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

Before Shri I.P. Bansal, Judicial Member
and Shri B. Ramakotaiah, Accountant Member

ITA No. 6922/Mum/2012
(Assessment Year: 2008-09)

M/s. Sandoz Private Limited Sandoz House, Dr. Annie Besant Road, Worli Mumbai 4000128 PAN - AAACS 9267 J	Vs.	D C I T, Circle 7(1) Room No. 622, 6th Floor Aayakar Bhavan, M.K. Road Mumbai 400020
Appellant		**Respondent**

Appellant by:	Shri R.R. Vora & Shri Heman Chandariya
Respondent by:	Shri Ajit Jain & Smt. Sasmita Misra

Date of Hearing:	21.03.2013
Date of Pronouncement:	05-04-2013

ORDER

Per B. Ramakotaiah, A.M.

This is an appeal against the order of the Dy. Commissioner of Income Tax, Circle 7(1) dated 30.10.2012 consequent to the directions issued by the Dispute Resolution Panel – II, Mumbai (DRP) dated 28.09.2012.

2. In this appeal, the assessee has contested various issues and has raised 20 grounds. In the course of appellate proceedings the assessee filed a request for admitting additional supplementary grounds, which are in fact various factual submissions in relation to the grounds already raised. After discussion with both the counsels these additional grounds are admitted as they are legal in nature. The consolidated grounds are as under: -

"1. The learned AO has erred in law and in facts by determining the total income of the Appellant and Rs.73,03,32,270/- as against a loss of Rs.53,82,33,226/- as claimed by the Appellant.

<u>Part 1- Transfer pricing adjustment of Rs.97,19,43,002/-</u>

The learned AO/Additional Commissioner of Income Tax Transfer Pricing – II(4) (hereinafter referred to as the 'learned TPO') has erred in law and in facts by:

Not providing an opportunity of being heard

2. not following the principles of natural justice and not providing an adequate opportunity of being heard to the Appellant in respect of the transfer pricing adjustment.

Rejecting the economic analysis undertaken by the Appellant

3. not appreciating the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 (hereinafter referred to as the 'Rules'), conducting a fresh economic analysis for the determination of the arm's length price (hereinafter referred to as the 'ALP') in connection with the international transactions relating to manufacture and export of Active Pharmaceutical Ingredients ('APIs'), manufacture and export of Finished Drug Formulations ('FDFs'), trading of APIs/FDFs and provision of contract development support services and holding that the Appellant's international transactions are not at arm's length.

Not accepting the segmental approach adopted by the Appellant

4. not accepting the segmental Transactional Net Margin Method (hereinafter referred to as 'TNMM') analysis adopted by the Appellant and by using an aggregated approach at an entity level, to determine the ALP of diverse international transactions undertaken by the Appellant with its Associated Enterprises (hereinafter referred to as 'AE').

**4a. erred in not considering the audited segmental accounts submitted by the Appellant and instead using aggregated approach at an entity level, while computing Appellant's margins from international transaction with comparables*

Making adjustments to transactions with non-AEs

5. making a transfer pricing adjustment even in respect of transactions undertaken by the Appellant with non-AEs including domestic transactions.

**5a. erred in rejecting the segmental margin analysis adopted by the appellant, merely on the ground that losses incurred by the appellant in respect of non-AE/third party sales; without considering the justification of the same*

Aggregating the international transaction of provision of services with other international transactions (relating to goods)

6. aggregating the international transaction of provision of contract development support services entered into by the Appellant with *other international transactions relating to manufacture and export of APIs, manufacture and export of FDFs and trading of APIs/FDFs.*

Rejecting the comparables identified by the Appellant

7. *rejecting the comparable identified by the Appellant for benchmarking the impugned international transactions relating to manufacture and export of APIs, manufacture and export of FDFs and trading of APIs/FDFs.*

Considering inappropriate comparable companies

8. *considering non-comparable companies as comparables for benchmarking the international transactions relating to manufacture and export of APIs, manufacture and export of FDFs and trading of APIs/FDFs.*

