आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी',मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES, 'C' MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री राजेश कुमार, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and Shri Rajesh Kumar, Accountant Member

ITA Nos.3558 & 3717/Mum/2016
Assessment Years: 2010-11 & 2011-12

People Interactive (I) Private Ltd. C/o- Samaria & Co. Chartered Accountants, 2E, Court Chambers, 35, New Marine Lines, Mumbai-400020	**बनाम**/ Vs.	DCIT-4(3), Mumbai
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AAECS7931B		

निर्धारिती **की ओर से /** Assessee by	Shri R.S. Samaria
राजस्व **की ओर से** / Revenue by	Shri Sanjay Singh-DR

सुनवाई की तारीख **/ Date of Hearing :**	**06/12/2016**
आदेश की तारीख /**Date of Order:**	**28/12/2016**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

Both these appeals are by the assessee against the impugned orders both dated 23/03/2016 of the Ld. Pr. Commissioner of Income Tax, Mumbai, invoking revisional jurisdiction u/s 263 of the Income Tax Act, 1961 (hereinafter the Act), directing the Assessing Officer to set off the brought forward losses, as per CBDT Circular dated 16/07/2013 and then worked out the deduction u/s 10A of the Act and reexamine the claim on admissibility of loss on disposal of investments.

2. During hearing of these appeals, Shri R.S. Samaria, ld. counsel for the assessee, broadly contended that the assessment order was framed after due application of mind, considering the submissions of the assessee and the CBDT Circular No.7/DV/2013 dated 16/07/2013 is not binding upon the Assessing Officer. It was contended that the assessment order is neither erroneous nor prejudicial to the interest of Revenue. It was also pleaded that one of the possible view was taken by the Assessing Officer. He placed reliance upon the decision in CIT vs Gabriel India Ltd. (1993) 203 ITR 108 (Bom.), CIT vs Malabar Industrial Company Ltd. 243 ITR 83 (SC), CIT vs Max India Ltd. (295 ITR 282)(SC), General Electrical International Inc. vs ACIT 287 ITR (80) 43(Bom.). The ld. counsel also claimed that relief u/s 10A of the Act is of the nature of exemption, although termed as deduction, therefore, such income is neither subject to charge of

income tax nor includible in the total income, thus, the relief u/s 10A of the Act has to be given prior to chapter –IV dealing with computation of income. Plea was also raised that income eligible for exemption u/s 10A of the Act would not enter into computation as the same has to be deducted at the source level. It was also contended that aforementioned CBDT Circular was considered by Hon'ble Gujarat High Court in Indusa Infotech Services (P.) Ltd. (2014) 45 taxman.com 34(Guj.) holding that telescoping of provisions of chapter-VIA in the context of deduction, which is allowable u/s 10A of the Act is not permissible unless a specific statutory provision, to that effect, is made. Reliance was placed upon the decision in CIT vs Black & Veatch Consulting Pvt. Ltd. (2012) 348 ITR 72, CIT vs Schmetz India (P.) Ltd. and Indus Infotech Servies (2014) 45 taxman.com 34 (Guj.). The ld. counsel further contended that in earlier assessment year, the submissions of the assessee were not considered and in spite of that the issue was decided in favour of the assessee, whereas, in the present Assessment Year, the submissions of the assessee were considered and thereafter assessment was framed by the Assessing Officer. It was also pleaded that 147/148 proceedings were initiated against the assessee and later on were dropped.

2.1. On the other hand, the ld. DR, Shri Sanjay Singh, strongly defended the impugned orders by contending that the Assessing Officer merely followed the

assessment order of earlier year, wherein, the matter was not examined by the Assessing Officer. It was contended that it is not the case that the same officer applied his mind rather both the orders (earlier and preset Assessment Year) were passed by different officers. It was pleaded that circular of the Board is very much binding upon the Assessing Officer. Plea was also raised that the Hon'ble Apex Court in Himatsingika Seide Ltd. vs CIT (2014) 248 taxman.com 357 (SC) affirmed the decision of Hon'ble Karnataka High Court and decided the issue in favour of the Revenue, therefore, the decisions relied upon by the assessee are of no much help to the assessee. Our attention was invited to the ratio laid down by Hon'ble Apex Court. Reliance was also placed upon the decision of the Mumbai Bench of the Tribunal in M/s. Serial Innovations India Pvt. Ltd. (formerly known as 'Sarnoff Innovative Technologies Pvt. Ltd. vs DCIT 12 taxman.com 51 (Bom. Trib.). So far as dropping of proceedings u/s 147/148 of the Act is concerned, it was contended that it was dropped without a speaking order by the officer concerned, whereas, in the impugned orders, the ld. Commissioner has merely asked the Assessing Officer to examined the case of the assessee after providing due opportunity to the assessee. Reliance was also placed upon the decision in M/s. G. Jewelcraft Ltd. vs Income Tax Officer (ITA No.5087/Mum/2012) order dated 14/11/2014.

