IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'I-2' NEW DELHI

BEFORE : SHRI I.C. SUDHIR, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 5262/Del./2010
Asstt. Year : 2006-07

EDAG Engineering & Design India Pvt. Ltd., C-227, Sankalp Ground Floor, Westend Marg, Near Garden of five Sense, Paryavaran Complex, New Delhi [PAN: AAACE 6666K] (Appellant)	vs.	Income-tax officer, Ward 11(1), New Delhi. (Respondent)

Appellant by	:	Sh. Anubhav Jain, Advocate
Respondent by	:	Sh. Anand Kedia, CIT/DR
Date of hearing	:	22.04.2016
Date of pronouncement	:	15.06.2016

ORDER

Per L.P. Sahu, Accountant Member:

This is an appeal filed by the assessee against the order of ITO Ward 11(1) New Delhi dated 29.09.2010 passed u/s. 143(3) read with section 144C of the Income-tax Act, 1961, on the following grounds :

Ground No. 1

A. The Assessing Officer had erred both on the law and on the facts of the case while making addition of Rs. 29,62,100/- pertaining to international transaction while determining the arm's length price in respect of International transaction without appreciating that the appellant has entered the international transactions at arm's length principle.

B. Without prejudice to the aforesaid ground, the Assessing officer has grossly erred as per law by not appreciating that the proposed addition of Rs. 29,62,199/- is within the variation limit of 5% provided as per section 92C(2) of the Income Tax Act, 1961 (the Act). Accordingly, there should not be any addition after applying the provisions of section 92C(2) of the Act.

C. The Assessing officer has erred as per law by making the aforesaid additions under the head "income from other sources" whereas the same should be assessed under the head "income from business & profession" as per the provisions of the Act.

Ground No. 2

The Assessing officer has grossly erred as per law by not allowing deduction under section 10A of the Act on the income determined under the head "income from business or profession" before set-off of brought forward losses/unabsorbed depreciation. In contrary to the provisions of the Act, the AO determined the deduction under section 10A of the Act after set-off of brought forward losses/unabsorbed depreciation from the Gross Total Income.

Ground No. 3

The Assessing officer has erred as per law & facts of the case by stating that the brought-forward losses/unabsorbed depreciation available up to AY 2005-06 will be set-off with the succeeding assessment year by applying the provisions of section 10A(8) of the Act.

Ground No. 4

The Assessing Officer has erred both on the law as well as on the facts of the case while making disallowance of Rs. 50,000/- under section 14A of the Act read with rule 8D of I. T. Rules, 1962 by ignoring the fact that the appellant has not incurred any expenditure related to exempt income during the year. Accordingly, no disallowance should be made by applying the provisions of section 14A of the Act read with rule 8D of I. T. Rules, 1962.

Further the AO has ignored the fact that the notification no. 45/2008 dated 24.03.2008 is not applicable to the relevant assessment year under consideration.

Ground No. 5

The Assessing Officer has erred in law and on the facts of the case in initiating the penalty proceeding under section 271(1) (c) of the Act."

Ground No. 1.

2. The brief facts of the case are that the assessee company was deriving income from its associate concern. The appellant is a subsidiary of EDAG Engineering and Designing, AG Germany. The appellant is engaged in providing software aided services for engineering and designing of automobile components. It provides these services on project basis to its parent company in Germany. The Appellant filed its return of income on 29th November 2006 and claimed exemption in respect of income from export of software out of India u/s 10A of the Act. It had reported international transactions amounting to Rs. 5,97,47,922/-, the details of which are as under:

3. The matter was referred to the Additional Commissioner of Income Tax (Transfer Pricing Officer) for examining whether the international transactions so entered were at arm's length.

4. The assessee applied TNMM method for determining the value of its international transaction relating to design and development of automobile parts. The Ld. TPO after applying the profit margin of certain comparable

companies, worked out the value of the transaction at Rs. 8,61,28,796/- and worked out a gross difference of Rs. 2,80,59,718/-. The Assessing Officer accepted TNMM method with OP/TC as profit level indicator. During the year, the assessee had receipt support of operating expenses to the tune of Rs.1,91,00,875/- and Rs.26,61,981/-. It means total reimbursement received is Rs.2,17,62,856/-. Therefore, after adjustment of Rs.2,17,62,856/-, there was a net balance of Rs.62,96,862/-.

