आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकरअपीलसं. / ITA Nos.42 & 43/PUN/2021
निर्धारणवर्ष / Assessment Years : 2015-16 & 16-17

DCIT, Circle-1(1), Pune.	Vs	M/s.Eaton Technologies Pvt. Ltd., Cluster C Wing-1, EON Zone, MIDC Kharadi, Knowledge Park, Plot No.1, Survey No.77, Kharadi, Pune – 411014. PAN: AABCE 4323 Q
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Vishal Kalra & Shri SS Tomar -AR
Revenue by	Shri Sunil Kumar – CIT(DR)
Date of hearing	24/06/2022
Date of pronouncement	07/07/2022

आदेश/ ORDER

Per S.S.Godara, JM:

These Revenue's twin appeals for the assessment years 2015-16 and 2016-17 arise against the CIT(A)-13, Pune's separate orders; both dated 29.05.2020, passed in case no.PN/CIT(A)-13/DCIT, Circle-1(2), Pune/10142/2019-20/02, PN/CIT(A)-13/DCIT, Circle-1(2), Pune/10142/2019-20/03 respectively, involving proceedings under section 143(3) of the Income Tax Act, 1961.

Heard both the parties. Case files perused.

2. Delay of 32 days in filing of these appeals stands condoned since falling under Covid-19 pandemic outbreak period.

3. The Revenue's former appeal ITA No.42/PUN/2021 for the A.Y. 2015-16 raises the following substantive grounds:

> *"1. The order of the Ld. CIT(A) is contrary to law and to the facts and circumstances of the case.*
>
> *2. The Ld.CIT(A) is erred in relying on Hon'ble ITAT's decision in ITA No.1002/PUN/2017 and holding that there was no arrangement between the Assessee and its Associated Enterprises (AEs) within the provisions of section 80IA(10) of the Income-tax Act, 1961 to yield more than normal profits for SEZ unit when the same was clearly pointed out by the Dispute Resolution Panel in para no.11.6 of directions date 30.12.2016 for the AY 2012-13?*
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> *3. The Ld. CIT(A) is erred in relying on Hon'ble ITAT's decision in ITA No.1002/PUN/2017 and holding that OP/OC method cannot be applied by the AO to arrive at reasonable profit of the SEZ unit when the Arm's Length Price of the transactions had been accepted by the TPO?*
>
> *4. The Ld.CIT(A) is erred in allowing the Assessee non deduction of TDS on payment made to non-resident?*
>
> *5. The Ld.CIT(A) is erred in deleting disallowance made by the AO u/s 40(a)(i) Income-tax Act, 1961 on the ground that Assessee had made payment to non-resident for acquiring software which amounts to royalty and hence falls within the purview of section royalty and hence falls within the purview of section 9(1)(vi) Income-tax Act, 1961 and hence the Assessee was liable to deduct TDS?*
>
> *6. The Ld.CIT(A) is erred in holding that payments made by the assessee cannot be treated as royalty under the provisions of Section 9(1)(vi) Income-tax Act, 1961, without appreciating that the payment made by the Assessee are on account of Royalty in view of Explanation 2 and Explanation 4 of Section 9(1)(vi) of the Act and decisions of Hon'ble Karnataka High Court's in the case of Synopsis International Old Ltd.*

(2012) 28 Taxmann.com 162 and Samsung Electronics Company Ltd. (2011) 16 Taxmann.com 141?

7. *The Ld.CIT(A) is erred in holding that the AO erred in computing disallowance u/s 14A rwr 8D when the Assessee had earned huge amount of exempt income with meager expenses?*

8. *The appellant craves to add, amend, alter or delete any of the above ground of appeal during the course of appellate proceedings before the Hon'ble Tribunal."*

4. It next emerges with the able assistance coming from both the parties that the Revenue has canvassed the very three substantive grounds which had arisen in assessee's appeal ITA No.3075/PUN/2017 for A.Y.2013-14 wherein the tribunal's co-ordinate bench accepted the former twin issues in latter's favour and restored the third one of section 14A read with rule 8D disallowance, back to the Assessing Officer in the following terms:

"4. Next comes the first substantive issue of Section 10AA deduction disallowance of Rs.1,66,90,42,654/- made by the lower authorities invoking Section 10 AA(9) r.w.s. 80IA (10) of the Act thereby alleging it to have earned more than the "ordinary" profits. The same is found to be no more re integra between the parties as this tribunal co-ordinate bench's order dated 12.09.2019 in assessee's appeal itself for assessment year 2012-13 has rejected Revenue's identical contentions as follows.

> *"4. The issue raised vide grounds of appeal No.2 to 7.2 is against disallowance of excess deduction claimed under section 10AA of the Act.*
>
> *5. Briefly, in the facts of the case, the assessee for the year under consideration was engaged in providing several services to Eaton International Corporation and various Eaton group companies. The assessee had furnished the return of income declaring income of ₹ 14.26 crores (approx.) after claiming the benefit under section 10AA of the Act amounting to ₹ 322.19 crores, on profits derived from various services provided by it to its associated enterprises. The assessee paid taxes under section 115JB of the Act on book profits of ₹ 330.40 crores. The Assessing Officer made reference under*

section 92CA(1) of the Act to the Transfer Pricing Officer (TPO) for benchmarking the arm's length price of various international transactions undertaken by it. The TPO made no adjustment to international transactions pertaining to engineering and design services to associated enterprises. However, the TPO made an adjustment of ₹ 2.46 crores to the segment ITES and BSS. The Assessing Officer in the draft assessment order proposed an addition of ₹ 2.53 crores alleging that the assessee had claimed excess deduction under section 10AA of the Act, on the ground that operating profit / operating cost of assessee was 150.55% as against 27.72% OP / OC of comparable companies. The assessee filed objections before the Dispute Resolution Panel (DRP). The DRP gave directions in respect of TP adjustment with regard to ITES and BSS segments. The DRP directed the TPO to include certain comparable companies and also to allow certain expenditure as operating cost for the purpose of determining OP/OC. Pursuant to the directions of DRP, addition in the BSS segment was reduced to nil. However, the TP adjustment in ITES segment was revised to ₹ 1.69 crores. The DRP upheld the reduction of deduction under section 10AA of the Act. The DRP also upheld the disallowance of expenditure in relation to purchase of off-the-shelf software under section 40(a)(i) of the Act, holding the same to be in the nature of royalty paid for use of license on which TDS was to be deducted. The Assessing Officer passed final assessment order, against which the assessee is in appeal before us.

6. The learned Authorized Representative for the assessee in this regard pointed out that the Assessing Officer has compared the OP/OC i.e. margins of assessee at 150.55% with the margins of comparable companies at 27.72%, to come to a conclusion that the assessee has earned super normal profits. However, the concept of OP/OC was relevant only for transfer pricing analysis and not for working out the super normal profits. The learned Authorized Representative for the assessee further pointed out that in fact the net profit of assessee was only 63% and similar net profit was shown in both preceding and succeeding years. The second plea raised by learned Authorized Representative for the assessee was that there was no arrangement to generate more than ordinary profits of eligible units and in the absence of the same, provisions of section 10AA(9) r.w.s. 80IA(1) of the Act were not attracted. He further stated that the issue stands covered by series of decisions of various Benches of Tribunal. In this regard, he placed reliance on the decision of Pune Bench of Tribunal in the case of Eaton Industries Pvt. Ltd. Vs. ACIT in ITA No.2544/PUN/2012, relating to assessment year 2008-09, order dated 30.10.2017 and Hon'ble Bombay High Court in CIT Vs. M/s. Schmetz India Pvt. Ltd. (2012) 211 TAXMAN 59 (Bom), which has been approved by the Hon'ble Supreme Court in Civil Appeal No.2013/2016 and 6097/2016, where both the SLPs of Department have been dismissed.