2.2. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the relevant provisions of section 263 of the Income Tax Act, 1961 (hereinafter the Act) for ready reference and analysis:-

> **263.** (1) The [Principal Commissioner or] Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.
>
> [*Explanation 1*.]—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—
>
> (*a*) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—
>
> (*i*) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner undersection 144A;
>
> (*ii*) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;
>
> (*b*) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;
>
> (*c*) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.
>
> [*Explanation 2*.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(*a*) the order is passed without making inquiries or verification which should have been made;

(*b*) the order is passed allowing any relief without inquiring into the claim;

(*c*) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(*d*) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, [National Tax Tribunal,] the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

2.3. As per the provision of section 263 before the revisional jurisdiction u/s 263 is invoked by the ld. Commissioner, it has to be seen that either the order is erroneous, in so far as, prejudicial to the interest of Revenue. We are expected to examine whether the conditions enshrined in this section has been complied with or not. We are also expected to analyze the provision by keeping the same in juxtaposition with section 10A of the Act. Section 10A is reproduced hereunder for ready reference and analysis:-

10A. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or

produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee:

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years:

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the undertaking began to manufacture or produce such articles or things or computer software in such free trade zone or export processing zone:

Provided also that for the assessment year beginning on the 1st day of April, 2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software:

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2012 and subsequent years.

(1A) Notwithstanding anything contained in sub-section (1), the deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2003, in any special economic zone, shall be,—

(*i*) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, and thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;

(*ii*) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Allowance Reserve Account") to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B):

Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139.

(1B) The deduction under clause (*ii*) of sub-section (1A) shall be allowed only if the following conditions are fulfilled, namely:—

(*a*) the amount credited to the Special Economic Zone Re-investment Allowance Reserve Account is to be utilised—

(*i*) for the purposes of acquiring new machinery or plant which is first put to use before the expiry of a period of three years next following the previous year in which the reserve was created; and

(*ii*) until the acquisition of new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

(*b*) the particulars, as may be prescribed[91] in this behalf, have been furnished by the assessee in respect of new machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.

(1C) Where any amount credited to the Special Economic Zone Re-investment Allowance Reserve Account under clause (*ii*) of sub-section (1A),—

(*a*) has been utilised for any purpose other than those referred to in sub-section (1B), the amount so utilised; or

(*b*) has not been utilised before the expiry of the period specified in sub-clause (*i*) of clause (*a*) of sub-section (1B), the amount not so utilised,

shall be deemed to be the profits,—

(*i*) in a case referred to in clause (*a*), in the year in which the amount was so utilised; or

(*ii*) in a case referred to in clause (*b*), in the year immediately following the period of three years specified in sub-clause (*i*) of clause (*a*) of sub-section (1B),

and shall be charged to tax accordingly.

(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(*i*) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year—

(*a*) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(*b*) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;

(*c*) commencing on or after the 1st day of April, 2001 in any special economic zone;

(*ii*) it is not formed by the splitting up, or the reconstruction, of a business already in existence:

Provided that this condition shall not apply in respect of any undertaking which is formed as a result of the re-establishment,

reconstruction or revival by the assessee of the business of any such undertakings as is referred to in section 33B, in the circumstances and within the period specified in that section;

(*iii*) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.—The provisions of *Explanation 1* and *Explanation 2* to sub-section (2) of section 80-I shall apply for the purposes of clause (*iii*) of this sub-section as they apply for the purposes of clause (*ii*) of that sub-section.

(3) This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

Explanation 1.—For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

Explanation 2.—The sale proceeds referred to in this sub-section shall be deemed to have been received in India where such sale proceeds are credited to a separate account maintained for the purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

(5) The deduction under this section shall not be admissible for any assessment year beginning on or after the 1st day of April, 2001, unless the assessee furnishes in the prescribed form[92], along with the return of income, the report of an accountant, as defined in the *Explanation* below sub-section (2) of section 288, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.

(6) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(*i*) section 32, section 32A, section 33, section 35 and clause (*ix*) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years ending before the 1st day of April, 2001, in relation to any building, machinery, plant or furniture used for the purposes of the

business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (*ii*) of sub-section (3) of section 32A, clause (*ii*) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (*ix*) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(*ii*) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74, in so far as such loss relates to the business of the undertaking, shall be carried forward or set off where such loss relates to any of the relevant assessment years ending before the 1st day of April, 2001;

(*iii*) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(*iv*) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.

(7) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.

(7A) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger,—

(*a*) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(*b*) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

(7B) The provisions of this section shall not apply to any undertaking, being a Unit referred to in clause (*zc*) of section 2 of the Special Economic Zones Act, 2005, which has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone.

(8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this

section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years.