5. The TPO further made adjustment of Rs.33,34,762/- which represented receipts for this year, but accounted for in the subsequent year (AY 2007-08). This was subject to verification by the AO that the amount was accounted for during year under consideration. After making above adjustment, the Assessing Officer enhanced the income by Rs.29,62,100/- for the assessment year 2006-07 for the international transaction undertaken during the F.Y. 2005-06.The TPO considered that there was net adjustment of Rs.62,96,862/- which is adjustment being outside the tolerance band of 5% of the book value of international transaction u/s. 92C(2) of the Act. There was a net addition after the direction of the TPO of Rs.29,62,120/- added under the head income from other sources. The ld. DRP-I vide its order dated 23.08.2010 directed the AO to verify whether the said addition is to be made under the head income

from business or profession or income from other sources. In this regard, the Assessing Officer made addition of the above amount under the head income from other sources and did not allow deduction u/s. 10A in view of the following proviso to section 92C as reproduced hereunder :

> *"**Provided** that no deduction under section 10A or section 10AA or Section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this section."*

6. During the course of assessment proceedings, the AO noticed that the assessee had claimed deduction u/s. 10A and thereafter brought forward losses had been set off against the balance income. The AO further asked the assessee whether it filed any declaration u/s. 10A(8) for the year 2005-06. In response the assessee submitted that the deduction was not claimed u/s. 10A and he further stated that procedure for utilizing option u/s. 10A(8) is procedural and not mandatory and relied on the judgment of Hon'ble ITAT Hyderabad in Teehtron Polyenses Ltd. vs. ITO (2009)1777 Taxman 28 (HYD)(MAG). In this regard, the submission of the assessee was not accepted by the Assessing Officer and did not allow deduction u/s. 10A before setting off of depreciation and carry forward losses.

7. The learned AO also made disallowance u/s. 14 of Rs.15,000/-, which was not pressed by the ld. AR before us. Thus, aggrieved by the aforesaid additions, the assessee has come up in appeal before the Tribunal.

8. The ld. AR of the assessee submitted that the TPO himself observed that the difference between ALP of the transactions as determined by him and the value of the transaction as shown by the assessee amounted to Rs.29,62,100/- is outside the purview of section 92C(2). The net addition comes to 4.96% which is below the range of 5%.Therefore, this section is not attracted and the addition deserves to be deleted.

9. The ld. DR relied on the order of the lower authorities and contended that section 92C has been amended by Finance Act 1911 w.e.f. 01.04.12 and it has been substituted by 3% in lieu of 5%.Therefore, the AO is justified to determine the ALP.

10. After hearing both the parties and perusing the material available on record, we find that there was a net adjustment of Rs.29,62,100/- which was recommended by the TPO to the AO for enhancement in the income, which is below the range of 5% of ALP variation & is below the limits given in section

92C(2) of the Act. For the sake of convenience, we reproduce the above section hereunder :

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed[72] :

Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

Provided further that if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price:

[73][**Provided also** that where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction or specified domestic transaction undertaken on or after the 1st day of April, 2014, shall be computed in such manner as may be prescribed and accordingly the first and second proviso shall not apply.]

*Explanation.*ð For the removal of doubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.ò

11. Similar issue has been decided by Hon'ble Jurisdictional High Court in the case of CIT vs. KEIHIN PANALFA Ltd. in ITA No. 11/2015 & 12/2015, vide order dated 09.09.2015, wherein the Hon'ble Delhi High Court, in the facts and circumstances of that case, held as under :

> *"3.1 The Assessee is engaged in the manufacture and sale of air-conditioners for cars manufactured by Honda Siel Cars India Ltd. During the relevant previous year, the Assessee entered into "international transactions" for purchase of parts and components; payment of guidance fee; payment of royalty; and payment of fees for technical know-how. As the international transactions were more than Rs.5 crores in value, a reference was made to Transfer Pricing Officer (hereafter *TPO') for determining of the Arm's Length Price (hereafter 'ALP') under the provisions of Section 92CA of the Act.*

3.2 The Assessee submitted a Transfer Pricing Report calculating the ALP by using Transactional Net Margin Method (hereafter 'TNMM") and using the ratio of Operating Profit to Capital Employed as the Profit Level Indicator (hereafter PLI). The TPO accepted TNMM as the appropriate method but rejected the PLI adopted by the Assessee. He used Operating Profits to Total Cost as the appropriate PLI and computed the PLI of comparables at 8.29% as against the Assessee's PLI of 6.22%.