7. The learned Departmental Representative for the Revenue on the other hand, placed reliance on the orders of authorities below with special reference to para 11.6 at page 78 of DRP.

8. We have heard the rival contentions and perused the record. The first issue which arises in the present appeal for our determination is the restriction of deduction claimed under section 10AA of the Act. The assessee was engaged in providing various services in the field of engineering services, IT services, ITES services and business support services to its associated enterprises Eaton International Corporation and various other Eaton group companies. For the year under consideration, the Assessing Officer made reference to TPO for benchmarking international transactions undertaken by assessee in different fields. The TPO made no adjustment in respect of engineering and design services. Consequent to the directions of DRP, no TP adjustment has been made in BSS segment. However, TP adjustment was made in ITES segment, which we shall deal in the paras below. The TPO in other words, had accepted the PLI shown by assessee at 150.55% when compared with mean margins of comparable companies at 27.72%. However, the Assessing Officer was of the view that the assessee by showing such high OP/OC had earned super normal profits when compared with the margins of comparable companies. We find no merit in the observations of Assessing Officer in this regard as the concept of PLI i.e. OP/OC which has been adopted by Assessing Officer was relevant for comparability for transfer pricing analysis. The same cannot be used for holding the assessee to have earned super normal profits in carrying on its business for that. He has to look at net profits shown by assessee, which in the present year is 63% only. The learned Authorized Representative for the assessee pointed out that similar net profit range has been shown both in preceding and succeeding years.

9. Now, coming to the issue at hand as to whether any disallowance is merited under section 10AA of the Act. The basic condition for application of the said provisions of the Act are an arrangement between the parties, which is so arranged as to enable the assessee to earn super normal profits. The TPO/Assessing Officer/DRP has not pointed out any such arrangement whatsoever between the assessee and the comparable companies selected. In the absence of the same, provisions of section 10AA(9) r.w.s. 80IA(10) of the Act are not attracted. This issue has been elaborated upon by us in various decisions, as also in the case of sister concern i.e. Eaton Industries Pvt. Ltd. The said issue has been decided in turn, relying on the ratio laid down by Tribunal in Honeywell Automation India Ltd. Vs. DCIT in ITA No.18/PN/2011, order dated 25.02.2015. The said decision was in an appeal filed by assessee against exercise of jurisdiction under section 263 of the Act. The relevant findings are in paras 17 to 24, which read as under:-

> *"17. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against*

the jurisdiction exercised by the Commissioner under section 263 of the Act wherein he has observed that the assessment order passed by the Assessing Officer was without application of mind on the issue of grant of deduction under section 10A of the Act. After considering the various aspects of the provisions of section 263 of the Act under the said section the Commissioner directed the Assessing Officer to apply the provisions of section 10A(7) r.w.s. 80IA(8) and 80IA(10) of the Act with respect to the operating profit margin shown by the assessee in the Engineering Design Services and consequently the deduction under section 10A of the Act was to be restricted, if required.

18. The assessee was providing Engineering Design Services to its Associated Enterprises in the STPI unit and the total turnover for the said unit was Rs.60.67 crores and the assessee had shown the profit of Rs.44.27 crores in the said unit. The operating profit margin on sales worked to 72.98% and the operating profit margin on total cost worked to 270%. The assessee while benchmarking its international transaction of Engineering Design Services had applied CUP method and the same was also applied by the TPO and the said international transaction was accepted to be at Arm's Length. It may be clarified herein itself that the net profit shown by the assessee for the year under consideration was 72.98% in the Engineering Design Services. The working of operating margin on total cost is to be adopted if TNM method is used as the most appropriate methods. However, both the assessee and the TPO applied the CUP method and the said working of operating margin on total cost at 270% had no application and was not used for determining the Arm's Length price of the international transaction undertaken by the assessee in the said division. The assessee had explained that it was providing complex engineering activities such as advance technological and product development services to its Associated Enterprises and because the cost provided by the assessee were controlled, the assessee had shown net profit of Rs.44.27 crores on total value of services provided at Rs.60.67 crores. In addition, the assessee had another unit which was a non STPI unit, under which the assessee was providing Business Support Services and the operating margin on total cost of the said division was 7.39%. The Assessing Officer/TPO benchmarked the said transaction of Business Support Services by applying TNM method as the most appropriate method and made some addition to the Arm's Length price of the said international transaction. However, in respect of the Engineering Design Services, no addition was made under the transfer pricing provisions. Further, the assessee had claimed deduction under section 10A of the Act in respect of the Engineering Design and Development Services provided to its Associated Enterprises which was allowed by the Assessing Officer. The Commissioner was of the view was that because of the high operating profit margin on total cost at 270%, when compared to the operating margin on total cost of the other division of the assessee at 7.39%, the Assessing Officer had not applied his mind in allowing the deduction under section 10A of the Act in view of the provisions of section 10A(7) r.w.s. 80IA(8) and 80IA(10) of the Act. The transactions which have been undertaken by the assessee in the Engineering Design Services with its Associated Enterprises was accepted to be at Arm's

Length price by the TPO and no adjustment was made. The TPO has also not given any finding that the profit markup on cost, reported by the assessee, in its transaction with its Associated Enterprises was in excess of the profit markup of external comparables. On the other hand the TPO had applied CUP method in benchmarking the transaction in the Engineering division and had accepted the results shown by the assessee. In the absence of any adjustment having been made by the TPO, the Assessing Officer had to accept the order of the TPO as mandated by the provisions of section 92CA(4) of the Act. The Assessing Officer in consequent determined the income of the assessee in confirmity with the order of the TPO.

19. The issue which arises before us in the present appeal is that in such circumstances where the assessee had claimed the deduction under section 10A of the Act on such exports to its Associated Enterprises, can the same be curtailed by invoking the provisions of section 10A(7) r.w.s. 80IA(10) of the Act on the premise that the assessee had earned higher profits than normal on exports made to its Associated Enterprises.

20. In the facts before the Tribunal in M/s Honeywell Automation India Limited vs. DCIT (supra), the dispute arose vis-à-vis the entitlement of the assessee for the claim of deduction under section 10A of the Act which was curtailed based on the provisions of section 10A(7) r.w.s. 80IA(10) of the Act. The TPO in the said case had restricted the profits eligible for the claim of deduction under section 10A of the Act, as the profits in relation to the 10A units were more than the ordinary profits. The Assessing Officer accordingly re-computed the amounts of profit which he considered as reasonable to have been derived in terms of section 10A(7) r.w.s. 80IA(10) of the Act. The assessee in its Transfer Pricing Study in the said case had benchmarked the international transaction by selecting the TNM Method. The TPO on a reference by the Assessing Officer passed an order under section 92CA(3) of the Act accepting the international transaction with respect to the software engineering services segment to be at arm's length. However, the Assessing Officer was of the view that the profit margins in respect of the 10A unit was substantially higher than the profit margin of the comparables chosen by the assessee while carrying out the comparability analysis under the TNM Method and therefore according to him the profits declared by the assessee in the 10A units was not the ordinary profits and had to be restricted under section 10A(7) r.w.s. 80IA(10) of the Act.

21. We find that similar issue for grant of deduction u/s 10A of the Act by invoking provisions of section 10A(7) r.w.s. 80-IA(10) of the Act, arose before the Tribunal in M/s. Honeywell Automation India Ltd. Vs. DCIT (supra). The Tribunal had considered the provisions of section 10A(7) of the Act and it was observed that the said provisions are attracted where closely connected party are taxable in India. In this regard, the relevant portions of the order of the Tribunal dated 25.02.2015 (supra) read as under :-

> *"7. Before proceeding further, we may briefly touch-upon the relevant provisions of the Act, which have a*

bearing on the controversy before us. Sub-section (7) of section 10A of the Act reads as under :-

> *"(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."*

8. Further, sub-sections (8) and (10) of section 80-IA of the Act referred to in section 10A(7) read as under :-

> *"(8) Where any goods [or services] held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods [or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods [or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods [or services] as on that date :*
>
> ***Provided** that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.*
>
> *[Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.]*
> *(9) xxxxxxxxxx*
> *(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."*

9. Section 10A of the Act is a special provision in respect of newly established undertakings in free trade zone, etc.. Section 10A postulates 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 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, while computing the total income of an assessee. Shorn of other details, for the present it would suffice to note that the three units of the assessee, namely, Unit No.I & II at Pune and Unit at Chennai are recognized as STPI Units in accordance with the Software Technology Park Scheme of the Government of India and they are eligible for the benefits of section 10A of the Act.

10. The bone of contention in the present case between the assessee and the Revenue is invoking of section 10A(7) r.w.s. 80-IA(10) of the Act. Section 80-IA(10) of the Act, reproduced above, empowers the Assessing Officer to re-compute the profits and gains of the eligible business for the purposes of deduction u/s 10A of the Act if it appears to him that the profits declared by the assessee are more than the ordinary profits which might be expected to arise in such an eligible business. So however, the aforesaid power of the Assessing Officer is subject to the pre-requisites contained in sub-section (10) of section 80-IA of the Act itself. The circumstances in which such a course is available to the Assessing Officer is contained in section 80-IA(10) itself. A perusal of section 10A(7) r.w.s. 80-IA(10) of the Act would show that the two essential conditions are to be established before the Assessing Officer can proceed to disregard the profits declared by the assessee and determine the amount of profits which may reasonably deemed to have been derived from such business. Notably, such conditions are (i) existence of a close connection between the assessee carrying on eligible business and any other person; and, (ii) that the course of business is so arranged that the business transacted produces to the assessee more than the ordinary profits.

11. At the outset, it is to be noted that the opening sentence in section 80-IA(10) of the Act contains the expression – "where it appears to the Assessing Officer that ……". This would show that the onus is on the Assessing Officer to justify invoking of section 10A(7) r.w.s. 80-IA(10) of the Act, having regard to the facts circumstances of a given case. Evidently, the primary rule of evidence is that "what is apparent is real" unless proved otherwise by the person alleging it so. Ostensibly, if the Assessing Officer is to invoke the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act then the onus is on him to justify such invocation having regard to the cogent material and evidence on record. On this aspect of the matter, there was no dispute between the rival counsels inasmuch as the Ld. CIT-DR quite fairly agreed

that the onus was on the Assessing Officer to justify invoking of section 10A(7) r.w.s. 80-IA(10) of the Act in the facts of a given case. Nevertheless, on this aspect, we may also make a reference to the judgement of the Hon'ble Karnataka High Court in the case of CIT vs. H.P. Global Soft Ltd., 342 ITR 263, which was referred to in the course of hearing before us. In the case before the Karnataka High Court, the issue was similar inasmuch as therein, the Assessing Officer had invoked the provisions of section 80-I(9) r.w.s. 10A(6) of the Act while re-determining the claim of exemption in terms of the then prevailing section 10A(4) of the Act, and the assessment years were 1995-96 to 1998-99. The provisions of section 10A(6) r.w.s. 80-I(9) of the Act, which were before the Hon'ble Karnataka High Court are quite similar to the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act before us. The Hon'ble Karnataka High Court, upheld the stand that the requirements of the provisions of section 80-I(9) of the Act are two-fold, namely that there should be a close connection between the assessee and the other person, which may be a reason for the assessee to earn higher profits but, more importantly there should be material to indicate that assessee had indulged in an arrangement with the other person so as to produce to the assessee more profits than ordinarily what profits the assessee might have expected to arise from such business. As per the Hon'ble Karnataka High Court, it was for the Assessing Officer to indicate any material or evidence to disclose any such arrangement between the assessee and the other person. The aforesaid judgement of the Hon'ble Karnataka High Court justifies the assertion of the assessee before us that the onus for justifying the invoking of section 80-IA(10) r.w.s. 10A(7) of the Act is on the Revenue based on cogent material. At this point, we may also make a reference to the judgement of the Hon'ble Bombay High Court in the case of CIT vs. M/s Schmetz India Pvt. Ltd. vide Income Tax Appeal No.4508 of 2010 dated 04.09.2012, which is also to the similar effect. In the case before the Hon'ble Bombay High Court assessee was a wholly owned subsidiary of a German Company. It had two divisions – one at Kandla in the Kandla Free Trade Zone, engaged in the manufacture and export of industrial sewing machine needless; and other at Mumbai, engaged in trading in industrial sewing machine needless. The manufacturing division at Kandla exported its entire production of industrial machine needless to its holding company in Germany. For the assessment year 2004-05 assessee declared an income of Rs.20.54 crores from its manufacturing division at Kandla and claimed 100% deduction u/s 10A of the Act. During the course of the assessment proceedings, Assessing Officer was of the view that abnormal profits had been declared in respect of the Kandla division, only in view of the income therefrom being exempt u/s 10A of the Act, and that the trading division at Mumbai showed a loss of Rs.70.29 lacs. The Assessing Officer invoked the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act to hold that profits of Kandla Division were abnormal profits. The Tribunal disagreed

with the Assessing Officer. The Tribunal, inter-alia, held that the Assessing Officer has not been able to prove that any arrangement had been arrived between the parties which resulted in extraordinary profits to the respondent-assessee's manufacturing division at Kandla. Consequently, the working of the profits by the Assessing Officer was not approved. The aforesaid action of the Tribunal was upheld by the Hon'ble Bombay High Court. On this aspect, the Bangalore Bench of the Tribunal in the case of Digital Equipment India Ltd. vs. DCIT, 103 TTJ 329 (Bang.) has also held that the conditions of the section have to be objectively satisfied by the Assessing Officer, based on cogent reasoning and evidence.

12. At the time of hearing, the Ld. Representative for the assessee vehemently argued that the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act are inapplicable in the present case because there is no material lead by the Revenue to say that there was any arrangement between the assessee and the associated enterprises which produced to the assessee more than the 'ordinary profits' within the meaning of section 10A(7) r.w.s. 80-IA(10) of the Act. According to the Ld. Representative, the transactions of the assessee by way of rendering software engineering services to its associated enterprises abroad are not arranged so to yield any extraordinary profits to the assessee. The Ld. Representative pointed out that assessee was charging the same rate for services rendered to associated enterprises as well as to the non-related parties. The details of rates charged by the assessee to the third parties vis-à-vis the related parties have also been placed in the Paper Book along with sample copies of invoices raised on the and non-related parties. It was also pointed out with reference to the submissions made to the Assessing Officer, which have been reproduced in para 2.6 of the assessment order, that the assessee has continued to charge similar rates even after the tax holiday period of STPI Unit had ended.

13. At the time of hearing, it was explained that the tax holiday u/s 10A of the Act was available for Unit No.I at Pune upto assessment year 2007-08; that for Unit No.II at Pune upto assessment year 2011-12; and, that for Chennai Unit upto assessment year 2009-10. A statement showing operating margins to total cost earned by the assessee from the STPI Units relatable to the software engineering services segment was furnished to show that even after the expiry of the tax holiday period the profits of the Units is higher than the other Units of the assessee.

14. In this context, a reference has also been made to the commercial reasons explained before the Assessing Officer for the high profits earned by the assessee's STPI Unit. From the submissions furnished to the Assessing Officer, which have been reproduced in para 2.6 of the assessment order, it is revealed that reasons were advanced to justify the higher margins of the STPI Units. Firstly, it was contended that there was substantial cost savings in terms of costs on sales, marketing, sale

promotion and advertisement because majority of the business in the engineering services segment was with affiliates only. Secondly, it was pointed out that assessee is in the business of IT enabled services rendering engineering consultancy services in execution of industrial automation and building automation and control projects and it does not incur much product development costs or investments which are usually incurred by other software companies. Thirdly, it was pointed out that the salary levels in the case of the assessee are much lower than other software companies because assessee was hiring electronics and process engineering Graduates/Diploma holders and not software professionals. It is also pointed out that assessee has a lower rate of idle staff as it works mostly on in-house Honeywell Technology and therefore the productivity of the employees is much higher than other software companies. Further, it was also pointed out that assessee was reimbursed all the costs, like foreign travel and living expenses incurred abroad by its employees in the course of rendering engineering/software services. Assessee was also reimbursed incidental expenses incurred by it viz. visa costs, work permit costs, etc. and therefore the cost of sales was on lower side, as a result of which the percentage of Operating profit to total cost shows a higher percentage, although the impact on profit remains unaltered. All these points, which were raised before the Assessing Officer, have been reiterated before us to show that the higher profits are not attributable to any arrangement with associated enterprises but due to business reasons.

15. Apart therefrom, it has also been pointed out that assessee is a public limited company listed on the stock-exchange wherein the overseas Honeywell entities owned 81.24% of shareholding and the public shareholding is to the extent of 18.76%. It was pointed out that initially TATA group was also owning shares in the assessee company to the extent of 40% and Honeywell entities held 41% and the balance 19% was held by the public. This pattern had changed from November, 2004 onwards when the TATA group gave up its shareholding in the assessee company. On the basis of the aforesaid shareholding pattern, a plea setup by the assessee is that if there was any manipulation of profits by assessee charging higher rates to its overseas Honeywell group entities resulting in shifting of profits from overseas entities to the assessee-company, it would not be a prudent exercise by the Honeywell group because it does benefit the Honeywell group as a whole. Since there is a significant public shareholding in the assessee company, it would mean that the any extraordinary benefit passed on by overseas Honeywell group entities to assessee would result in a loss for Honeywell group on an overall basis to the extent of public shareholding in the assessee company. It was, therefore, contended that in such a scenario, it could not be said that there was any arrangement between the assessee and the overseas Honeywell entities to produce

higher profits to the assessee. In support of such proposition, reliance has been placed on the decisions of the Mumbai Bench of the Tribunal in the case of ITO vs. Zydus Nycomed Healthcare (ITA Nos.4013/Mum/208, 4206/Mum/2009 and 4343/Mum/2009 dated 31.10.2013).

16. Apart from the aforesaid, it has been vehemently argued that ordinary profits for the purposes of section 10A(7) r.w.s. 80-IA(10) of the Act cannot be computed relying upon the Transfer Pricing documents prepared by the assessee. The Ld. Representative pointed out that having regard to the intention of the Transfer Pricing Provisions, the margins determined under the TNM Method are to be taken as indicative of the least profits that must be retained in India and it cannot be used to benchmark the 'ordinary profits' as referred to in section 10A(7) r.w.s. 80-IA(10) of the Act. The sum and substance of the plea setup by the assessee is that the legislative intent behind the Transfer Pricing Provisions is different from the intent behind section 10A(7) r.w.s. 80-IA(10) of the Act.

17. The Ld. CIT-DR has made detailed submissions in support of the invoking of section 10A(7) r.w.s. 80-IA(10) of the Act in the present case. The Ld. CIT-DR submitted that section 80-IA(10) of the Act placed much lighter burden of proof on the Assessing Officer because of the presence of the expression "it appears" in section 80-IA(10) of the Act. According to the Ld. CIT-DR, section 80-IA(10) can be invoked by the Assessing Officer when 'it appears' to him, and it is not subject to the Assessing Officer's belief or satisfaction as is the case with invoking of section 147/148, etc.. The following portion of section 80-IA(10) of the Act was emphasized ".....the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived....." to say that it does not require the Assessing Officer to precisely determine the eligible profits, but only a prima-facie satisfaction about presence of more than the ordinary profits would suffice. It is sought to be emphasized that because of the presence of the words ".....as may be reasonably deemed to have been derived....." in section 80-IA(10) of the Act, a much lighter burden of proof is put on the Assessing Officer for computing tax avoidance. As per the Ld. CIT-DR, similar to the Transfer Pricing Provisions, the said Provision does not require a precise accuracy on the part of the Assessing Officer. At this point, the Ld. CIT-DR relied upon the decision of the Hon'ble Kerala High Court in the case of Abdul Vahab P. vs. ACIT, (2012) 249 CTR 102 (Kerala) wherein the word "appears" has been understood to imply a 'prima-facie' satisfaction of the Assessing Officer. Therefore, it is sought to be made out that a prima-facie satisfaction of the Assessing Officer is enough to apply the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act.

18. It is further submitted that the word "arrangement" used in section 80-IA(10) of the Act is to be understood as any agreement with the associated enterprise and in support of the same reliance has been placed on the decision of the Hon'ble Bombay High Court in the case of Bank of India Ltd. vs. Ahmedabad Manufacturing & Calico, (1972) 42 CompCas 211 (BomXDPB-p-42), wherein it has been held as under :-

> *"The word "arrange" has, as one of its meaning, in the Shorter Oxford Dictionary, edition, "to come to an agreement or understanding", and the word "arrangement" has, as its primary meaning, "the action of arranging". As a matter of plain language it would, therefore, follow that the term "arrangement" means any agreement or understanding between the parties concerned."*

19. As per the Ld. CIT-DR, since there is an agreement between the assessee and the associated enterprises for Provision of IT enabled engineering/software services, it is to be understood as an "arrangement" within the meaning of section 80-IA(10) of the Act. According to him, the requirements of section 80-IA(10) of the Act are satisfied if there exists an arrangement which leads to production of more than ordinary profits. Therefore, according to him, in the present case, the Assessing Officer is justified to invoke section 10A(7) r.w.s. 80-IA(10) of the Act inasmuch as the profit margin of the assessee's STPI Units is 80.06% as against 17.06% of the comparable selected by the assessee itself in its Transfer Pricing Study. As per the Ld. CIT-DR, when the arrangement has led to resulting into more than ordinary profits, necessary condition for invoking section 80-IA(10) of the Act is satisfied.

20. Apart from the aforesaid submissions, the Ld. CIT-DR has made other pleas also to justify the restriction of deduction u/s 10A of the Act. In this context, he has pointed out that even the Safe Harbor Rules issued by the CBDT with respect to the Transfer Pricing assessment provide for 20% operating profit as an acceptable profit in IT enabled services segment and therefore that was a good benchmark as to what constitutes 'ordinary profits' in the assessee's impugned line of business. The Ld. CIT-DR also made a submission that even if the computation of excess profits done by the Assessing Officer based on the margin of the comparable is not found to be a good methodology, yet the failure of computation process by the Assessing Officer would not vitiate the invoking section 10A(7) r.w.s. 80-IA(10) of the Act in the present case. The excess profits according to him can be computed by an appropriate method by remanding the matter back to the file of the Assessing Officer. In any case, it has been contended section 80-IA(10) of the Act requires computing of 'more than ordinary profits' in the eligible business. Comparable companies are in the same line of the business and having similar functions performed, assets employed and risks assumed as the assessee, therefore,

comparable companies are carrying on eligible business, and thus the profits margin of comparable reflect ordinary profits.

21. With regard to the assessee's plea that even after the expiry of section 10A benefits, assessee was declaring healthy profits, the Ld. CIT-DR pointed out that what matters in future years is the actual amount of the taxes paid and not merely the profits generated in the Unit. It was also contended that the fact that assessee has rendered services to the non-related parties at the same rates is also not relevant for the purposes of application of section 10A(7) r.w.s. 80-IA(10) of the Act. It was also submitted by him that fact of the assessee being reimbursed the travelling costs, etc. cannot be responsible for assessee's high profit which are not of an ordinary level. The Ld. CIT-DR pointed out that if certain part of the expenditure is being incurred by the other parties then the cost of such expenditure would certainly be reduced from the price charged by the assessee for the services rendered. In any case, it is pointed out that reimbursement of expenses is a profit neutral transaction and does not impact the profitability of the assessee.

22. Before we proceed further, it would be appropriate to examine the scope and intent of the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act. In this context, a reference has been made to the CBDT Circular No.308 dated 29.06.2008 wherein the reasons for introduction of sub-section (7) to section 10A of the Act has been explained. In-particular, reference has been made to the following contents of the Circular :-

> *"The provisions of sub-section (8) and sub-section (9) of section 80-I will also apply in relation to the industrial undertaking referred to in the new section 10A as they apply in relation to an industrial undertaking referred to under section 80-I. Under the applied sub-section (8) of section 80-I, it is provided that where an Assessee has several units, some in the free trade zone and some outside, the profits of the unit in the free trade zone will be computed after taking the cost of the goods transferred to or from the unit on the basis of the market value of such goods. The applied sub-section (9) of section 80-I empowers the Income-tax Officer to determine the reasonable profits that could be attributed to the qualifying undertaking in the free trade zone in cases where, owing to the close connection between the Assessee and any other persons or for any other reason, the course of the business is so arranged that the industrial undertaking set up in the free trade zone derives more than ordinary profits which may be expected to arise in that business. <u>This provision has been made with a view to avoiding abuse of the new tax concessions by manipulation of profits between</u>*

associate concerns or different units of the same concern."

[underlined for emphasis by us]

23. Quite clearly, the provisions of section 10A(7) of the Act intend to plug abuse of tax concession by manipulation of profits between associated concerns or between different units of the same concern. The objective of the aforesaid Provision is that the tax concessions are not abused by manipulation of profits. In our considered opinion, the aforesaid explanation in the CBDT Circular (supra) signifies the legislative intent and it is also manifested in the language of section 10A(7) r.w.s. 80-IA(10) of the Act. We say so for the reason that the phraseology of section 80-IA(10) of the Act itself suggests that the profits and gains of an eligible business cannot be tinkered with by the Assessing Officer merely because they are more than the ordinary profits or that they are quite high. The existence of substantial or more than ordinary profits by itself does not sufficiently empower the Assessing Officer to disregard them and determine the profits which he may consider to be reasonably deemed to have been derived therefrom. The presence of the expression "the course of business …… is so arranged ……. that the business transacted ……. produces to the assessee more than ordinary profits" is significant and its understanding has to be prefaced by the legislative objective of plugging abuse of the tax concessions granted u/s 10A of the Act by manipulation of profits between associated parties. In other words, the import of the expression "so arranged" has to be read in conjunction with the legislative intent that there should not be any abuse of tax concession by manipulation of profits. Therefore, section 10A(7) r.w.s. 80-IA(10) of the Act can be invoked only where it is shown that the course of business is so arranged which reflects an abuse of tax concession whereby the business transacted between two entities is so arranged, which produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business. The emphasis is to eschew those 'more than the ordinary profits' which are as a result of a business between two closely connected concerns having been arranged with the intent of abuse of the tax concession. Ostensibly, in the present case, the Revenue would have to justify that the course of business between assessee and the associated enterprises has been 'so arranged' which produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business with the intention of abusing the tax concession granted in section 10A of the Act. The mere existence of (i) a close connection between the assessee and the other person; and, (ii) more than ordinary profits is not sufficient to justify invoking of section 80-IA(10) of the Act in the absence of there being any material to say that the course of business between them is "so arranged" to abuse the tax concessions granted u/s 10A of the Act by manipulating profits between associated persons. Ostensibly, the same is required to be demonstrated on

the basis of a cogent material and evidence. In other words, the presence of the expression "so arranged" has to be understood in the context of the abuse of tax concession which is sought to be plugged by the provisions of section 10A(7) r.w.s. 80-IA(10) of the Act.

24. On this aspect, the Ld. CIT-DR had vehemently argued, based on the judgement of the Hon'ble Bombay High Court in the case of Bank of India Ltd. (supra) that the meaning of the word "arranged' in section 80-IA(10) of the Act has to be understood to mean an agreement or an understanding between the parties concerned. The relevant portion of the decision of the Hon'ble Bombay High Court has been reproduced in the earlier part of this order, according to which, it is said that the term arrangement in plain language means any agreement or understanding between the parties concerned. On this basis, the Ld. CIT-DR submitted that undeniably there is an agreement between the assessee and the associated enterprises whereby the services have been provided by the assessee to them and therefore the same is to be understood as an "arrangement" within the meaning of section 10A(7) r.w.s. 80-IA(10) of the Act. Along with the aforesaid, it has also been emphasized, on the basis of the language of section 80-IA(10) of the Act that, the Assessing Officer is not required to be prove that there is an arrangement for producing more than ordinary profits. Whereas, as per the Ld. CIT-DR, section provides that arrangement leading to production of more than ordinary profit will satisfy the necessary condition of section 80-IA(10) of the Act. Thus, according to the Ld. CIT-DR, in the instant case there is an arrangement and it has lead to production of more than the ordinary profits. According to the Ld. CIT-DR, the meaning of the words "so arranged" in section 80-IA(10) of the Act only seeks to ensure that there was an agreement between the assessee and associated enterprise.

25. We have carefully examined the aforesaid contentions of the Ld. CIT-DR. In our considered opinion, the import of the expression "arranged" in section 80-IA(10) of the Act is not to be understood in its plain language but the same has to be understood in the context in which it is placed in the section. Notably, section 80-IA(10) of the Act restricts the plain meaning of the term "arranged" because it is placed between the words ".....the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business....." . Therefore, it would necessarily mean that the 'arrangement' referred to is an arrangement of the course of business which produces to the assessee more than the ordinary profits with the intent of abusing the tax concession. Thus, the word "arranged" in the section does not envisage a simple arrangement, but a arrangement of "the course of business transacted" which produces to the assessee more than ordinary profits which might be

expected to arise in such a business with the intent of abusing the tax concessions. Therefore, the meaning of the words "so arranged" have to be understood in the context in which they are placed in section 80-IA(10) of the Act. A mere agreement between the assessee and the associated enterprises for transacting business is not enough to invoke section 80-IA(10) of the Act.

26. In-fact, even the Hon'ble Bombay High Court in the case of Bank of India Ltd. (supra) has also appreciated the contextual meaning of the expression "arrangement". The issue before the Hon'ble Bombay High Court was with regard to the scheme of re-construction or arrangement contained in section 391(1) of the Companies Act, 1956. In the context of section 391(1) of the Companies Act, 1956, the Hon'ble High Court was dealing with the meaning of the word "arrangement". After having explained the meaning of the term arrangement in plain language, which we have referred earlier, the Hon'ble High Court went on to say as under in the context of the word "arrangement" qua section 391(1) of the Companies Act, 1956 :-

> *"Section 391(1), however, in any opinion somewhat restricts this otherwise unlimited import of the term "arrangement" in so far as the said section applies only to an agreement or understanding between the company and its creditors or any class of them, or between the company and its members or any class of them, or between the company and its members or any class of them, which would necessarily mean that it must be an agreement or understanding which affects their rights"*
>
> ***[underlined for emphasis by us]***

27. The aforesaid clearly points out that the Hon'ble High Court imparted meaning to the word "arrangement" in the context of section 391(1) of the Companies Act, 1956 to mean that it must be an agreement or understanding which affects the rights between the company and its creditors or any class of them and between the company and its members or any class of them. By the same analogy in the present context, we have to understand the meaning of the expression "as arranged" in section 10A(7) r.w.s. 80-IA(10) of the Act to mean a situation whereby the course of business has been so arranged that the business transacted produces to the assessee more that the ordinary profits with an intent to abuse the tax concessions granted in section 10A of the Act. Moreover, if one is to understand the import of the expression "so arranged" in section 80-IA(10) of the Act as canvassed by the Ld. CIT-DR, it would mean that for the purposes of fulfillment of the conditions prescribed in section 10A(7) r.w.s. 80-IA(10) of the Act, existence of mere close connection and more than the ordinary profits would suffice. In other words, as per the Revenue, the existence of close connection and high profits would lead to a presumption that there is an "arrangement" within the

meaning of section 80-IA(10) of the Act. The aforesaid plea, in our view, not only belies the language of section 80-IA(10) but also the legislative intent which seeks to curtail the abuse of tax concession by manipulation of profits between associated concerns. Therefore, an arrangement which is referred to in section 10A(7) r.w.s. 80-IA(10) of the Act has to be one which is prefaced by an intention to abuse the tax concessions, as per the intendment of the legislature. Therefore, existence of a mere agreement to do business is not enough to fulfill the requirement of section 10A(7) r.w.s. 80-IA(10) of the Act in the context of the words "the course of business between them is so arranged".

28. At this stage, we may also address the argument of the Ld. CIT-DR that the burden cast on the Assessing Officer in section 10A(7) r.w.s. 80-IA(10) of the Act is much lighter and even a prima-facie satisfaction of an existence of tax avoidance is sufficient. In this context, we may refer to the decision of the Bangalore Bench of the Tribunal in the case of Digital Equipment India Ltd. (supra), wherein similar argument from the side of the Revenue has been addressed. The Bangalore Bench of the Tribunal was dealing with invoking of section 10A(6) r.w.s. 80-I(9) of the Act for assessment year 1995-96, which are pari-materia to section 10A(7) r.w.s. 80-IA(10) of the Act invoked by the Revenue before us. The following discussion is relevant:-

> *"The requirements under the section are :*
>
> *(a) There must be a close connection between the appellant and other person.*
>
> *(b) The course of business between them should be so arranged that it produces to the appellant more than the ordinary profits from such business. To satisfy the above test the AO has to adduce evidence and reasons cogently and the same is open to verification by the appellate authorities. The primary rule of evidence is that "what is apparent is real" unless proved otherwise by the person alleging it otherwise. The manner of satisfaction outlined in the section should be based on evidence and not on surmise or suspicion. The question is not whether the onus is light or heavy but whether the AO has discussed objectively the conditions mentioned in the section to disturb the results declared by the appellant. In this case, the AO has failed to adduce any evidence or reason to satisfy the invoking of s. 80-1(9). First of all, a mere substantial profit does not give rise to any valid view that there could be any arrangement. It is a case of joint venture listed Indian company, where all arrangements are open for scrutiny and acceptance not only by digital group worldwide but also from joint venture partners and shareholders. Digital group overseas will not pay undue sum,*

which it cannot recoup entirely to exclusion of others. Hence nothing can be arranged to the exclusive benefit of overseas partner. One cannot presume the existence of close connection or possibility of an arrangement for earning more than ordinary profits. In this case the profits earned is comparable with the profits earned by other companies in the same industry. Hence there is no case for further verification. The AO has compared the profit of software unit with that of hardware unit. Thus the foundation itself is on wrong premise. There cannot be comparison between an orange and an apple. It is known fact that profitability of software units is always higher than hardware unit. The test whether the appellant has earned more than ordinary profits, in this case, the answer is obvious NO, even as found by the AO. When the profits earned are reasonable and not excessive, there is no reason to sustain the addition Further there is no evidence of existence of any arrangement as contemplated under s. 80-1(9)."

29. Quite clearly, as per the Tribunal the question is not whether the onus is light or heavy but whether the Assessing Officer has discussed objectively the conditions mentioned in the section to disturb the results declared by the appellant."

22. The other aspect noted by the Tribunal was the arrangement between the parties for earning more than ordinary profits wherein onus was upon the Department to prove that an arrangement existed. The findings of the Tribunal are as under :-

"30. Now, the case of the Assessing Officer is that the profits derived by the assessee from the eligible business are more than the ordinary profits and therefore he is empowered to arrive at what could be a reasonable profit from such eligible business and such profit be taken as reasonably deemed to have been derived from the eligible business for the purposes of computing the deduction u/s 10A of the Act. We find that in the entire assessment order, there is no material or any evidence which has been brought out to say that the course of business between assessee and the associated enterprises has been so arranged that the business transacted has produced to the assessee more than the ordinary profits.

31. No doubt, there is a close connection between assessee and the associated enterprises and to that extent section 10A(7) r.w.s. 80-IA(10) of the Act has been rightly examined by the income-tax authorities. The second aspect that the course of business was so arranged so as to result in more than ordinary profits is not at all forthcoming from the order of the Assessing Officer. There is no

material or evidence referred to in the assessment order to indicate that the course of business has been so arranged so as to inflate profits with the intent to abuse tax concession u/s 10A of the Act. At this point, we may make a reference to the stand of the Assessing Officer that the operating profit margins of the assessee are substantially higher than the average operating margin of the comparables selected by the assessee in its Transfer Pricing Study. This has formed the basis for the Assessing Officer to say that assessee has earned more than ordinary profits which might be expected to arise in such a business. Be that as it may, the aforesaid is not enough to say that the course of business has been so arranged to result in more than ordinary profits. However, from the side of the Revenue, it was pointed out that the Transfer Pricing comparability analysis itself suggests that the profit margins of the assessee are more than the ordinarily accepted margin in this line of business. The moot question is as to whether the same can be considered as a material to indicate that the course of business between the assessee and the associated enterprises has been so arranged, so as to result in 'more than the ordinary profits' within the meaning of section 10A(7) r.w.s. 80-IA(10) of the Act. In this context, we may refer to the decision of the Chennai Bench of the Tribunal in the case of Visual Graphics Computing Services India (P) Ltd. vs. ACIT, 148 TTJ 621 (Chennai), wherein following discussion is relevant :-

> *"We heard both sides in detail and considered the issue. As far as the present case is concerned, the Transfer Pricing Officer has made a categorical finding that the operating profit reported by the assessee is higher than the profit worked out on the basis of arm's length price. The Transfer Pricing Officer, therefore, concluded that no transfer pricing adjustment is called for in the present case. The Assessing Officer has made the reference to the Transfer Pricing Officer under section 92CA. The reference is made for the purpose of computing income arising from an international transaction with regard to the arm's length price as provided in section 92. Therefore, it is to be seen that the scope and extent of reference made by the Assessing Officer to the Transfer Pricing Officer is confined to the singular purpose stated in section 92. Sections 92A, 92B, 92C, 92CB, 92D, 92E and section 92F are all precisely defining and facilitating provisions ultimately for the purpose of computing the income as stated in section 92. All the above stated sections*

provided in Chapter X of the Income-tax Act, 1961 belong to a separate code as such, enacted for the purpose of computing income from international transactions having regard to the arm's length price so as to confirm that there is no avoidance of tax by an assessee. Therefore, where in a case, the Transfer Pricing Officer suggests that the operating profit declared by an assessee is compatible to the arm's length price norms and no adjustment is necessary, the operation of all those provisions come to an end. If the, Assessing Officer has to make any other adjustment towards computing deduction available under section 10A, the computation has to be made in the context of section 10A(7) read with section 80-IA(10).
It is clear that in a case of transfer pricing assessment, it has got two segments. The first segment consists of rules and procedures for computing the income other than the income arising out of international transactions with associate enterprise. The second segment consists of rules and procedures in connection with computation of income from international transactions with associate enterprises on the basis of the arm's length price. The second segment relating to computation of the arm's length price, is a set of rules for the purposes of transfer pricing matters and those procedures and rules can be used only for the purpose serving the object of section 92. When the Transfer Pricing Officer states that there is no need of transfer pricing adjustment, the matter should end there and any other adjustment that the Assessing Officer would like to make with reference to the first segment must be made independent of the order of the Transfer Pricing Office under section 92CA.

To state in simple terms, the transfer pricing regime is different from regular computation of income. Section 10A belongs to that part of regular computation of income and it should be computed independent of transfer pricing regulations and transfer pricing orders. It is not therefore, permissible for the Assessing Officer to work out section 10A deduction on the basis of arm's length price profit generated out of the order of the Transfer Pricing Officer.

In fact these issues have already been considered in various orders of the Tribunal. The Income-tax Appellate Tribunal, Chennai "A" Bench in the case of Tweezerman (India)

> *P. Ltd. v. Addl. CIT [2010] 4 ITR (Trib) 130 (Chennai) (133 TTJ 308) has considered the matter in detail and held that the reduction of eligible profits of an assessee as done by the Assessing Officer by invoking the provisions of section 80-IA(10) read with section 10B(7), in the context of the Transfer Pricing Officer's order is unsustainable. The Tribunal has held that the Assessing Officer was not justified to invoke the provisions of section 80-IA(10) read with section 10B(7) so as to reduce the eligible profits on the basis of the arm's length price computed by the Transfer Pricing Officer without showing how he determined that the assessee had shown more than "ordinary profits".*
>
> *As rightly argued by learned senior counsel the arm's length price is determined on the basis of the most appropriate method. The most appropriate method is chosen either on profit basis method or price basis method. In the latter ease, profits are not at all considered. In that method, profit is only a derivative of prices. When profits itself is not worked out, how is it justified to adopt the arm's length price profits to determine what is "ordinary profits" for the purpose of section 10A(7)?*
>
> *In the facts and circumstances of the case, we hold that the Assessing Officer has erred in reducing Rs.4,48,50,795 from the eligible profits of the assessee under section 10A. The said adjustment made by the assessing authority in computing the deduction under section 10A is accordingly, deleted."*

32. In our considered opinion, the result of the Transfer Pricing assessment can at best be taken as an indicator for the Assessing Officer to investigate as to whether or not there exists any arrangement which has resulted in more than ordinary profits qua the requirements of section 10A(7) r.w.s. 80-IA(10) of the Act. Even if it is accepted that the difference between the operating margins of the assessee and the comparables show existence of more than the ordinary profits in the hands of the assessee, so however, it was still imperative for the Assessing Officer to establish on the basis of substantive evidence and corroborative material that qua section 10A r.w.s. 80-IA(10) of the Act, the course of business between the assessee and the associated enterprises is so arranged that the business transacted between them produces to the assessee more than the ordinary profits with the intent of abusing tax concession. Quite clearly, in the entire assessment order, there is no whisper of any material or evidence in this regard. In-fact, the approach of the Assessing Officer is quite misdirected as the following discussion in his order shows :-

> *"Accordingly, the section only encumbers the A.O. to examine if the profits derived from the eligible business by the assessee is more than the ordinary profits, then the A.O. has to arrive as to what could be the reasonable profit from the such eligible business and such profit has to be then taken as reasonably deemed to have been derived from the eligible business for the purposes of computing deduction under the section."*
>
> *33. The aforesaid discussion in the assessment order reveals that as per the Assessing Officer, the existence of close connection and more than ordinary profits is enough to assume an arrangement as contemplated u/s 80-IA(10) of the Act. The aforesaid understanding, in our view, is directly contrary to the judgement of the Hon'ble Karnataka High Court in the case of H.P. Global Soft Ltd. (supra) and our discussion in the earlier part of this order.*
> *34. In view of the aforesaid, we conclude by holding that in the present case, the Assessing Officer has not proved that any arrangement had been arrived between the parties which resulted in higher profits. Consequently, the re-working of the profits by Assessing Officer by invoking section 10A r.w.s. 80-IA(10) of the Act is not justified. The action of the Assessing Officer to restrict the deduction u/s 10A of the Act to Rs.7,74,60,281/- as against the claim of Rs.36,35,09,382/- is hereby set-aside. Thus, assessee succeeds on this aspect."*

23. Now coming to the facts of the present case where the assessee had shown profits from its Engineering Design & Development Services which was an STPI unit and had shown the net profit range of 72.98%, and the international transaction of the assessee with its Associated Enterprises had been accepted by the TPO in his report under section 92CA of the Act to be at Arm's Length and the Assessing Officer had adopted the said profit margins and after verification had allowed the claim of deduction under section 10A of the Act in respect of the activity of rendering Engineering Design Services. The question is whether deduction claimed under section 10A of the Act could be curtailed. The answer is 'No' in view of the ratio laid down by the Tribunal in Honeywell Turbo Technologies (India) Pvt. Ltd. Vs. DCIT in ITA No.2584/PUN/2012 order dated 10-02-2017 which has been applied by the Tribunal further in Tata Johnson Controls Automotive Limited Vs. DCIT (supra). The onus is upon the department to prove that there existed an arrangement between the assessee and its Associated Enterprises to earn more than ordinary profits and in the absence of the said onus having been discharged by the department and following the parity of reasoning as in Honeywell Turbo Technologies (India) Pvt. Ltd. Vs. DCIT and Tata Johnson Controls Automotive Limited Vs. DCIT (supra), we find no merit in the order of the Commissioner passed under section 263 of the Act in holding that the Assessing Officer while granting deduction under section 10A of the Act has passed the said order without any application of mind. Similar issue of invoking of jurisdiction under section 263 of the Act by the Commissioner curtailing the deduction

under section 10B(7) r.w.s. 80IA(8) and 80IA(10) of the Act arose before the Tribunal in Spicer India Ltd. Vs. CIT (supra) and the Tribunal vide order dated 08-07-2015 in similar circumstances had reversed the order of the Commissioner passed under section 263 of the Act.

24. Where the Assessing Officer in his order considered the claim of assessee under section 10A of the Act and allowed the same, merely because the Commissioner is not agreeable to the view adopted by the Assessing Officer, the exercise of jurisdiction under section 263 by the Commissioner cannot be upheld. We place reliance on the ratio laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Company Ltd. Vs. CIT 243 ITR 83 (SC) and CIT Vs. Max India Ltd. 295 ITR 282 (SC). In order to invoke the provisions of section 263 of the Act, the order must be both erroneous and prejudicial to the interest of revenue. Where the Commissioner does not agree with the view of the Assessing Officer the same cannot be basis/justification for invoking the provisions of section 263 of the Act. Further, the opinion of the Commissioner was not formed on any other material but on the basis of the order passed by the TPO under section 92CA of the Act, without making any adjustments. Accordingly, there is no merit in the exercise of jurisdiction under section 263 of the Act and we hold so. In this regard, we find support from the ratio laid down by the Pune Bench of the Tribunal in M/s. Semco Electric Pvt. Ltd. Vs. ACIT (supra)."

10. Further, the Hon'ble Bombay High Court in CIT Vs. Schmetz India (P) Ltd. in Income Tax Appeal No.1382 of 2013, judgment dated 24.06.2015 has laid down similar proposition and the appeal filed by Revenue has been dismissed.

11. In view thereof, we hold that there is no merit in invoking provisions of section 10AA(9) r.w.s. 80IA(10)of the Act in the case of assessee. The TPO having accepted the transactions to be at arm's length and where the assessee was raising invoices on man hour basis, in line with the third party agreement and where net profit was shown by the assessee at 63%, there is no merit in applying the concept of OP/OC, which cannot be the basis for benchmarking the profits of any business. Hence, we direct the Assessing Officer to allow the deduction claimed under section 10AA of the Act in entirety. The grounds of appeal No.2 to 7.2 are thus, allowed. The learned Authorized Representative for the assessee fairly pointed out that in case the above grounds of appeal are allowed, the grounds of appeal No.8 to 11 would become academic. Hence, the same are dismissed."

5. Mr. Walimbe vehemently contended in the light of the DRP's detailed discussion in paras 7.6 on page 54 onwards that the assessee had paid an abnormally high- premium of Rs.3,38,370/- per share having face value of Rs.10 each only for buying back 5700 equity shares from its Mauritius based group company/existing shareholder M/s. ETN Holdings Ltd. u/s 77A of the Companies Act. He sought the buttress the point in tune with the Revenue's stand as well as DRP's discussion that the assessee had derived extraordinary profits which attracts section 10AA(9) r.w.s. 80IA (10) of the Act. And also that the

assessee has defeated the provisions of the Act by indulging in gross tax evasion in this entire deduction scheme. We find no merit in Revenue's instant arguments as the learned co-ordinate bench hereinabove has already rejected the very reasoning in preceding assessment years. We thus adopt the foregoing detailed discussion mutatis mutandis to accept assessee's first substantive ground of Section 10AA deduction in very terms. The assessee succeeds in its 2nd to 9th substantive grounds.

6. The assessee's next substantive ground challenges correctness of the lower authorities action disallowing its software purchase claim involving amount of Rs.11,66,32,207/- paid to non-resident on account of non- reduction of TDS thereupon. The Revenue's case in light of the departmental authorities stand throughout is that the same represents "Royalty" for use of copyright than purchase of copyrighted article claim on behalf of the assessee's which attracts Section 40(a)(i) disallowance. We find that instant second issue also stands adjudicated in tribunal's earlier order (supra) in assessee's favour as follows.

> *"12. The next issue raised vide ground of appeal No.12 is against disallowance made under section 40(a)(i) of the Act on account of payment of software on the ground that the assessee had purchased copyright in the said software. However, the plea of assessee before the authorities below and even before us is that it had only made payment for purchase of copyrighted software i.e. off-the-shelf software and there was no merit in holding the said payment to be in the nature of royalty. The learned Authorized Representative for the assessee before us has pointed out that the issue stands covered by the decision of Pune Bench of Tribunal in the case of John Deere India Pvt. Ltd. (2019) 70 ITR (Trib) 73 (Pune). He also pointed out that the DRP had decided the issue in turn, relying on the ratio laid down in the case of Cummins Inc for assessment years 2004-05 and 2006-07 in ITA Nos.73 & 74/PN/2011, order dated 08.08.2013.*
> *13. We have heard the rival contentions and perused the record. We find that the issue raised in the present appeal is squarely covered by the order of Tribunal in the case of John Deere India Pvt. Ltd. (supra). As far as reliance of DRP in the case of Cummins Inc (supra) is concerned, we find that the said order of Tribunal was recalled in Miscellaneous Application and thereafter the issue was decided in favour of assessee, in turn, relying on the ratio laid down in the case of John Deere India Pvt. Ltd. (supra). The Tribunal vide para 90 the case of John Deere India Pvt. Ltd. (supra) held as under:-*
>
> > *"90. In conclusion, we hold that purchase of software by the assessee being copyrighted article is not covered by the term 'royalty' under section 9(1)(vi) of the Act. Where the assessee did not acquire any copyright in the software, is not covered under Explanation 2 to section 9(1)(vi) of the Act. We further hold that amended definition of 'royalty' under the domestic law cannot be extended to the definition of 'royalty' under DTAA, where the term 'royalty' originally defined has not been amended. As per definition of 'royalty' under DTAA, it is payment received in*

consideration for use or right to use any copyright of literary, artistic or scientific work, etc.; thus, purchase of copyrighted article does not fall in realm of 'royalty'. We also hold that since the provisions of DTAA overrides the provisions of Income Tax Act and are more beneficial and the definition of 'royalty' having not undergone any amendment in DTAA, the assessee was not liable to deduct tax for payments made for purchase of software. In such scenario, the assessee cannot be held to be in default and the demand created under section 201(1) and interest charged under section 201(1A) of the Act is thus, cancelled.

14. Following the same parity of reasoning, we hold that the payment made by assessee for purchase of off-the-shelf software is not in the realm of royalty and in any case as the definition of royalty has not been amended under DTAA, provisions of DTAA being beneficial are to be applied and there was no requirement to deduct tax at source out of such payment. The ground of appeal No.12 is thus, allowed."

7. The Revenue is fair enough in not pointing out any distinction as facts or law in impugned as well as all preceding assessment years. We therefore accept the assessee's 10th substantive ground and its 11th ground is rendered infrastractus. Ordered accordingly.

8. The assessee's 12th and 13th substantive grounds raise the issue of section 14A r.w.s. Rule 8D(2)(iii) disallowance of administrative expenditure of Rs.1,44,88,051/- in relates to its exempt income. We note that the learned lower authorities have neither considered assessee's suo moto expenditure of Rs.78,301 u/s.14A read with Rule 8D(2)(iii) after recording the necessary satisfaction. Nor have they restricted the impugned disallowance only qua investments yielding exempt income in light of REI Agro v/s DCIT (2013) 144 ITD 149 (Kol) which has been upheld the hon'ble high court concerned. Coupled with this, the assessee's further case before us is that its investment had been made in debt funds only wherein necessary charges stand deducted by portfolio manager on actual basis. We are of the opinion in this backdrop that this instant issue requires factual verification at the Assessing Officer's end in light of all preceding facts as well as settled legal position. These 12 & 13 substantive ground are accepted for statistical purposes therefore."

5. There is hardly any dispute that the CIT(A) has followed various judicial precedents in assessee's case(s) itself whilst deciding all these three issues of section 80IA(10) deduction section 40(a)(i), TDS deduction disallowance(s) on account of payment of alleged royalty and section 14A read with rule 8D disallowance particularly

to exempt income which are identical in the impugned assessment year as well since involving no distinction on facts or law at all.

6. Learned AR at this stage vehemently argued that the Assessing Officer had not recorded his satisfaction in tune with section 14A(2) of the act regarding correctness of the assessee's suo moto disallowance of Rs.90,552/- as against exempt income of Rs.11,74,91,223/- derived in the relevant previous year. We find no merit in the assessee's instant argument as the same goes against the factual position on record in the Assessing Officer's detailed discussion in para 9.1 page 30 of his assessment order. We therefore adopt judicial consistency and direct the learned Assessing Officer to re-decide this last issue of administrative expenditure disallowance afresh in very terms as in A.Y. 2013-14 (supra).

7. The Revenue's former appeal in ITA No.42/PUN/2021 is partly allowed for statistical purpose in above terms.

8. Same order to follow in Revenue's latter appeal ITA No.43/PUN/2021 since raising the very three issues involving varying sums under the corresponding three heads(supra).

9. These Revenue's twin appeals are partly allowed for statistical purpose in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 7th July, 2022.

Sd/-	**Sd/-**
(DR. DIPAK P. RIPOTE	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 7th July, 2022/ *SGR**

<u>आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.