(9) [*Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.*]

(9A) [*Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.*]

Explanation 1.— [*Omitted by the Finance Act, 2003, w.e.f. 1-4-2004.*]

Explanation 2.—For the purposes of this section,—

(*i*) "computer software" means—

(*a*) any computer programme recorded on any disc, tape, perforated media or other information storage device; or

(*b*) any customized electronic data or any product or service of similar nature, as may be notified by the Board,

which is transmitted or exported from India to any place outside India by any means;

(*ii*) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 (42 of 1999), and any rules made thereunder or any other corresponding law for the time being in force;

(*iii*) "electronic hardware technology park" means any park set up in accordance with the Electronic Hardware Technology Park (EHTP) Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(*iv*) "export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;

(*v*) "free trade zone" means the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify for the purposes of this section;

(*vi*) "relevant assessment year" means any assessment year falling within a period of ten consecutive assessment years referred to in this section;

(*vii*) "software technology park" means any park set up in accordance with the Software Technology Park Scheme notified by the Government of India in the Ministry of Commerce and Industry;

(*viii*) "special economic zone" means a zone which the Central Government may, by notification in the Official Gazette, specify as a special economic zone for the purposes of this section.

Explanation 3.—For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for development of software) outside India

> shall be deemed to be the profits and gains derived from the export of computer software outside India.
>
> *Explanation 4.*—For the purposes of this section, "manufacture or produce" shall include the cutting and polishing of precious and semi-precious stones.

2.4. It is noticed that though section 10A of the Act speaks about deduction but section 10A/10B of the Act were amended by the Finance Act, 2000 w.e.f. 01/04/2001 to change “exemption” to “deduction”. The deduction contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to other eligible or non-eligible units or undertaking of the assessee. The benefit of deduction is provided by the Act to the individual undertaking and resultantly flows to the assessee. The deduction of profit & gains of an eligible undertaking has to be made independently and before giving effect to the provisions of set off and carry forward contained in section 70, 72 and 74. The deduction u/s 10A and 10B are prior to commencement of the exercise to be undertaking under chapter VI of the Act for arriving at total income of the assessee from the gross total income. The difference between the two expressions “exemption” and “deduction”, though, broadly, may appear to be same i.e. immunity from taxation, the practical effect of it in the light of specific provision contained in different parts of the Act would be wholly different. Sub-section 4 of Section 10A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic

sales, is one instance of deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of Sub-section 6 of Section 10A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section 10A in Chapter VI of the Act can be understand by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10A. The provisions of Sections 80HHC and 80HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section 10A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Section 80HHC and 80HHE, despite the amendment of Section 10A, in our view, indicates that some additional benefits to eligible Section 10A units, not contemplated by Sections 80HHC and 80HHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the

deductions under Section 10A and 80HHC and 80HHE are substantially different.

2.5. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09/08/2000) 22 understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking.

2.6. If the issue of section 263 is analyzed with the help of various other decisions, the landmark decision from Hon'ble Apex Court is Malabar Industrial Company Ltd. Vs CIT (2000) 243 ITR 83 (SC); (2000) 109 taxman 66 (SC) holding that before invoking jurisdiction u/s 263 of the Act, the assessment order should be erroneous as well as prejudicial to the interest of Revenue. The Hon'ble Court held that if the Revenue is losing tax lawfully payable by a person, it will be prejudicial to the interest of the Revenue. However, every loss of Revenue, as a consequence of order of Assessing Officer, cannot be treated as prejudicial to the Revenue.

2.7. If the totality of facts are analyzed, we are satisfied that requisite details were duly furnished by the assessee and the same were duly examined by the Assessing Officer. In such a situation, we are of the view, that there is a distinction between "lack of enquiry" and "inadequate enquiry". In the present case the Assessing Officer collected necessary details, examined the same and then framed the assessment u/s. 143(3) of the Act. Therefore, in such a situation the decision from Hon'ble High Court of Delhi in CIT vs. Anil Kumar Sharma (2011) 335 ITR 83 (Del.)(supra), clearly comes to the rescue of the assessee . The Hon'ble High Court held as under :-

> " Held, dismissing the appeal, that the present case would not be one of "lack of enquiry" even if the enquiry was termed inadequate. The Tribunal found that complete details were filed before the

> Assessing Officer and that he applied his mind to the relevant material and fact, ***although such application of mind was not discernable from the assessment order***. The Tribunal held that the Commissioner in proceedings u/s. 263 also had all these details and materials available before him but had not been able to point out defects conclusively in the material, for arriving at a conclusion that particular income had escaped assessment on account of non-application of mind by the Assessing Officer . The Tribunal was right and the order of revision was not valid."