3.3 The total operating income/revenue of the Assessee for the relevant period was Rs,72,24,22,000/-. Applying the margin of 8.29% - as determined by the TPO on the basis of selected comparables - the TPO concluded that the total operating expenses ought to have been Rs.66,71,17,924/-. Since the actual operating expenses incurred by the Assessee during the period were Rs.68,00,88,000/-, the TPO held that a TP Adjustment of Rs.l,29,70,076/- ought to be made in respect of expenses attributable to the international transactions. Insofar as the payment of royalty of Rs.1,24,41,118/- is concerned, the TPO had held that no royalty would be payable if the transactions were on Arm's Length basis as according to the TPO, the Assessee was functioning as a contract manufacturer. The TPO observed that all the sales were being made by the petitioner to Honda Siel Cars India Ltd. and 99.99% of the said company were held by Honda Motors Co, Ltd. (Japan), which also held 41.33% of KC (the AE in the present case). KC in turn held 74% shares in the Assessee. The TPO reasoned that since the products being manufactured by the Assessee were specifically designed for Honda Cars Produced by Honda Siel Cars India Ltd and the technical designs and intellectual property rights were held by their parent/group companies, the Assessee was in effect manufacturing for its related enterprise and, therefore, payment of any royalty on sales would be unreasonable. The TPO made observations to the effect that the payment of royalty had, in fact, inflated the operating costs and was 'Villain of the piece".

3.4 The Assessing Officer passed an Assessment Order dated 26th December, 2006 making an addition of Rs. 1,29,70,076/- on account of TP Adjustment made by the TPO. The Assessee had reflected Rs. 1,24,41,000/- as expenses on Royalty. The TPO computed the ALP for royalty as Nil, which was subsumed in the TP Adjustment of Rs. 1,29,70,076/-. In addition, the AO disallowed 25% of the expenses on account of royalty amounting to Rs.22,53,000/- as being capital in nature.

4. With respect to the Assessment Year 2005-06, the TPO did not draw any adverse inference with respect to the international transactions except the transaction relating to payment of royalty. The TPO followed a similar reasoning as adopted in respect of Assessment Year 2004-05 and passed an order dated 24th October, 2008 directing the AO to make an addition of a sum of Rs. 1,97,40,7267- being the amount of royalty, for the Financial Year 2004-05, The AO, following the directions of the TPO, made an addition of the aforesaid sum and passed an assessment order dated 29th December, 2008.

5. The Assessee preferred appeals before the CIT(A) against the assessment orders dated 26th December, 2006 in respect of the Assessment Year 2004-05 and assessment order dated 29th December, 2008 in respect of the Assessment Year 2005-06.

6. The CIT(A) by an order dated 29th March. 2011 allowed the Assessee's appeal against the assessment order dated 26th December, 2006. Before the CIT(A) the Assessee contended that the computation of the TP Adjustment was flawed, inasmuch as, the TPO had also attributed TP Adjustments relating to uncontrolled third party transactions to the international transactions. The international transactions in issue constituted only 23.38% of the total expenses and, therefore, the adjustment on account of operating expenses attributable to international transaction would necessarily be in the same proportion. According to the Assessee, the same would amount to Rs.30,33,593/-. The expenses attributable to the international transaction (i.e. 23.38% of the total expenses) amounted to Rs.15,90,66,935/- and after the TP Adjustment, the expenses on Arm's Length basis were computed at Rs.15,60,33,342/- (i.e. 15,90,66,935/- -30,33,593/-). The Assessee further contended that 5% of the ALP computed as above would amount to Rs.78,01,667/-. The Assessee urged that the TP Adjustment fell within the aforesaid range and, therefore, by virtue of second proviso to Section 93CA, no TP Adjustments were liable to be made. This contention was accepted by the CIT(A) and the TP Adjustments made by the AC) were deleted.

7. The CTT(A) also held that the TPO was in error in holding that no royalty was payable. The CIT(A) held that the functions performed by the Assessee included procurement and inventory management, production and manufacturing planning, co-ordination of production and sales, import of goods, maintenance of production facilities and quality control

functions; therefore, the Assessee could not be considered as a contract manufacturer. The CIT(A) also held that the TPO exceeded its jurisdiction by rejecting the agreements entered into between the Assessee and the KC and not computing the ALP in accordance with the Act.

8. The CIT(A) also allowed the appeal preferred by the Assessee against an order dated 29th December, 2008 passed by the AO in respect of Assessment Year 2005-06 for the same reasons as indicated in respect of the appeal relating to Assessment Year 2004-05.

