05/2011, and the matter was set aside before AO for considering the said claim of the assessee, therefore the claim ought to have been considered accordingly. Rejecting the claim on mere technicalities is not justified.*
3. *The Appellant craves leave to add, amend, alter or delete[d] any or all the above grounds of appeal."*

18. Briefly stated, the assessee company had filed its return of income for A.Y. 2003-04 on 27.11.2003, declaring total income of Rs. Nil after claiming deduction under Sec. 80HHC of Rs.1,18,64,695/-. The assessment under Sec. 143(3) was completed on 31.03.2006 and the total income of the assessee was assessed at Rs.93,27,550/-. Subsequently, the assessment was rectified under Sec.154 and deduction allowed under Sec. 80HHC of Rs. 29,24,785/- by the A.O while framing the assessment under Sec.143(3) was withdrawn.

19. Aggrieved, the assessee filed an appeal against the order passed by the A.O under Sec.154. The appeal of the assessee was dismissed

by the CIT(A), vide his order dated 20.11.2006. The assessee also assailed the order passed by the A.O under Sec. 143(3) before the CIT(A), who vide his order dated 01.01.2009 partly allowed the appeal. The CIT(A) while upholding the disallowance of deduction u/s 80HHC, however, directed the A.O to examine the matter from the point of view of deduction under Sec. 80HHB and allow the same if the assessee fulfilled the conditions envisaged in the said section.

20. On further appeal, the tribunal vide its consolidated order for A.Y 1999-2000, A.Y 2003-04 and A.Y 2004-05, dated 20.05.2011 confirmed that the assessee was not eligible for deduction under Sec. 80HHC and 'set aside' the matter back to the file of the A.O for verifying the alternate claim of the assessee towards deduction under Sec. 80HHB.

21. In the course of the 'set aside' proceedings though the assessee tried to impress upon the A.O as regards its eligibility towards claim of deduction under Sec.80HHB, however, the latter declined to accept the same and assessed the income of the assessee company at Rs.90,38,270/-. The order passed by the A.O under Sec.143(3) r.w.s. 254, dated 08.03.2013 was thereafter upheld by the CIT(A) and the appeal was dismissed.

22. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We find that as the facts and the issue in the appeal before us remains the same as was involved in the appeal of the assessee for the A.Y. 1999-2000 viz. ITA No. 4308/Mum/2015 as had been adjudicated by us hereinabove, therefore, our order passed while disposing off the appeal of the assessee for A.Y 1999-2000 shall apply *mutatis mutandis* for disposing off the present appeal of the assessee for A.Y. 2003-04 viz. ITA No 4309/Mum/2015. The **Grounds of appeal No. 1 to 2** are allowed in

the same terms. The **Ground of appeal No. 3** being general in nature is dismissed as not pressed.

23. The appeal of the assessee is allowed in terms of our aforesaid observations.

24. That both the appeals of the assessee for A.Y. 1999-2000 i.e ITA No. 4308/Mum/2015 and A.Y 2003-04 i.e ITA No. 4309/Mum/2015 are allowed.

Order pronounced in the open court on 12.04.2019

Sd/-	Sd/-
(G.Manjunatha)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 12.04.2019
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**