2.8. The aforesaid order clearly fits into the facts before us . While coming to the aforesaid conclusion the Hon'ble High Court duly considered the decision in *CIT vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del.) (para-6 & 7).* We are expected to ascertain whether the Assessing Officer had investigated the issue and applied his mind towards the whole record made available by the assessee during assessment proceedings. Uncontrovertedly, necessary details were produced by the assessee and examined by the Assessing Officer, therefore, it is not a case of lack of enquiry by the Assessing Officer. Identical ratio was laid down by the Tribunal in the case of Reliance Gas Transportation Infrastructure Ltd. vs. CIT (2014) 100 DTR (Mum.) (Trb.) 1 , order dated 10/1/2014. In another case from Hon'ble Jurisdictional High Court in CIT vs. Development Credit Bank Limited (2010) 323 ITR 206, on identical fact wherein assessment order was passed after considering all details called for and furnished by the assessee. The ld. Commissioner invoked revisional

jurisdiction on the ground that enquiry was not conducted, the Hon'ble High Court held that the ld. Commissioner was not justified. Identical is the situation from Hon'ble High Court Punjab & Haryana in Hari Iron Trading Company vs. CIT (263 ITR 437) order dated 23/5/2003. The Hon'ble High Court of Delhi in CIT vs. Eicher (294 ITR 310) (Del.) wherein the entire material was placed by the assessee before the Assessing Officer at the time of original assessment, the Assessing Officer applied his mind to the material and accepted the view canvassed by the assessee. Identically, the Hon'ble High Court of Delhi in CIT vs. Ashish Rajpal (320 ITR 674) vide order dt.14/5/2009, decided in favour of the assessee. The Hon'ble Jurisdictional High Court in CIT vs. Gabriel India Ltd. (203 ITR 108) held that there must be material before the Commissioner to satisfy himself that two requisite provided u/s. 263 are present, otherwise power cannot be exercised at the whims and caprice of the Commissioner. We have also seen the factual finding recorded in the assessment order (reproduced hereinabove) before framing the assessment u/s. 143(3) of the Act and are satisfied that the ld. Assessing Officer made necessary enquiries, asked for details, which were furnished by the assessee, therefore, the observation made by the ld. Commissioner is not substantiated as has been alleged in the revisional order.

2.9. Admittedly, an incorrect assumption of fact or an incorrect application of law would satisfy the requirement of

order being erroneous u/s. 263. The phrase "prejudicial to the interest of the Revenue" u/s. 263, has to be read in conjunction with the expression "erroneous" order by the Assessing Officer. Every loss of Revenue as a consequence of assessment order cannot be termed as prejudicial to the interest of Revenue. Meaning thereby "prejudice" must be caused to the Revenue administration. At the same time, if another view is possible revision is not permissible. Our view is fortified by the decision from Himachal Pradesh Financial Corpn. (186 Taxmann 105)(HP), Bismillah Trading Co. (248 ITR 292)(Ker.) and CIT vs. Green World Corpn. (314 ITR 81)(SC). For invoking revisional jurisdiction u/s. 263 the assessment order must contain grievous error which is subversive of the administration of Revenue. Further, exact error must be disclosed by the Commissioner as was held in CIT vs. G.K. Kabra (211 ITR 336)(AP). Totality of facts, clearly indicates that assessment u/s. 143(3) of the Act was framed by the Assessing Officer after obtaining necessary details from the assessee and further the same were examined by him.

2.10. It is also noted that the Hon'ble Apex Court in a latest decision dated 16/12/2016 in CIT vs Yokogawa India Limited (CIVIL APPEAL NO. 8498 OF 2013) settled the issue after considering the decision from Hon'ble Karnataka High Court in 343 ITR 385(Karnataka) and held as under:-

"2. The true and correct meaning and effect of the provisions of Section 10A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") is the principal issue arising for determination of the Court. At the outset, it must be made clear that the decision of this Court with regard to the provisions of Section 10A of the Act would equally be applicable to cases governed by the provisions of Section 10B in view of the said later provision being pari materia with Section 10A of the Act though governing a different situation.

3. The broad question indicated above may be conveniently dissected into the following specific questions arising in the cases under consideration.

(i) Whether Section 10A of the Act is beyond the purview of the computation mechanism of total income as defined under the Act. Consequently, is the income of a Section 10A unit required to be excluded before arriving at the gross total income of the assessee?

(ii) Whether the phrase "total income" in Section 10A of the Act is akin and pari materia with the said expression as appearing in Section 2(45) of the Act?

(iii) Whether even after the amendment made with effect from 1.04.2001, Section 10A of the Act continues to remain an exemption section and not a deduction section?

(iv) Whether losses of other 10A Units or non 10A Units can be set off against the profits of 10A Units before deductions under Section 10A are effected? (v) Whether brought forward business losses and unabsorbed depreciation of 10A Units or non 10A Units can be set off against the profits of another 10A Units of the assessee.

4. At the very outset, Section 10A of the Act as it existed prior to its amendment by the Finance Act of 2000 with effect from 1.04.2001; subsequent to the aforesaid amendment and the provisions of Section 10A of the Act, as further amended by the Finance Act, 2003 with retrospective effect from 1.04.2001 may be conveniently set out below.

5. Section 10A of the Act, as it stood prior to the amendment made by the Finance Act, 2000, (amendment effective from 1.4.2001) was as follows: "10A. (1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:—

(i) ...

(ia) in relation to an undertaking which begins to manufacture or produce any article or thing on or after the 1st day of April, 1995, its exports of such articles or things are not less than seventy-five per cent of the total sales thereof during the previous year;

(ii) …

Provided …

(iii) …

(3) The profits and gains referred to in sub-section (1) shall not be included in the total income of the assessee in respect of any ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things.