9. The Revenue appealed against the decisions of the CTT(A) before the Tribunal. Before the Tribunal, the Assessee conceded that it had no objection to the decision of the TPO regarding the adoption of PLI of Operating Profit to Total Cost. However, the Assessee urged that the adjustments computed in respect of the entire expenses could not be loaded on the international transactions, The Tribunal upheld the orders passed by the CIT(A) and rejected the appeals by a common order dated 6th May,2014.

10. The learned counsel appearing for the Revenue contended that the Tribunal has grossly erred in apportioning the adjustment on account of expenses over the uncontrolled transactions and international transactions. Me urged that in respect of the Assessment Year 2004-05, the entire adjustment on account of the difference in operating expenses of Rs. 1,29,70,076/- as determined by the TPO ought to have been adjusted only against the international transaction, which admittedly constituted only 23.38% of the operating income/revenue. He next referred to the technical collaboration agreement dated 12th September, 1997 entered into between ICC and the Assessee and contended that the royalty paid by the Assessee was in excess of the amounts as computed under the said agreement.

11. Insofar as the contention that the amounts paid were not in accordance with the agreement between the Assessee and the KC is concerned, we find that no such contention had been urged by the Revenue either before the CIT(A) or before the Tribunal. Therefore, in our view, no such plea can be permitted to be taken for the first time in these proceedings.

12. The contention that the adjustment on account of expenses as determined by the TPO must be attributed entirely to the international transaction is bereft of any merits. During the Financial Year 2003-04 relating to the Assessment Year 2004-05, the Assessee had reported an operating income of Rs.72,24,22,000/-, The total expenses for the said period amounted to Rs.68,00,88,000/-. Admittedly, the international transactions in question amounted to Rs. 15,90,66,935/- which were only 23.38% in value of the total expenses. The TPO had determined the PLI (Operating Profit over Total Cost) of comparable cases at 8.29% against 6.22% as declared by the Assessee. Applying the PLI of comparable cases, the adjusted total expenses were computed at Rs.66,71,17,924/-, thus, indicating an adjustment of Rs. 1,29,70,076/-. As is apparent from the above, the said adjustment related to entire expenses and not just the international transactions alone. Since the international transactions only constituted 23.38%, a TP Adjustment proportionate to that extent could be made in respect of such international transactions. Thus, only an adjustment of Rs.30,33,593/- could be attributed to the international transactions in question. The same was accepted by the CIT(A) as well as the Tribunal. We do not find any infirmity with their decision.

13. We also find no infirmity with the view of CIT(A) and the Tribunal that the Assessee had acted like any other Original Equipment Manufacturer (OEM) and could not be treated as a job worker or a contractor.

14. We find no substantial question of law that arises for our consideration in these appeals. Accordingly, the appeals are dismissed. No order as to costs."

12. Similarly, Hon'ble Jurisdictional High Court in the case of CIT vs. Fire Stone International (P) Ltd. in ITA No. 1354 of 2013 vide order dated 15th June, 2015 held as under :

"2. The Revenue has urged the following questions of law for our consideration:-

"(a) Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in restricting the adjustment only on international transactions where the assessee has selected TNMM and applied the same on entity level because presumption underlying arms length principle is that uncontrolled transactions are at arm's length, and therefore, it the overall margins are less than arms length margins, the short fall must he on account of AE transactions only and not on pro rata basis.

(b) Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in deleting the addition of Rs.8,39,245/- as the adjustment is with +/ -5% as the ITAT has restricted the adjustment only on AE transactions which has resulted the adjustment within +/ -5%?

(c) Whether, on the facts and in the circumstances of the case and in law, the Tribunal is justified in restoring the issue of disallowance u/s. 14A back to the file of the AO for fresh consideration in view of the decision of this Court in the case of Godrej & Boyce Manufacturing Co. Ltd. (328 ITR 81) against which an SLP has been filed in the Apex Court?".

3 As far as Question (a) is concerned, the learned Counsel for the Revenue is unable to show how it arises from the impugned order of the Tribunal. It appears that the question itself is academic. In the above view, there is no occasion to entertain Question (a) as substantial question of law.

4 (i) So far as Question (b) is concerned, the Respondent-Assessee is engaged in dealing with the Associated Enterprises (AE) in Import and Export of polished diamonds (Manufacturing). The Assessing Officer in line with the directions of the Transfer Pricing Officer (TPO) made an addition of Rs.1.20 Crores in respect of the Appellant's transaction with its AEs while arriving at Arms Length Price (ALP). This on the basis of the entire turn over of the Assessee and not only on the basis of the transaction with its AE.