Using single year data

9. *ignoring the provisions of Rule 10B(3) of the Rules which envisage usage of multiple year data of comparable companies for the purpose of determination of the ALP as defined under section 92F(ii) of the Act.*

Inaccurate computation of margins

10. *erroneously computing the operating margins of some of the companies identified as comparable by the learned TPO.*

Not considering +/- 5% variation

11. *not considering the +/- 5% variation from the ALP permitted to the Appellant under the proviso to section 92C(2) of the Act.*

Undertaking a double adjustment in respect of reimbursement transaction

12. *erroneously undertaking a double adjustment of Rs.15,55,01,002/- in respect of the reimbursement amounts, by holding that they are in the nature of services rendered by the Appellant and such amounts do not form part of the Appellant's profit and loss statement.*

**12a. Without prejudice to ground no. 12, relating to adjustments on reimbursement transactions, even if it is considered that the reimbursements are in the nature of provisions of contract development support services and not pure reimbursements, no adjustment is called for on margins earned from this segment as it is at arm's length.*

Part II – Corporate tax adjustments

The learned AO has erred in law and in facts by:

Disallowing software expenses incurred by the Appellant

13. *disallowing the software expenditure of Rs.5,67,500/- incurred by the Appellant on the ground that the same represents capital expenditure.*

Non-grant of depreciation on software expenses disallowed in the earlier years

14. not granting depreciation of Rs.38,01,785/- on the written down value of software expenses disallowed in earlier years.

Adjustment under section 145A of the Act

15. making an addition of Rs.7,49,31,715/- under section 145A of the Act on account of excise duty element (CENVAT credit) on raw material forming part of closing stock.

16. without prejudice to the above, the AO ought to increase the value of opening stock of the subsequent assessment year (hereinafter referred to as 'AY") by Rs.7,49,31,715/- on account of addition made to the closing stock for the AY 2008-09.

Invoking the provisions of section 14A of the Act

17. disallowing Rs.26,55,50,308/- by invoking the provisions of section 14A of the Act in respect of the net loss incurred by the Kalwe unit of the Appellant, which is eligible for deduction under section 10B of the Act.

Disallowing the deduction claimed under section 10B of the Act

18. disallowing deduction of Rs.10,33,40,093/- from the profits and gains of business as claimed by the Appellant under section 10B of the Act in respect of its Turbhe unit, thereby reducing carry forward of loss to that extent.

Levy of interest under section 234B and section 234D of the Act

19. charging interest under section 234B and section 234D of the Act.

Initiation of penalty proceedings under section 271(1)(c) of the Act

20. Initiating penalty proceedings under section 271(1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income.

***(*)** additional grounds admitted*

3. Briefly stated, assessee is a subsidiary of Novartis Holdings AG, Switzerland and is engaged in pharmaceutical business in India and its operations primarily include manufacture and sale of APIs, manufacture and sale of Finished Drug Formulations and trading of APIs/FDFs and providing support service to its AEs. Assessee filed return of income for A.Y. 2008-09 declaring a total loss of ₹53,82,33,224/-. The AO, noticing that the assessee had transactions with Associated Enterprises, referred the matter to the Transfer Pricing Office for determination of arm's length price of the

international transactions entered into by the assessee. The international transactions, as reported by the assessee, are as under: -

S.No.	International transaction	Total value of transaction (Rs.)	Method used	Margins of the appellant	Arithmetic mean of updated average margin of comparables selected by the Appellant
1	Import of raw materials in connection with manufacture of APIs	27,53,97,970	TNMM – Operating Profit Operating Revenue as PLI	11.50%	-7-37%
2	Manufacture and export of APIs	92,86,59,862			
3	Import of raw materials/ APIs/ packing materials in connection with manufacture of FDFs	20,37,83,582	TNMM – Operating Profit Operating Revenue as PLI	21.94%	4.83%
4	Manufacture and export of FDFs	184,52,84,406			
5	Trading of APIs/FDFs	47,07,12,556	TNMM – Operating Profit Operating Revenue as PLI	8.58%	11.25%
6	Provisions of contract development support services	74,95,72,742	TNMM – Operating Profit Operating Revenue as PLI	41.24%	17,79%
7	Provision of Information Technology ('IT') support services	12,10,750	TNMM – Operating Profit Operating Revenue as PLI	46.46%	10.11%
8	Reimbursements/ recovery of costs (including cost allocations)	85,95,96,474	At cost	No bench-marking required	