(4) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years, in relation to any building, machinery, plant or furniture used for the purposes of the business of the industrial undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly

sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74 and no deficiency referred to in sub-section (3) of section 80J, in so far as such loss or deficiency relates to the business of the industrial undertaking, shall be carried forward or set off where such loss, or, as the case may be, deficiency relates to any of the relevant assessment years;

(iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB or section 80J in relation to the profits and gains of the industrial undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the industrial undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment years.

(5) …

(6) The provisions of sub-section (8) and sub-section (9) of section 80-I shall, so far as may be, apply in relation to the industrial undertaking referred to in this section as they apply for the purposes of the industrial undertaking referred to in section 80-I.

(7) …

(8) …

6. Section 10A was substituted by the Finance Act, 2000 with effect from 1.4.2001 in the following terms:

"10A. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or

computer software, as the case may be, shall be allowed from the total income of the assessee:

Provided that where in computing the total income of the undertaking for any assessment 8 year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years:

Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone by reason of conversion of such free trade zone or export processing zone into a special economic zone, the period of ten consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the undertaking was first set up in such free trade zone or export processing zone:

Provided also that the profits and gains derived from such domestic sales of articles or things or computer software as do not exceed twenty-five per cent of total sales shall be deemed to be the profits and gains derived from the export of articles or things or computer software.

Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1st day of April, 2010 and subsequent years.

(2) This section applies to any undertaking which fulfils all the following conditions, namely :—

(i) …

(a) …

9 (b) …

(c) …

(ii) …

(3) …

(4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the assessee.

(5) …

(6) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,—

(i) Section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years, in relation to any building, machinery, plant or furniture used for the purposes of the business of the undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been 10 given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction;

(ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74 in so far as such loss relates to the business of the undertaking, shall be carried forward or set off where such loss relates to any of the relevant assessment years;

(iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80-IA or section 80-IB in relation to the profits and gains of the undertaking; and

(iv) in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment year.

(7) The provisions of sub-section (8) and sub-section (10) of section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA."

7. Section 10A was further amended by the Finance Act of 2003 with retrospective effect from 1.04.2001. For the purposes of the present case, the amendments introducing Section (1A); making the provisions of sub-section (4) subject to the provisions of Sections (1) and (1A) and making the benefit of the provisions of Sections 32, 32A, 33, 35 and clause (ix) of Section 36(1) and also Sections 72(1) and 74(1) and (3) operative from the assessment year 2001-2002 alone would be significant.

8. The cardinal principles of interpretation of taxing statutes centers around the opinion of Rowlatt, J. in Cape Brandy Syndicate vs. Inland Revenue Commissioner1 which has virtually become the locus classicus2 . The above would dispense with the necessity of any further elaboration of the subject notwithstanding the numerous precedents available inasmuch as the evolution of all such principles are within the four corners of the following opinion of Rowlatt, J.

"…in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

9. The amendment of Section 10A of the Act, by the Finance Act, 2000 with effect from 1.4.2001, specifically uses the words 'deduction of profits and gains derived by an eligible unit …… from the total income of the assessee'. There are other provisions of Section 10A, as amended, which could be suggestive of the fact that by the amendment made by Finance Act, 2000, Section 10A had changed its colour from being an exemption section to a provision providing for deduction. Yet, Section 10A continued to remain in Chapter III of the Act which Chapter deals with incomes which do not form part of the total

income. There are several Circulars that have been placed before us by the contesting parties to explain the purpose and object of the amendment. Having looked at the aforesaid Circulars, issued from time to time, what we find is a fair amount of ambiguity therein as to the true nature and effect of the amendment. Specifically, we may refer to Circular No. 7 dated 16.07.2013 as well as Circular No. 01/2013 dated 17.01.2013 which appear to be conflicting and contradictory to each other; in the former Circular the provision, i.e., Section 10A is referred to as providing for deductions whereas the later Circular uses the expression "exemption" while referring to the provisions of Sections 10A and 10B of the Act. Even the Income Tax Return Forms i.e. Form No. 1 dated 17.08.2001 and Form No. 6 for the assessment year 2012-13 are equally contradictory. The appellant Revenue would, however contend that, ex facie, from the language appearing in Section 10A it is crystal clear that the aforesaid provision of the Act, as amended by Finance Act, 2000 provides for deductions from the gross total income, notwithstanding the use of the words 'total income' in Section 10A. Exemptions provided for under the old Section 10A have been discontinued by the Legislature. According to the Revenue, where the purport and effect of the statute is clear from the language used there is no scope to turn to Chapter notes or the marginal notes so as to understand Section 10A to be an exemption section on the basis that the said provision is still included in Chapter III of the Act. Reliance in this regard has been placed on the decision of this Court in Tata Power Co. Ltd. vs. Reliance Energy Ltd. 3 wherein at page 687, it is held that:

> *"89. Chapter headings and the marginal notes are parts of the statute. They have also been enacted by Parliament. There cannot, thus, be any doubt that it can be used in aid of the construction. It is, however, well settled that if the wordings of the statutory provision are clear and unambiguous, construction of the statute with the aid of "chapter heading" and "marginal note" may not arise. It may be that heading and marginal*

note, however, are of a very limited use in interpretation because of its necessarily brief and inaccurate nature. They are, however, not irrelevant. They certainly cannot be taken into consideration if they differ from the material they describe."