(ii) On appeal, the Commissioner of Income Tax [CIT(A)] held that the addition cannot be on the entire turnover of the Assessee but has to be restricted only to transactions with AEs. Consequently, the additional was restricted to 1.80% of the sales to AEs i.e. on Rs.4.51 Crores (Sales) at Rs.8.39 lakhs.

(iii) Being aggrieved, the Revenue as well as the Respondent-Assessee carried the issue in appeal to the Tribunal. The impugned order of the Tribunal held that the addition made on account of ALP of Rs.8.39 lakhs at 1.86% is within the +/- 5%

range as provided in Section 92C of the Act. Thus, if this was extended, no addition was called for. Besides, the Tribunal by the impugned order on examination of the facts held that even the ALP as determined by the TPO is taken into account at Rs.61.99 Crores is taken, even then it is within the 5% +/- safe harbor Rules not warranting any addition. The impugned order held that amount of Rs.8.39 lakhs added by the CIT(A) is to be deleted as it falls within +/- 5% variation provided under Section 92C of the Act.

(iv) We find that the decision of the Tribunal is a factual determination of the ALP and the same is found within +/- 5% safe harbor range. This is not show to be perverse and/or arbitrary. Accordingly, no occasion to entertain question (b) can arise as it does not give rise to any substantial question of law.

5 As far as Question (c) is concerned, no fault can be found with the impugned order of the Tribunal inasmuch as it follows the decision of this Court in Godrej & Boyce v/s. DCIT 328 ITR 81. Accordingly, there is no occasion to entertain question (c) as it does not give rise to any substantial question of law.

6 Thus, Appeal dismissed. No order as to costs."

Respectfully following the above judgments of Hon'ble jurisdictional High Court and as is clear from the sections as quoted above, the case is outside the scope of above sections. Therefore, the adjustment cannot be made and this ground of appeal is accordingly allowed.

Ground No.2:

13. In regard to ground No. 2, i.e., set off of losses/unabsorbed depreciation before deduction u/s. 10A, the appellant submitted the decision of Hon'ble jurisdictional High Court in the case of Technovate E-Solution Pvt. Ltd. in ITA No. 828/2015 dated 14.12.2015. In this case it has been held that deduction

u/s. 10A should first be allowed from gross total income and after the set off of brought forward losses, be made against balance amount. He further submitted that this issue is fully covered by this decision. The action of the AO has to be rejected and the direction be issued to allow the deduction u/s. 10A of the Act at the first instance, i.e., before setting off of brought forward losses. He also placed reliance on the decisions in the following cases :

(i). Changepond Technologies Pvt. Ltd. vs. ACIT, (2008) 22 SOT 220 (Chennai).
(ii). Honeywell International India Pvt. Ltd. vs. DCIT, (2008) 26 SOT 503 (Delhi)
(iii). Ford Business Services Centre Pvt. Ltd. vs. ACIT (2008) 114 TTJ-881 (Chennai).

14. The ld. DR relied on the order of the Assessing Officer.

15. After hearing both the parties and perusing the materials available on record and case laws relied by both the parties, we find that Hon'ble Jurisdictional High Court judgment dated 14.12.2015 is reproduced as under :

"3. The following questions of law are framed for consideration:

"(1) Whether the Tribunal is right in law in holding that Section 10A is a deduction provision and not an exemption provision?

(2) Whether the Tribunal is right in law in holding that for computing deduction under Section 10A of the Act, brought forward losses should

first be deducted from the total income of the current year and thereafter the deduction u/s 10A of the Act should be allowed?"

4. The facts in brief are that the Assessee provides back office services/services/ remote data entry services, establishing and promoting call centre services for customers in and outside India. The Assessee was registered in September 2001 under the Software Technology Park Scheme of India (STPI). During the AY in question, the Assessee earned income of Rs. 1,31,17,439 from its business operations in the software technology park. Invoking Section 10A of the Act, the Assessee claimed exemption of 90% of such income being Rs.1,18,05,695. It accordingly declared a net business income of Rs. 13,11,744. Rs.32,367 on account of bank interest was declared as 'Income From Other Sources' and another sum of Rs 1,80,000 as 'Income From House Property. Thus the gross income declared was Rs.15,24,111. The Assessee incurred a loss of Rs.72,70,264 in the earlier AY 2002-03 which was brought forward and was available for being set off against the total income of the AY in question. This loss was accordingly set off against the business income of Rs.13,11,744. The return filed by the Assessee was picked up for scrutiny.