PLI – Profit Level Indicator

4. Based on the PLI statement it was assessee's contention that the international transactions with the AEs are at arm's length. The TPO did not agree with assessee's contention of segment-wise TNMM analysis for each of

the international transactions on the reason that the segment-wise accounts are not audited. The TPO adopted an entity method approach for the purpose of determining ALP. However, while rejecting the segmental analysis undertaken by the assessee, the TPO accepted the 4 segments of assessee's operations and identified comparables. He arrived at different arithmetical means of appropriate profit level indicators by taking operating profit by cost of various identified comparables in each segment. He thereafter gave weighted average to assessee's percentage of turnover out of the total turnover and accordingly determined the weighted average of the arithmetic mean in each segments and arrived at the operating profit at 18.09% at entity level. This is taken as the arm's length profit margin and as assessee's operating margin of 4.78% operating cost was less than the ALP so determined, the TPO made an adjustment of ₹82,76,36,000/- to assessee's income. After making the adjustment on account of entity level margin the TPO further considered the weighted average margin of 18.09 adopted by the assessee with reference to contract services and thereafter made an adjustment of ₹15,55,01,002/- towards notional income on reimbursements. Therefore, the total adjustment has come to ₹98,31,37,002. After the draft assessment order dated 26.12.1022 the assessee preferred objections before the DRP. It has filed detailed objections and the DRP gave directions vide order dated 28.09.2012. Consequent to that, in accordance with the directions of the DRP, the AO passed order dated 30th October 2012 determining the total income of the assessee at ₹73,03,32,270/-.

Ground No. 1 to 12a

5. With the reference to the transfer pricing issue contested at ground No. 1 to 12 the learned counsel for the assessee drew our attention to the order of the TPO, TP study undertaken by the assessee, draft assessment order, objections with DRP and submitted that the transfer pricing adjustments made by the AO on the basis of the TPO's order are not correct. The first objection is with reference to adopting the entity level approach as against the segmental approach made by the assessee. In this regard it was submitted that based on the audited report for the purpose of claim of

deduction under section 10A & 10B the assessee furnished segmental accounts with reference to each of the activity undertaken by the assessee company which the AO rejected on the reason that they are not audited. It was submitted that the audited reports were submitted to the DRP, who did not consider the issue at all in its order. Therefore, when assessee has submitted segmental reports, with out rejecting them the AO was not correct in adopting the entity level approach of making the transfer pricing adjustments.

5.1 The next objection is with reference to the method adopted by the TPO in arriving at the operating profit at 18.09%. It was submitted that this method is not supported by any Rule. It was the contention that the TPO should have examined different operating profits adopted in the order with reference to same segment rather than undertaking weighted average method and arriving at different arithmetic mean, which is not supported by any methodology or the Rules in this regard.

5.2 The third objection is with reference to making adjustment on the entire turnover of the assessee company rather than restricting to the transactions with AEs.

5.3 Fourth objection is with reference to various comparables and arriving at the profit margins, which was not considered elaborately by the TPO in his order or by the DRP in their directions.

5.4 It was further contended that the AO, after making adjustments at the entity level, considering all the areas of operations of the assessee again made adjustments on the reimbursements of expenditure which itself is part of segments already considered, thereby making double addition. It was submitted that neither the TPO nor the DRP examined the objections of the assessee in detail and have not provided segmental data of comparables for arriving at different profit margins and the detailed objections filed by the assessee are not even considered. Therefore, it was prayed that the issue may be restored to the file of the AO for considering the objections in detail.

6. The learned D.R., however, submitted that the assessee has not submitted the segmental accounts before the TPO and could only furnish

before the DRP. Therefore the question of analysing the segmental data by the TPO does not arise. He also referred to a certificate given by the Chartered Accountant, particularly in Page NO. 256 of the paper book, referring to the methodology and verification process that the sales break up between the AE and non-AE is made on the basis of details of customer-wise, project-wise sales made available to him. The learned D.R.'s objection is that the Auditor did not examine the details completely so they cannot be relied upon. He supported the orders of the AO and DRP.

7. We have considered the issue and the rival contentions. There is no dispute with reference to the fact that assessee's operates in four different independent segments. It was the contention of the assessee, based on segmental reports, that assessee's transaction with AEs are at arm's length. It was supported by TP study and further that assessee's transactions locally are governed by price regulations by the government. Therefore the transactions undertaken with third parties are generally resulting in losses. In its contentions, it also taken support from the audited reports furnished for claims of 10A and 10B and consistent methodology adopted in earlier years and later years. However, these contentions were not accepted and as seen in the order of the TPO, he rejected the segmental report only on the basis that the accounts are not audited. The assessee did furnish audited segmental accounts before the DRP along with its various objections. The DRP, however, while recording that assessee has furnished segmental audited accounts, did not give any finding either accepting or rejecting assessee's segmental accounts. Therefore in our opinion the entire approach of the TPO/DRP is not correct. Assessee did submit segmental accounts for each of its operation which are different from the other and therefore the correct approach under TNMM should be with each of the segmentals with the corresponding comparables involved in similar lines of functioning after proper FAR analysis.

8. In addition to the above, we are also unable to support the TPO's weighted average method of arriving at the profit margins, which is not supported by any methodology prescribed or Rules prescribed. Since the AO has details of each segment-wise profit margins of comparables, at best he

could have compared with relevant profit margins with that of assessee's profit margins in each segment. However, instead of taking segmental analysis, he undertook weighted average method of arriving at entity based profit margin. After arriving at the margin, instead of restricting it to the AEs transactions the TPO undertook to make the adjustment on the entire turnover of the assessee including transactions with non-AEs, which is also not supported by the transfer pricing provisions. Further, in arriving at the segment-wise profit margin, the AO included Annexures 1 to 3 to the order, which, on perusal, does not give any information except the percentage of profit in two columns against the company's names. There is no analysis of each company's business activity, why they are selected as comparable and what are the functions of the company, operating margins, etc. It was one of assessee's contentions that the data was not available in public domain and the AO's selection of comparables is not according to the parameters/filters in respect of each of the segment. There is no discussion, whatsoever, in TPO's order as to why the comparables of the assessee are rejected or why other comparables are accepted. In fact, except the percentage in two columns, out of which the percentage in the last column is taken as operating profit by operating cost to arrive at the profit margin and average weightage determined in TPO's order, no information was provided in arriving at the profit margins. Thus, the approach of the TPO cannot be verified by any data available on record. Therefore assessee's objections in selection of some comparables or rejection of its own comparables could not be verified by us. As seen from the detailed objections filed before the DRP, even the DRP did not address this issue except rejecting the objections on the reason that the assessee did not furnish any details. The assessee is opposing selection of comparables by the TPO. Therefore it is the responsibility of the TPO to furnish necessary details. The onus cannot be shifted to the assessee when it is contending that proper data is not available in public domain in this regard. Therefore, we have no option than setting aside the issue to the file of the AO for obtaining fresh TP report after doing proper analysis and verifying the rules and guidelines in this regard. Needless to say that the assessee's segmental profits should be examined and if they are not acceptable should be rejected on reasonable/ verifiable grounds, which should be recorded. Selection of comparables, arriving at the operating profits, etc. needless to state that the TPO should give /provide proper opportunity and pass a detailed and reasonable order and then make TP adjustments. The assessee should be given due opportunity and if any objections were raised they should be considered properly why they are accepted or rejected.

9. Another contention, which was also raised in the ground, is the double addition made of an amount of ₹15.05 crores. Prima facie objection seems correct. The AO/TPO is also directed to examine this issue and decide afresh after considering the objections of the assessee. With these directions, the entire order of the TPO alongwith the consequential orders of the AO and DRP are set aside and the matter is restored to the file of the AO for fresh TP analysis and report by the TPO. The grounds 1 to 12 are allowed for statistical purpose.

10. **Ground No. 13** is with reference to the treatment of software expenditure of ₹5,67,500/- on the reason that the same represent capital expenditure. Originally, the AO considered an amount of ₹66,77,457/- as capital expenditure on various software purchases and consequent to the direction of the DRP the AO examined the nature of software and determined that purchase of software, whose life is more than two years, is considered as capital and disallowed only an amount of ₹5,67,500/-. After considering the rival submissions, we are of the view that there is no need to disturb the findings of the AO who examined the same consequent to the direction of the DRP and restricted the disallowance to the above amount. Therefore, the ground is rejected. The AO is, however, directed to allow the depreciation as applicable, if not allowed.

11. **Ground No. 14** pertains to non-granting of depreciation on the written down value (WDV) of software expenses disallowed in earlier years. The DRP has already directed the AO on this issue, who is bound to allow depreciation consequent to capitalization of software purchases in earlier years. It seems that the AO has not given effect to this direction of the DRP

against objection No. 5C in page No. 21. Since there is already a direction from the DRP, the AO is directed to allow the depreciation on software expenditure disallowed as capital expenditure in earlier years by working out the WDV. This ground is considered allowed.

12. **Ground No. 15 &16** pertain to the adjustments under section 145A of the Act. Both the parties fairly admitted that this issue is to be restored to the file of the AO consequent to the direction given in earlier years. The ITAT in ITA No. 5964 & 8489/Mum/2004 and other appeals dated 09.11.2004 considered the issue of adjustments under section 145A and restored the issue to the file of the AO. The directions of the ITAT are as under: -

> *"9 Having considered the rival submissions as well as the relevant material on record, at the outset, we note that an identical issue has been considered and decided by this Tribunal in assessee's own case for the Assessment Year 2000-01 vide order dated 9.5.2012 in paras 11 to 13 as under:*
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> *"11. At the time of hearing, Id A.R. submitted that the above issue is covered in favour of assessee by the judgment of Hon'ble Jurisdictional High Court in the case of CIT vs. Mahalaxmi Glass Works P Ltd.,318 ITR 116(Bom) and also the judgment of Hon'ble Delhi High Court in the case of CIT vs. Maha veer Aluminium Ltd, 297 ITR 77, wherein, it has been held that if there is change in valuation of closing stock in one end it must necessarily be a corresponding change at the other end, otherwise, the true profit would not be reflected.*
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> *12. On the other hand, Id D.R. relied on the order of authorities below.*
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> *13. We have considered the submissions of representatives of parties and orders of authorities below as well as the decisions relied upon by Id A.R. We observe that Hon'ble Delhi High Court in the case of Mahaveer Almn Ltd (supra) have held after considering the decision in the case of CIT v. Ahmedabad New Cotton Mills Co. Ltd., AIR 1930 PC 56, that a mistake in the method of valuation cannot be rectified by refusing the valuation of closing stock only but the valuation of opening and closing stock had to be revised. In the case of Mahalaxmi Glass Works Pvt Ltd., (supra), the issue related to closing stock valuation of adjustment of unutilized modvat credit. The Tribunal allowed the adjustment. Hon'ble High Court confirmed the order of the Tribunal. Therefore, the issue is covered in favour of the assessee by the decision of Hon'ble Jurisdictional High Court (supra). Hence, we decide Ground No.3 of appeal in favour of assessee by modifying the orders of authorities below that if the closing stock is to be increased on account of unutilized modvat credit, the corresponding opening stock of that year should also be increased. Ground No.3 is allowed."*
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> *10 Following the earlier order of this Tribunal in assessee's own case we decide this issue accordingly direct the Assessing Officer to make the necessary adjustment in the opening stock by the relevant amount of unutilised Modvat credit of last year."*

Following the orders of the Tribunal in earlier years in assessee's own case we set decide the issue accordingly and direct the AO to make necessary adjustments in the opening stock by the relevant amount of unutilised Modvat credit of last year. With these directions, the grounds are considered allowed.

13. **Ground No. 17 & 18** pertain to the issue of disallowing the entire loss incurred by Kalwe unit, which is eligible for deduction under section 10B under section 14A and not allowing carry forward of loss. It was fairly admitted that this issue also stands covered by the orders of the ITAT in earlier years. In the above referred ITAT order, the ITAT considered the issue in detail as under: -

> *"29 Having considered the rival submissions as well as the relevant material on record, we note that this issue is settled by the decision of the Hon'ble jurisdictional High Court in the case of Hindustan Unilever Ltd. (supra) wherein the Hon'ble High Court has held in paa 23 & 24 as under:*
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> *"23 The fourth and final ground which has weighed with the Assessing Officer in reopening the assessment is that the assessee claimed a deduction of Rs. 14.53 crores under section 10B. The deduction was restricted to Rs. 11.11 crores in the order. While reopening the assessment, the Assessing Officer has proceeded on the basis that section 10B provides an exemption and that in respect of the Crab Stick Unit the assessee had suffered a loss of Rs. 1.33 crores. The Assessing Officer has observed that since the income of the unit was exempt from taxation, the loss of the unit could not have been set off against the normal business income. However, this was allowed by the assessment order and it is opined that the assessee's income to the extent of Rs. 1.33 crores has escaped assessment.*
>
> *24 There is merit in the submission which has been urged on behalf of the assessee that the Assessing Officer has while reopening the assessment ex facie proceeded on the erroneous premise that section 10B is a provision in the nature of an exemption. Plainly, section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10B was substituted by the Finance Act of 2000 with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent. export oriented undertaking, to which the section applies "shall not be included in the total income of the assessee". The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of section 10B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent. export oriented undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be reopened is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four units of the assessee were eligible under section 10B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained*

by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be reopened is contrary to the plain language of section 10B.

29.1 We further note that in the case of Galaxy Surfactants Ltd (supra), the Hon'ble High Court has again decided the identical issue in para 5 & 6 as under:

"5. At the outset, while dealing with the submission which has been urged on behalf of the Revenue, it must be noted that Section 10B when it was originally introduced by the Finance Act, 1988, with effect from 1 April 1989, provided for an exemption of the profits and gains derived by the assessee from a hundred percent export oriented undertaking. The earlier provision specifically stipulated that profits and gains derived by an assessee from a hundred percent export oriented undertaking to which the section applies shall not be included in the total income of the assessee. Section I0A as at present stands, came to be substituted by the Finance Act, 2000 with effect from 1 April 2001. The section as it now stands, is not a provision for exemption, but a provision which enables an assessee to claim a deduction. As it now stands, the section contemplates a deduction of such profits and gains as are derived by a hundred per cent export oriented undertaking from the export of articles and things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be. The deduction has to be allowed from the total income of the assessee. In Hindustan Lever Ltd. v. Dy. CIT [2010] 325 ITR 102 / 191 Taxman 119 (Born.) a Division Bench of this Court considered the provisions of Section 1 OB, while considering a petition challenging the action of the Assessing Officer in purport to reopen the assessment under Section 148. The Division Bench noted that upon the substitution of the provision by the Finance Act, 2000, Section l0B was no longer a provision for exemption, but a provision for deduction. The Division Bench observed as follows:

"Plainly, section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section lOB was substituted by the Finance Act of 2000 with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent export oriented undertaking, to which the section applies "shall not be included in the total income of the assessee". The, provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of Section 1 OB by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent export oriented undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be reopened 'is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four units of the assessee were eligible under Section l0B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be reopened is contrary to the plain language of Section l0B."

This decision of the Division Bench has been followed by another Division Bench of this Court itt the case of CIT v. Patni Computers Systems Ltd. [IT Appeal 2177 of 2010, dated on 1-7-2011].

6. Quite apart from the fact that the issue stands covered against the Revenue by the view taken by the Division Benches in the aforesaid two cases, even as a matter of first principle, we find no justification in the submission which has been urged on behalf of the Revenue. Section 70 provides for a setting off of a loss from 'one source falling under any head of income (other than capital gains) against income from any *other source under the same head. Section 71 provides for the setting off of a loss sustained with reference to one head of income against income from another head, (save and except for capital gains). Under Section 72, a provision has been made for carry forward and setting off of a loss sustained against the head of profits and gains of business or profession. Under Section 72, where a loss which has been sustained under the head of profits and gains of business or profession cannot be set off against income under any head of income under Section 71 so much of the loss as has not been set off or the entire loss where there is no income under any other 'head can be carried forward in the manner which is indicated in the provision. Section 72 which provides for a carry forward of a business loss comes into operation only when the provisions of Sections 70 and 71, as the case may be, are exhausted. There is no provision in Section 10-B by which a prohibition has been introduced by the Legislature in setting off of a loss which is sustained from one source falling under the head of profits and gains of business against income from any other source under the same head. On the other hand, there is intrinsic material in Section l0B to indicate that such a prohibition was sub -section (7) of Section 10B provides that the provisions of sub-section (8) and subsection(10) Section 80-IA shall, so far as may be, apply in relation to the undertaking referred to in the section as they apply for the purposes of an undertaking referred to in Section 80-IA. Section 80-IA contains a specific provision in sub-section (5) to the following effect:*

"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1)apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

A similar provision corresponding to sub-section (5) of Section 80-IA is to be found in sub-section (6) of Section 80-I. Under sub-section (5) of Section 80-IA which begins with overriding non-obtante provisions, profits and gains of an eligible business to which sub-section (1) applies are for the purposes of determining the quantum of deduction to be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year. A provision akin to sub-section (5) of Section 80-IA or for that matter akin to sub-section (6) of Section 80-I has not been introduced by the Legislature when it enacted Section l0B. The fact that unabsorbed depreciation can be carried forward to a subsequent year does not militate against the entitlement of the assessee to set off a loss which is sustained by an eligible unit against the income arising from other units under the same head of profits and gains of business or profession. The Legislature not having introduced a statutory prohibition, there is no reason to deprive the assessee of the normal entitlement which would flow out of the provisions of Section 70."

29.2 Since the decision of the Hon'bel Karnataka High Court in the case of Yokogawa India Ltd is on the issue of setting off of loss from non STGP unit before allowing the deduction u/s 10A and even the Hon'ble Karnataka High Court has relied upon the decision of the Hon'ble jurisdictional High Court in the case of Hindustan Unilever Ltd (supra); therefore, the said decision would not help the case of the revenue.

29.2 Even otherwise, when a series of decision of the Hon'ble jurisdictional High Court are in favour of the assessee on the issue; therefore, the same are binding on us and accordingly, by following the decision of the Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd (supra). We decide this issue in favour of the assessee and against the revenue.

> *29.3 Having held that the provisions of sec. 10B are in the nature of deduction and not exemption; we are of the view that the provisions of sec. 14A are not attracted as far as the issue involved in ground no 1 (c) is concerned."*

Respectfully following the above, we hold that provisions of section 14A are not attracted in the case of the unit suffering losses eligible for deduction under section 10B and further the assessee is entitled to set off of loss of STP unit under section 10B against other business income. The AO is directed to do accordingly. Grounds are considered allowed.

14. **Ground No. 19** pertains to levy of interest under section 234B and 234D, which are consequential in nature and does not require any fresh adjudication. Ground is considered allowed for statistical purpose.

15. **Ground 20** is with reference to initiation of penalty proceedings. Since the issues are restored to the file of the AO for consideration, the question of deciding on the reasons for initiation does not arise and moreover this issue can only be examined when the proceedings under section 271(1)(c) are finalised. Accordingly this ground is treated as pre-mature and rejected.

16. In the result, appeal is 'partly allowed' for statistical purposes.

Order pronounced in the open court on 5th April, 2013.

Sd/-	Sd/-
(I.P. Bansal)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 5th April, 2013
<u>*Copy to:*</u>

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) concerned*
4. *The CIT concerned*
5. *The DR, "K" Bench, ITAT, Mumbai*

By Order

//True Copy// np

Assistant Registrar
ITAT, Mumbai Benches, Mumbai