10. The Revenue further contends that by virtue of the amendment made by Finance Act, 2000, deductions under Section 10A are required to be made and allowed at the stage of computation of total income under Chapter VI of the Act notwithstanding the absence of any specific provision in Chapter VI to the said effect. In fact, the Revenue contends that in view of the clear language of Section 10A, as brought about by the amendment, a parallel or consequential amendment in Chapter VI of the Act was wholly unnecessary.

11. On the other hand, on behalf of the assessees, it is contended that though there may be some features of deduction brought in by the amendment to Section 10A, as for example, disallowance of profits in regard to domestic sales, the legislative intent in retaining Section 10A in Chapter III of the Act would clearly demonstrate the true nature of the said provision of the Act even after amendment thereof by the Finance Act of 2000. Deductions from the total income which is nowhere envisaged under the Act and the reference to the total income of the undertaking, referred to in several subsections of Section 10A, would indicate that the total income referred to in Section 2(45) has no application to the computation under Section 10A and the reference therein is only to the total income of the eligible unit/undertaking. The provisions of Section 10A(6), as amended by Finance Act of 2003 retrospectively with effect from 1.4.2001, has also been stressed upon to contend that with effect from the assessment year 2001-02 losses and unabsorbed depreciation of eligible units would be allowable for set off immediately on the expiry of the period of tax holiday i.e. 10 years. The provisions of Sections 32, 32A, 33, 35 and part of 36 do not separately apply to an eligible unit during the period of tax holiday. During the

said period the deduction under the aforesaid sections of the Act are deemed to have been made. Similarly, under Section 10A(6)(ii) losses referred to in Section 72(1) or 74(1) and 74(3) are also eligible to be carried forward to the assessment year following the end of the holiday period commencing from the assessment year 2001-02. All these, according to the learned counsels for the assessees, suggest that, though heterogeneous elements exist in Section 10A, the provision is really an exemption provision. Alternatively, according to the learned counsels, even if Section 10A is understood to be providing for deductions, the stage of such deductions would be immediately after computation of profits and gains of business and before the aggregate of incomes under different heads of other loss making eligible units or non-eligible units of the assessee are taken into account. In other words, it is immediately after the computation of profits and gains of business of the undertaking that the deduction under Section 10A is required to be made. There is no question of such deductions being computed at the stage of application of provisions of Chapter VI of the Act.

12. We have considered the submissions advanced and the provisions of Section 10A as it stood prior to the amendment made by Finance Act, 2000 with effect from 1.4.2001; the amended Section 10A thereafter and also the amendment made by Finance Act, 2003 with retrospective effect from 1.4.2001.

13. The retention of Section 10A in Chapter III of the Act after the amendment made by the Finance Act, 2000 would be merely suggestive and not determinative of what is provided by the Section as amended, in contrast to what was provided by the un-amended Section. The true and correct purport and effect of the amended Section will have to be construed from the language used and not merely from the fact that it has been retained in Chapter III. The introduction of the word 'deduction' in Section 10A by the amendment, in the absence of any contrary material, and in view of the scope of the deductions contemplated by Section 10A as already discussed,

it has to be understood that the Section embodies a clear enunciation of the legislative decision to alter its nature from one providing for exemption to one providing for deductions.

14. The difference between the two expressions 'exemption' and 'deduction', though broadly may appear to be the same i.e. immunity from taxation, the practical effect of it in the light of the specific provisions contained in different parts of the Act would be wholly different. The above implications cannot be more obvious than from the case of Civil Appeal Nos. 8563/2013, 8564/2013 and civil appeal arising out of SLP(C) No. 18157/2015, which have been filed by loss making eligible units and/or by non-eligible assessees seeking the benefit of adjustment of losses against profits made by eligible units.

15. Sub-section 4 of Section 10A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance of deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of Sub-section 6 of Section 10A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section 10A in Chapter VI of the Act can be understand by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10A. The provisions of Sections 80HHC and 80HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section 10A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Section 80HHC

and 80HHE, despite the amendment of Section 10A, in our view, indicates that some additional benefits to eligible Section 10A units, not contemplated by Sections 80HHC and 80HHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under Section 10A and 80HHC and 80HHE are substantially different. This is the next aspect of the case which we would now like to turn to.

16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,

> *"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."*

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000) 22 understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes

under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly.

2.11. So far as, loss on the investment of Rs.22,36,163/- being writing off to the profit & loss account of the assessee and claimed as deduction form the profits of the eligible unit. The stand of the assessee is that in order to attract the Indian diaspora to its website, the assessee/STPI Unit has to spend aggressively on brand building and advertising outside India and for this purpose the assessee/STPI Unit has 300% subsidy in three markets U.K., U.S.A. & U.A.E and during impugned Assessment Year under appeal, the assessee has closed 100%

subsidiary in UAE and incurred loss on investment of Rs.22,36,163/- is charged to P & L Account of STPI. Thus, it was explained that the profit of STPI Unit of Rs.16,88,45,731/- is after such loss reduced from the profit of the company which was duly examined by the Assessing Officer from the submissions of the assessee, during the course of hearing, by letter dated 27/02/2014, which is placed on paper book at page no.39 and conscious decision was taken by the Assessing Officer before allowing the said loss, which was incurred for the "purposes of business" of the assessee and is to be allowed u/s 37(1) of the Act as the same was incurred "wholly and exclusively" for the purpose of business of the assessee. Thus, we are of the view that even for the sake of argument, the said loss is disallowed, the same will enhance profits of eligible undertaking by Rs.22,36,163/-, which in any case is exempt u/s 10A of the Act, keeping in view decision of Hon'ble Bombay High Court in the case of Black & Veatch Consulting Pvt. Ltd. 348 ITR 72 (Bom.), CIT vs Schmetz India Pvt. Ltd. (2012) 211 taxman 59 (Bom.) and decision of the Bombay High Court in the case of CIT vs Techno Tarp and Polymers Pvt. Ltd (INCOME TAX APPEAL NO. 2134 OF 2013 vide order dated 5/12/2015). The Hon'ble Bombay High Court in the case of Techno Tarp & Polymers Pvt. Ltd. (supra) has duly considered the decision of Hon'ble Supreme Court dated 19/09/2013 and held that deduction u/s 10A shall be allowed without adjusting brought forward losses of the eligible unit. Thus,

we are in agreement with the argument of the ld. counsel of the assessee that the order of the Assessing Officer is neither erroneous nor prejudicial to the interest of the Revenue so as to be covered under the extraordinary revisionary powers of CIT u/s 263 of the Act and CIT cannot substitute its opinion unless it is shown that order of the Assessing Officer is erroneous so far as it is prejudicial to the interest of the Revenue as contemplated under the mandate of section 263 of the Act, which is a settled proposition of law by various judicial decisions of the Hon'ble Supreme Court in CIT vs Malabar Industrial Company Ltd. (243 ITR 83)(SC), CIT vs Max India Ltd. (2007) (295 ITR 282). It is further brought to the notice of the Tribunal by the ld. counsel that now the Revenue has come out the Circular No.37/2016 dated 02/11/2016, wherein, it has been decided by the CBDT that any additions made on account of provisions u/s 32, 40(a)(ia), 40A(3), 43B, etc. to the income of the eligible unit shall not be contested by Revenue as it has the effect of increasing the profits of eligible unit, which in any case is deductible due to the exemption granted under the Act and hence it is decided to withdraw/not pressed such appeals. It is also submitted that the issue is covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. *[2010] 194 Taxman 192 (Bombay)/[2011] 330 ITR 175 (Bombay)/[2010] 233 CTR 248 (Bombay).* The sanctity and mandate of the aforesaid circular is to avoid unnecessary litigation in case where

there is increase in profits of eligible units due to disallowance made by the Revenue, which in any case is entitled for exemption/deduction as contemplated for eligible unit. Hence, the whole exercise as contemplated by proceedings u/s 263 are academic in nature and cannot be allowed to proceed further on this ground as the same is covered by the mandate and the sanctity of the said circular. The said circular is reproduced hereunder:-

F.No.279/Misc./140/2015/ITJ
Government of India
Ministry of Finance,
Department of Revenue
Central Board of Direct Taxes
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New Delhi, Dated 2nd November 2016

Subject: Chapter VI-A deduction on enhanced profits- Reg.

Chapter VI-A of the Income-tax Act, 1961 ("the Act"), provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowances pertaining to sections 32, 40(a)(ia), 40A(3), 43B etc., of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A.

2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:

(i) If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40(a)(ia) of the Act would qualify for deduction under section 80-IB of the Act. This view was taken by the courts in the following cases:

- Income-tax Officer - Ward 5(1) vs. Keval Construction, Tax Appeal

No. 443 of 2012, December 10, 2012, Gujarat High Court.!

- Commissioner of Income-tax-Iv, Nagpur vs. Sunil Vishwambharnath Tiwari, IT Appeal No. 2 of2011, September 11, 2015, Bombay High Court

(ii) If deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled for deduction under section 80-IE of the Act. This view was taken by the court in the following case:

- Principal CIT, Kanpur vs. Surya Merchants Ltd., I.T. Appeal No. 248 of 2015, May 03, 2016, Allahabad High Court.

The above views have attained finality as these judgments of the High Courts of Bombay, Gujarat and Allahabad have been accepted by the Department.

3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

4. Accordingly, henceforth, appeals may not be filed on this ground by officers of the Department and appeals already filed in Courts! Tribunals may be withdrawn not pressed upon. The above may be brought to the notice of all concerned.

Thus, the issue under the instant appeal is no more res-integra as in nutshell Hon'ble Supreme Court has held that it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under

Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly. Thus, the Hon'ble Supreme Court held that no adjustment of brought forward losses/unabsorbed depreciation of the eligible unit shall be made before allowing deduction of profits of the eligible unit, which is to be allowed under chapter-IV of the Act without resorting to the adjustments as contemplated under chapter VI of the Act, thus, now, the issue of proceedings u/s 263 of the Act by the CIT on the first issue of adjustment of brought forward losses/unabsorbed depreciation of the eligible unit against the profits of the current year of the eligible unit is academic in nature in view of binding decision of Hon'ble Supreme Court in the case of CIT vs Yokogawa India Ltd.

(supra) and hence the said proceedings u/s 263 of the Act have become in-fructuous.

3. Regarding second issue with regard to the adjustment of losses of Rs.22,36,163/-, we are in agreement with the contentions of the ld. counsel for the assessee that So far as, loss on the investment of Rs.22,36,163/- being writing off to the profit & loss account of the assessee and claimed as deduction from the profits of the eligible unit, which was stated to be incurred by the assessee in order to attract the Indian diaspora to its website, the assessee/STPI Unit has to spend aggressively on brand building and advertising outside India and for this purpose the assessee/STPI Unit has three hundred percent subsidy in three markets UK, U.S.A. & U.A,E and during impugned Assessment Year under appeal, the assessee has closed 100% subsidiary in UAE and incurred loss on investment of Rs.22,36,163/- is charged to P & L Account of STPI. Thus, it was submitted before us that the profit of STPI Unit of Rs.16,88,45,731/- is after such loss reduced from the profit of the company. We have observed that the Assessing Officer has duly considered the said facts which were submitted before the Assessing Officer during the course of hearing by letter dated 27/02/2014, which is placed on paper book at page no.39 and conscious decision was taken by the Assessing Officer before allowing the said loss. Even if the said loss is disallowed, the same will enhance profits of eligible

undertaking by Rs.22,36,163/-, which in any case is exempt u/s 10A of the Act keeping in view decision of Hon'ble Bombay High Court in the case of Black & Veatch Consulting Pvt. Ltd. 348 ITR 72 (Bom.), CIT vs Schmetz India Pvt. Ltd. (2012) 211 taxman 59 (Bom.) and decision of the Bombay High Court in the case of The Commissioner of Income Tax Act, 1961 (hereinafter the Act) Vs. Techno Tarp and Polymers Pvt. Ltd (INCOME TAX APPEAL NO. 2134 OF 2013 vide order dated0 5/12/2015). The Hon'ble Bombay High Court in the case of Techno Tarp & Polymers Pvt. Ltd. (supra) has duly considered the decision of Hon'ble Supreme Court dated 19/09/2013 in the case of "CIT Vs. Himatasingike Seide Ltd., 48 taxman.com 357(SC) and held that deduction u/s 10A shall be allowed without adjusting brought forward losses of the eligible unit which is now affirmed by Hon'ble Supreme Court in the case of CIT vs Yokogawa India Ltd. (supra), thus, the order of the ld. Assessing Officer is neither erroneous nor prejudicial to the interest of the Revenue so as to be covered under the extraordinary revisionary powers of CIT u/s 263 of the Act and CIT cannot substitute its opinion unless it is shown that order of the Assessing Officer is erroneous so far as it is prejudicial to the interest of the Revenue as contemplated under the mandate of section 263 of the Act, which is a settled proposition of law by various judicial decisions of the Hon'ble Supreme Court in CIT vs Malabar Industrial Company Ltd. (243 ITR 83)(SC), CIT vs Max India Ltd.

(2007) (295 ITR 282). Now the Revenue has also come out the Circular No.37/2016 dated 02/11/2016, wherein, it has been decided by the CBDT that any additions made on account of provisions u/s 32, 40(a)(ia), 40A(3), 43B, etc. to the income of the eligible unit shall not be contested by Revenue as it has the effect of increasing the profits of eligible unit, which in any case is deductible due to the exemption granted under the Act and hence it is decided to withdraw/not pressed such appeals. The sanctity and mandate of the aforesaid circular is to avoid unnecessary litigation in case where there is increase in profits of eligible units due to disallowance made by the Revenue, which in any case is entitled for exemption/deduction as contemplated for eligible unit. Hence, the whole exercise as contemplated by proceedings u/s 263 are academic in nature and cannot be allowed to proceed and is hereby quashed.

Finally, we quashed the revisionary proceedings undertaken u/s 263 of the Act by the Ld. Commissioner. The appeals of the assessee are allowed.

This order was pronounced in the open court on 28/12/2016.

Sd/-	Sd/-
(Rajesh Kumar)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** /JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/12/2016

*Shekhar, P.S./*नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**