5. The Assessing Officer ('AO) by the order dated 29th March 2006 held that the income for the purposes of Section 10A of the Act should be deducted from the business income but only after set off of the brought forward losses. Accordingly, the income of the Assessee was recomputed as Rs.67,69,267 and the tax liability was worked out as Rs.15,40,579. In other words, the business loss brought forward from AY 2002-03 in the sum of Rs.72,70,264 was reduced from the gross income before computation of the deduction under Section 10A of the Act.

6. After the Commissioner of Income Tax (Appeals) ['CIT (A)'] upheld the order of the AO by the order dated 21st October 2010, the Assessee appealed to the ITAT. Upon dismissal of the Assessee's appeal by the ITAT by the impugned order, the present appeal has been filed.

7. Mr. G.C. Srivastava, learned counsel appearing for the Appellant Assessee, submits that as far as Question No.1 is concerned, it stands covered in favour of the Assessee by the decision of this Court in Commissioner of Income Tax v. Tei Technologies Pvt. Ltd. 2014 (361) ITR 36 (Del). He accordingly submits that as far as Question No.2 is concerned it after the income under Section 10A of the Act, which is completely

exempt, is taken out from the total income that the brought forward losses have to be set off against the remaining business income of the Assessee.

8. Mr. Rahul Chaudhary, learned Senior Standing counsel for the Revenue first submitted that the decision in Tei Technologies Pvt. Ltd. (supra] was distinguishable inasmuch as in that case there were two units and one of which was a Section 10A unit. He sought to rely on the decision of the Karnataka High Court in Commissioner of Income Tax v. Himatsingke Seide Ltd. (2006) 156 Taxman 153 (SC) which stands affirmed by the Supreme Court in Himatsingka Seide Ltd. v. Commissioner of Income Tax [20141 48 taxmann.com 357 (SC). He also referred to a Circular No.7/DV/2013 issued by the Central Board of Direct Taxes (CBDT) clarifying that Section 10A was only a deduction provision and not an exemption provision.

9. At the outset it requires to be noticed that the issue involved in the decision of the Karnataka High Court in Commissioner of Income Tax v. Himatsingke Seide Ltd. (supra] was regarding adjustment of unabsorbed depreciation against the exempt income under Section 10B of the Act. That is not the issue that arises in the present case. Secondly, a CBDT circular cannot possible override a decision of the Court.

10. Thirdly, the Court finds that the decision of this Court in Tei Technologies Pvt. Ltd. (supra) has categorically held that Section 10A "although worded as deduction provision is essentially and in substance an exemption provision." The Court has clarified that "the implication of an exemption provision is that the particular income which is exempted from the tax does not enter the field of taxation and is not subjected to the computation provision of the Act do not get attracted at all to the exempted income." The Court notices that the decision in Tei Technologies Pvt. Ltd. (supra) has also considered the decision of the Karnataka High Court in Commissioner of Income Tax v. Himatsingke Seide Ltd.(supra] and has rightly distinguished it. The interpretation of Section 10A of the Act cannot change only because there is only one unit of Assessee.

11. This Court accordingly answers Question No.1 in the negative i.e. in favour of the Assessee and against the Revenue by holding that the ITAT was in error in considering Section 10A of the Act to be a deduction provision.

12. In view of answer to Question No.1, Question No.2 is also to be answered in favour of the Assessee. In other words, the brought forward losses are to be set off only after giving effect to Section 10A of the Act. The Assessee earns both exempt income as well as income, which is ineligible for exemption under Section 10A of the Act. The ineligible Business income will be available for adjustment of brought forward losses of the earlier years.

13. The impugned order of the ITAT dated 27th February 2015 in ITA No. 104/Del/2011, as regards the above two issues, is set aside.

14. The appeal is allowed but in the circumstances with no order as to costs."

Respectfully following the judgment of Hon'ble jurisdictional High Court as discussed above, we allow this ground of assessee as well. Accordingly, the appeal of the assessee deserves to be allowed.

16. In the result, the appeal is allowed.

Order pronounced in the open court on 15.06.2016.

Sd/-	Sd/-
(I.C. SUDHIR)	**(L.P. SAHU)**
Judicial Member	Accountant Member

Dated :15.06.2016
*aks/-

Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi