IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'A' BENCH
BEFORE SHRI I.P. BANSAL, JM & SHRI A.N. PAHUJA, AM

ITA No.3647/Del/2007 Assessment Year:2002-03		
M/s Aithent Technologies Pvt Ltd., A-16/9, Vasant Vihar, New Delhi	**V/s.**	Income Tax Officer, Ward 1(1),C.R. Building, New Delhi
[PAN No.: AAACS2319H]		
(Appellant)		(Respondent)

Assessee by	Shri Abhishek Gupta, AR
Revenue by	Ms. Geetmala Mohanany, DR

Date of hearing	23-11-2011
Date of pronouncement	09-12-2011

O R D E R

A.N.Pahuja:- This appeal filed by the assessee on 14th August, 2007 against an order dated 23rd May, 2007 of ld. CIT(A)-VI, New Delhi, raises the following grounds**: -**

"1. "The order passed by the Ld. Assessing Officer and the Ld. Transfer Pricing Officer is bad in law and on the facts and circumstances of the case.

2. The ld. Assessing Officer/ld. Transfer Pricing Officer has erred in law and on the facts and circumstances of the case in:

a) holding that the transaction between the appellant and its associated enterprise has not been carried out at arm's length price. The said conclusion has been arrived at, ignoring the principle of commercial expediency.
b) Charging notional interest on the loan given by the appellant to its wholly owned subsidiary in USA (i.e. Aithent Inc).

3. The following contentions of ld. AO/ld. TPO, amongst others, are bad in law and on the facts and circumstances of the case:
a) Extending interest free loans to associate enterprise was an entirely separate transaction which was not in conjunction with the main activity of software development and hence merited a separate analysis.
b) The loan was not given from the funds received from ITG Investments (a company which has invested money in the appellant company).

c) The method adopted by the appellant to justify the arm's length price i.e. Transactional Net Margin Method is not justified.

4. The ld. AO has erred in law by not providing an opportunity of being heard to the appellant before passing the order of assessment on the basis of Arm's length price determined by the ld. TPO.

5. The ld. TPO and the ld. AO has erred in law and in the facts and circumstances of the case in applying the Transfer Pricing provisions mechanically and without appreciating the facts and circumstances of the case.

6. The ld. AO and the ld. CIT(A) has erred in calculating deduction u/s 10B of the Act. They have erred in law and in the facts and circumstances of the case by computing deduction u/s 10B of the Income Tax Act, 1961 on the total income of the appellant as against the deduction claimed by the appellant u/s 10B of the Act on the unit-wise income, earned by it.

7. The appellant craves leave to add, modify, amend or forgo any of the grounds of appeal at the time of hearing."

2. This appeal, earlier disposed of vide order dated 19.7.2010,was recalled in MA no. 553(Del.) of 2010 in terms of order dated 3.6.2011.Adverting now to ground nos. 1 to 5 in the appeal, facts, in brief, as per relevant orders are that return declaring income of ₹73,13,540/- filed on 31st October, 2002 and subsequently revised on 05.03.2003 returning loss of ₹2,47,28,350/-. by the assessee, engaged in the business of development of software, after being processed u/s 143(1) of the Income Tax Act, 1961,(hereinafter referred to as the Act) was selected for scrutiny with the service of a notice u/s 143(2) of the Act. Since the assessee entered into international transaction of sale of software of Rs. 16.55 crore with its subsidiary company M/s Aithent Inc, USA (AE in short),the matter was referred to Transfer Pricing Officer (TPO),who vide order dated 18.03.2005 accepted the Arm Length Price (ALP) in respect of international transactions relating to sale of software. However, in respect of interest free loan of USD 15,15,000/- (₹7,39,16,850), the TPO observed as under: -

"The assessee has during the year given periodic interest free loans to its AE totaling to USD 1,51,5,000 corresponding

to Rs. 73,916,850. The assessee has claimed that these loans advanced to the subsidiary were for the purpose of funding the operatins and expansions of business. The arguments put forth by the assessee for not charging any interest can be summarized as: -

i)The loan has been granted by the assessee to promote its own business interests as the assessee is getting all its business revenue from the transactions entered into with the Associated Enterprise.

ii) The amount of interest is already included into the cost of software development costs charged to the AE.

iii)Considering the nature of transaction between the assessee and the AE, there is no data available in the public domain which could be comparable to the transactions between these entities.

Accordingly, the assessee has inferred that no external comparable Uncontrolled Price was available for benchmarking this transaction and thus, it proceeded to apply Transactional Net Margin Method (TNMM) to determine the arm's length basis of this loan. The detailed discussion on this has been given in page 28 of the Transfer Pricing Report.

The assessee has further argued that this loan would have fetched on interest of 10% as per the lending rate authorized by the Reserve Bank of India. The assessee has used overall TNMM in which this notional interest has been factored in the software development income. The notional amount of interest of Rs. 31.51 lacs (page xxxi of the TP report) has been deducted from the Software development income of Rs. 16.64 crores. The operating expenses of the assessee during the year were Rs. 14.91 crores. The net operating margin ratio after deduction of the notional interest element was higher than the average net margins of the comparable. Accordingly, the assessee has concluded that the interest free loan given to its subsidiary was at arm's length.

On analysis of the transactions it was observed that extending of the interest free loans to the AE was an entirely separate transaction which was not in conjunction with the main activity of software development and hence merited a separate analysis. This was also necessary for the reason that the risk/reward profile of a loan is entirely different when compared to that of software development activity. In view of the same, vide letter dated 21.02.2005, it was proposed to the assessee that this interest free loan be analyzed and benchmarked separately.

A detailed reply dated 25.02.2005 was furnished by the assessee on 03.03.2005. Vide this submission, the assessee

contended that the associated enterprise Aithent Inc. USA is a wholly owned subsidiary of the assessee. Both the companies are completely aligned in their business and have exclusive business arrangement whereby the entire development and execution of off shore projects of the AE are outsourced to the assessee. Cent percent of the assessee's US based business and revenues have been generated from Aithent Inc. Aithent Inc. does the marketing and customization in the US and other overseas market and the assessee is responsible for the contact execution and software/product development. For further leverage to Aithent Inc's position, in the E business services market, it needed further investment for its growth and expansion plans. Being a 100% holding, further investment for its growth and expansion plans. Being a 100% holding company, it was the onus of the assessee to invest money in the subsidiary. It could have either invested the same in the form of capital contribution or given it as a loan as per RBI approval. The assessee has further argued that investment in the form of capital may not return back while the loan amount will come back to India once the subsidiary has funds available.

It was also claimed that the loan to the AE had been funded from an amount received from a Singapore based venture capital fund as investment in the assessee company and did not bear any cost to the assessee.

Determination of Arm's Length Price of Interest on loan to subsidiary

The arguments put forth by the assessee were examined. The claim regarding catalyzing the business by infusing funds, in whatever form is not refuted. The expansion of business is liable to devolve fruitfully on the assessee as well as the subsidiary entity. In the light of the same, it is not clear as to why the interest on the funds infused in the form of a loan would have to be forgone by the assessee. Under the arm's length conditions, i.e. if there is no relation between the two persons other than the normal business relation, no person will give loan without charging any interest. Whenever, a person advances a loan to other person, it forgoes its income which it would have earned if the same amount would have been invested in some other financial instrument or deposit. Besides, foregoing the income, it undertakes the risk of loosing the entire amount if the borrower defaults in repayment of loan. Under the arm's length condition no person would undertake such a big risk without expecting any return.

Secondly, on an analysis of the financial transactions of the assessee, it was observed that the amount received from the Singapore based venture capital fund has been received in the F.Y. 2000-01. The Singapore based company ITG Investment had contributed an amount of USD 7 million as share application money. A major part of this share application

money amounting to Rs. 32.61 crore remained invested in the form of FDRs as in the beginning of the financial year. The assessee had exclusive rights on this money and it cannot be compared with interest free borrowing from a third party. At the end of the year, a major part of the FDR stood withdrawn which apparently was used to fund the interest free loan to the subsidiary. Hence, the claim that the money was advanced out of interest free funds is not acceptable.

Therefore, the argument of the assessee regarding not charging of interest from the AE is not persuasive and without any force. As per the Transfer Pricing guidelines, every transaction has to be analyzed separately and the arm's length price has to be benchmarked. Therefore the method adopted by the assessee in factoring the notional interest with the software development function under the TNMM analysis is not acceptable. As discussed above, the amount would have fetched interest in any arm's length transaction. Considering a risk free return from the subsidiary a notional interest of 10% on this loan is considered as the arm's length value of the interest. This notional amount as calculated by the assessee on page xxxi of the TP report works out to Rs. 31,51,259/-. This amount is to be added to the total income of the assessee."

3. On the basis of aforesaid findings of TPO, the AO added an amount of ₹31,51,259/- by way of notional interest @ 10% of the loan of ₹7,39,16,850/- (USD15,15,000 .

4. On an appeal, the ld. CIT(A) upheld the findings of AO/TPO in the following terms: -

2.3 "I have considered the arguments of ld. AR and gone through the observations of the AO. My findings on the issue of addition of Rs. 31,51,250/- u/s 92(c)(4) of the I.T. Act are as under:

(i) The appellant had advanced Rs. 7,39,16,850/- as interest free loan to its AE situated in USA. The AO has charged the notional interest @ 10% against such interest free loan as to determine arm's length price and consequently he made the addition of Rs. 31,51,259/-.

(ii) The ld. AR has objected the aforesaid addition on the ground that the AO did not provide opportunity to the assessee before making addition on the report given by the TPO. The ld. AR relied on the Delhi High Court decision in Sony India Pvt. Ltd. (supra). On going through the said decision containing in para 25(e), I find that the Hon'ble Jurisdictional High Court has observed, "the AO is not bound to accept the ALP as determined by the TPO. He can always be

persuaded by the assessee at that stage to reject the TPO's report and proceed to still determine the ALP by himself."

(iii) Further on going through the case records, I find that the TPO has given the report dated 18.3.05 while the assessment was made u/s 143(3) vide order dated 29.03.2005. Thus, there was difference between the TPO report and the assessment order for 11 days. Further,I find that the representative of the assessee appeared before the AO on 23.03.05 and 29.03.05 i.e. after data of TPO report and date of assessment and filed certain details before the AO.

(iv) Though the record does not speak, whether the AO has given any specific opportunity with reference to TPO report dated 18.3.2005, yet the copy of TPO's report was marked to the assessee and the representative of the assessee appeared twice before the AO after the receipt of TPO's report. Hence, the assessee was fully aware about addition recommended by the TPO and it had sufficient opportunity to file the objection before the AO, if it has any grievance against the TPO's report. Thus, there was default from both the sides, i.e. first the AO failed to provide the specific opportunity with reference to TPO report, on the other hand the assessee failed to file the objection before the AO against the TPO's report dated 18.3.2005, though it had already received the TPO report.

(v) Further, considering the fact that the representative of the assessee appeared before the AO twice after receipt of the TPO report dated 18.3.05 it can safely be presumed that the appellant had been provided implied opportunity against the TPO report by the AO but it failed to avail it. Thus, it can be said that the appellant has not come to equity with clean hand. Hence, the ld. AR plea for not providing the opportunity is not justified.

(vi) On going through the judgment of Hon'ble Delhi High Court in Sony India Pvt. Ltd. (supra) in para 25(e), If find that the assessee was required to persuade the AO to reject the TPO's report and determine the ALP afresh. Thus, the appellant failed to discharge its duty and the ld. AR is not justified to raise this objection before the appellant authority.

(vii) Further without prejudice to the finding given in clauses (iv), (v) of such para 2.3 of this order, on going through the judgment of Hon'ble Delhi High Court in Sony India Pvt. Ltd. in para 20, I find that the Hon'ble jurisdictional High Court has observed, "the AO is required to provide opportunity to the assessee after receipt of the TPO's report before finalizing the assessment", yet, there was no finding about the consequences, in case the AO has failed to provide specific opportunity, though the opportunity was provided impliedly in this case with reference to TPO's report. Thus, it is very difficult to annul the assessment only on the ground that the AO did not provide specific opportunity on receipt of TPO's report to the assessee before making the addition with

reference to arm's length price, though, the appellant had appeared before the AO twice after the receipt of TPO's report dated 18.03.05 and before completion of assessment vide order dated 29.03.05.

(viii) Further, the provision relating to assessment of arm's length price as contained in Chapter X are new provision and it was the first year of such a special provision. Moreover, there was no specific provision and judicial precedent for providing the specific opportunity with reference to the TPO's report by the AO. In the light of these facts and circumstances of the case, I hold that there is no need to interfere with the assessment order merely on the ground that no specific opportunity with reference to TPO's report dated 18.3.05 was provided. Moreover, having co-terminus power with the AO, I am going to consider the appellant's objection on merit which will amount to proper opportunity to the appellant and meet out the principle of natural justice, if at all not followed by the AO, in respect of the TPO's report.

(ix) In respect of merit of the case, I find that the appellant has provided interest free loan amounting to Rs. 7,39,16,850/- to its "Associated Enterprises (AE) situated in USA and used Transactional Net Margin Method (TNMM) to bench mark the international transactions. In this regard, the TPO observed, "that extending of the interest free loans to the AE was an entirely separate transaction which was not in conjunction with the main activity of software development and hence merited a separate analysis." Considering the fact of the case, the TPO in his report dated 18.3.05 further observed, "under arm's length condition i.e. if there is no relation between the two persons other than the normal business relation no person will give loan without charging any interest".

(x) With these observations, the TPO rejected the ld. AR argument for not charging the interest from the AE and further observed as under:

"As per transfer price guidelines, every transaction has to be analyzed separately and the arm's length price has to be bench marked. Therefore, the method adopted by the assessee in factoring the notional interest with the software development function under the TNMM analysis is not acceptable."

Accordingly, the AO worked out the notional interest @ 10% against the interest free loan advanced to the appellant AE situated in US. Considering the TPO report, the AO made an addition to the extent of Rs. 31,51,259/- in the assessment order dated 29.3.2005.

(xi) On the other hand, ld. AR argued that the interest free loan was given with a view to assist the AE as its business was badly affected in 2001 terrorist attack in U.S. considering the fact of the case and legal provision, I find that this argument may deserve for personal sympathy but legally it is not acceptable as the appellant was separate entity than its

AE situated in USA. The appellant had its legal duty to pay the due taxes against the income derived in India before rendering help to its AE. In other words, it can be said that the appellant was required to support its AE situated in US after paying the due taxes in India.

(xii) In respect of argument about 100% income deductible in India u/s 10B and payment of taxes by its AE situated in U.S. is also not tenable. The appellant is required to determine the arm's length price as per provision contained in Chapter X of I.T. Act, 1961 and pay the taxes thereon. It is immaterial, whether appellant income was fully deductible u/s 10B and it did not prevent the TPO/AO to determine the assessee's ALP. Moreover, as per first provision to clause 4 of sec. 92C, no deduction u/s 10B shall be provided against the enhanced income by way of determination of ALP. Moreover, the charging of notional interest while determining the ALP is permissible as the Transfer Pricing Provision is different than the normal provision relating to determination of income.

Considering the fact of the case, I hold that the TPO was justified to determine the arm's length price of the appellant after charging the notional interest @ 10% against the interest free loan advanced to its AE situated in US. Thus, Grounds No. 2 & 3 relating to Transfer Pricing are decided against the appellant."

5. The assessee is now in appeal before us against the aforesaid findings of the ld. CIT(A). The ld. AR on behalf of the assessee while carrying us through the impugned orders and the findings of the TPO contended that the ld. CIT(A) was not justified in upholding the addition, the amount having been advanced to wholly owned subsidiary in USA and the transaction was exceptional in nature. Though the cost of funds so advanced was factored in determining the ALP of transactions of sales made to the AE, no separate addition should be made in view of certain exceptional circumstances since the subsidiary was facing financial crunch. To a query by the Bench, the ld. AR admitted that the transaction of advancing of loan to AE was an independent transaction and while making transfer pricing study, the assessee could not identify any uncontrolled transaction. While relying on the decision dated 20th May, 2011 of the of Chennai Bench of the ITAT in the case of M/s Shiva Industries & Holdings Ltd. in ITA No. 2148/Mad./2010 for the A.Y. 2006-07,the ld. AR further pointed out that in the said decision LIBOR rates were considered as bench mark while determining the ALP of the

transaction in respect of loan given in foreign currency. To a query by the Bench, the ld.. AR admitted that the LIBOR rate was considered by the Bench but in view of 6% p.a. rate charged by the assessee in that case no interference was made, LIBOR rates being 4.42%.

6. On the other hand, the ld. DR supported the findings of ld. CIT(A)/TPO and further pointed out that while adopting the rate of interest of 10%, the TPO/AO considered the RBI rates .

7. We have heard both the parties and gone through the facts of the case as also the decision relied upon by the ld. AR. Indisputably, the aforesaid international transaction of interest free loan to the AE is an independent transaction ,requiring determination of ALP. The assessee in their transfer pricing study inferred that no external comparable uncontrolled price was available for benchmarking this transaction and thus, it applied Transactional Net Margin Method (TNMM) method and concluded that transaction was at arms length. However, the TPO noticed on an analysis of the financial transactions of the assessee that the amount of USD 7 million was claimed to have been received from the Singapore based venture capital fund in the F.Y. 2000-01 through the ITG Investment as share application money. A major part of this share application money amounting to Rs. 32.61 crore remained invested in the form of FDRs as in the beginning of the financial year. At the end of the year, a major part of the FDR stood withdrawn which apparently was used to fund the interest free loan to the subsidiary. Accordingly, the TPO while rejecting the assessee's method considered a risk free return from the subsidiary, a notional interest of 10% on this loan as ALP amounting to ₹31,51,259/-.Consequently, this amount was added to the income and the ld. CIT(A) upheld the findings of the AO. Before us, the ld. DR relied upon a decision of a co-ordinate Bench in Perot Systems TSI(India) Ltd. Vs. DCIT,,2010-TIOL-15-Del, where in the assessee granted interest-free loans to two of its wholly owned subsidiaries in Canada and Dubai. In its Transfer pricing study, the assessee adopted CUP method and justified the interest free loan on

the basis that it had sufficient interest free funds. The TPO rejected the claim and computed notional interest at the rate of 14percent, based on certain domestic borrowings of the assessee.. On appeal, the Tribunal observed that the cost incurred by the assessee was not a relevant consideration under the CUP method and held that it was irrelevant whether the loans were advanced out of own funds or out of borrowed funds and whether the interest free loan were commercially expedient for the assessee or not. However, the Tribunal held that since the transaction was of lending in foreign currencies to its foreign subsidiaries, the comparable transaction should be foreign currency lending between unrelated parties. Since, the assessee had a foreign currency loan from a bank, it held that the rate of lending by the bank would be an appropriate comparable, irrespective of whether such funds were actually used for lending monies to the subsidiaries. On this basis, the Tribunal directed the TPO to recompute the ALP considering the rate at which the assessee had borrowed in foreign currency from the bank. In the light of aforesaid view taken by a co-ordinate Bench and considering the facts and circumstances of the case, we are of the opinion that the asseseee, in the instant case, was required to comply with the provisions of the Act containing the legislation relating to transfer pricing, namely, sections 92 to 92F of the Act , with respect to the said transaction of interest free loan to its subsidiary. In the instant case, neither the AO/TPO nor the ld. CIT(A) recorded any findings on the most appropriate method to be followed in such a transaction. In line with the reasoning in the aforesaid decision in Perot Systems TSI(India) Ltd. (supra), we are of the opinion that CUP method is the most appropriate method in order to ascertain arms length price of the aforesaid international transaction by taking into account prices at which similar transactions with other unrelated parties. For that purpose assessment of the credit quality of the borrower and estimation of a credit rating, evaluation of the terms of the loan e.g period of loan, the amount, the currency, interest rate basis , and any additional input such as convertibility and finally estimation of arm's length terms for the loan based upon the key comparability factors and internal and/or external

comparable transactions are relevant. None of these inputs have anything to do with the costs; they only refer to prevailing prices in similar unrelated transactions instead of adopting the prices at which the transactions have been actually entered in such cases, the hypothetical arms length prices, at which these associated enterprises, but for their relationship, would have entered into the same transaction, are taken into account. Whether the funds are advanced out of interest bearing funds or interest free advances or are commercially expedient for the assessee or not, is wholly irrelevant in this context. The transaction in the present case is of lending money, in foreign currency, to its foreign subsidiary. The comparable transaction therefore should be of foreign currency lending by unrelated parties. The ld. AR relied on decision of Chennai Bench in M/s Shiva Industries & Holdings Ltd.(supra) and suggested to adopt LIBOR rates. However, we find that though Chennai Bench referred to LIBOR rates of 4.42%, since the assessee charged interest @6% , no further addition was made.

7.1 Since in the instant case, neither the assessee nor the TPO/AO and the ld. CIT(A) have examined the applicability of CUP method as the most appropriate method in order to determine ALP of the international transaction of interest free foreign currency loan to its subsidiary by the assessee, we consider it fair and appropriate to vacate the findings of the ld. CIT(A) and restore the matter to the file of the AO for fresh adjudication with the directions to recompute the ALP of the aforesaid international transaction in the light of our aforesaid observations, following CUP method, keeping in view various judicial pronouncements, including those referred to above and of course, after allowing sufficient opportunity to the assessee. Since onus is on the assessee to establish ALP of the international transaction ,the assessee shall also provide all necessary relevant inputs for establishing ALP of the transaction in accordance with CUP method. With these directions, ground nos. 1 to 5 in the appeal are disposed of .

8. The next ground no. 6 relates to computation of deduction u/s 10B of the Act. During the course of assessment proceedings, the AO

noticed that the assessee claimed deduction u/s 10B of the Act on its entire business income in the original return. However, in the revised return, the assessee restricted its claim to those units which earned business profit and carried forward loss of unit having business loss. While referring to provisions of sec. 10B(1) of the Act, the AO concluded that the assessee is entitled to deduct u/s 10B of the Act only from its total income .Accordingly, the deduction u/s 10B of the Act was determined as under: -

		[In₹
Profit from Unit, Gurgaon		*5,07,25,646/-*
Loss from Unit, Bangalore	*95,03,940*	
Loss from Unit, Chennai	*1,25,59,456*	
Loss from Unit, Gurgaon	*95,88,881*	
Loss from Unit, Canada	*14,47,490*	*3,30,99,767/-*
Gross business income		*1,76,25,879/-*

9. On an appeal, the ld. CIT(A) upheld the findings of AO as under: -

> *1.3 "I have considered the arguments of ld. AR and gone through the observations of the AO. I have also perused the provision of sec. 10B of the Act and case laws as relied upon by the ld. AR. My observations on the issue are as under:*
> *(i) The appellant has claimed deduction u/s 10B in the original return against the total income, i.e. after setting off losses of 4 units from profit of one unit, while in the revised return, the deduction was claimed unit wise. On going through the details, I find that there was positive income in unit-1 as Gurgoan, while there was losses from Bangalore, Chennai, unit-II of Gurgaon and Canada unit. In the revised return the appellant had claimed deduction from the profit of first unit of Gurgaon and claimed carry forward losses from remaining 4 units. On the other hand, the AO has set off the losses of the remaining 4 units with the profit of first unit of Gurgaon and allowed the deduction on the balance profit of Rs. 1,76,25,879/-.*
> *(ii) I further find that all the units are deriving income from the software development and exporting the same. On going through the provisions of sec. 10B(1), it is evident that the deduction under this section shall be allowed "**from the total income of the assessee**".*
>
> *(iii) I further find that the phrase 'total income' has been defined u/s 2(45) of the I.T. Act, which reads as under:*
> *"That the total income means the total amount of income rendering in sec. 5 computed in the manner laid down in this Act."*

*Further on going through the provisions of sec. 5(1), I find that "**the total income includes of income from whatever source derived**".*

(iv) Considering the provisions of sections 10B(1), 2(45) and 5(1) of the I.T. Act, I find that the deduction u/s 10B is allowable against the 'total income' of the assessee, which means that the losses first from other units shall be set off from the profit of first unit of Gurgoan and the deduction shall be allowed on the balance income, i.e. the net income which works out after setting off the loss of other units.

(v) As regards arguments based on explanatory note and CBDT Circular about the allowability of deduction from the profit of the business of the undertaking, I find that it may be applicable in case where the assessee was doing different types of business in different undertaking. On the contrary, in the appellant's case I find that all the units are doing the same nature of business and deriving income from export of software. In this situation, the argument of ld. AR for claiming deduction u/s 10B from the positive profit of one unit and claiming losses of other units to be carried forward for setting off in subsequent years is not tenable.

(vi) Further, I do not find substance in the arguments that sec. 10B(c)(ii) permits the assessee to carry forward the losses incurred by remaining four units to be set off in subsequent years before setting off such losses from the positive income derived in 1st unit of Gurgoan in appellant case. On the other hand, I find that as per provisions of sec. 70(1) of the I.T. Act, the loses, incurred in same sources of business under the same head is required to be set off against the income of any other source under the same head. Since the appellant has derived income from the first unit of Gurgaon and derived losses in the remaining 4 units, the losses for the remaining 4 units are required to be set off from the positive income of first unit of Gurgoan and the deduction u/s 10B shall be allowed on the net income.

(vii) On going through the case laws as relied upon by the ld. AR, I find that M/s Mahavir Spinning Mills was relating to allowability of deduction u/s 80HHC and exemption u/s 10B while in the present case the facts is relating to allowability of deduction u/s 10B after setting off the losses of remaining 4 units from the profit of one unit. Thus, there is substantial difference in the facts and the principle laid down in such case is not helpful to the appellant. Similarly, the principle laid down by Mumbai ITAT in DCIT Vs. Decibelle Electronics P Ltd. is also relating to exemption u/s 10A. Hence, the facts was different in that case that the appellant. Further, on going through decision of the ITAT in IIS Infotech Ltd., (supra) I find that the question of allowability of exemption u/s 10B was disputed after amalgamation from export business

while in the appellant case the facts are altogether different. Hence, the principle laid down in that case is also not applicable in the appellant's case.

Considering the fact of the case and on going through the provisions of sections 10B(1), 2(45) and 5(1), I find that the deduction u/s 10B was allowable from the 'total income of the assessee', i.e. after setting off the losses from 4 units from the profit derived in one unit, i.e. first unit of Gurgaon. In this situation, the action of the AO for allowing the deduction from the 'net income' of Rs. 1,76,25,879/- is justified and the same is upheld. Thus, this ground of appeal is decided against the appellant."

10. The assessee is now in appeal before us against the aforesaid findings of the ld. CIT(A). At the outset, the ld. AR on behalf of the assessee invited our attention to the decision of Hon'ble Bombay High Court in the case of Hindustan Liver Ltd. Vs. DCIT, 191 Taxmann 119 (Mum.), wherein it was held that the assessee entitled to deduct u/s 10B in respect of profits of the eligible units while the loss sustained by the four units could be set off against the normal business income.. On the other hand, ld. DR relied upon the decision in the case of CIT Vs. Patspin India Ltd., 15 Taxman.com 122 (Ker.) and CIT vs. Himatasingike Seide Limited ,286 ITR 255 (Karnataka).

11. We have heard both the parties and gone through the facts of the case as also the afore-cited decisions relied upon by both the parties. The extant provisions of sec. 10B(1) of the Act provide for deduction of such profits and gains as are derived by a hundred per cent. export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer, software, as the case may be from the total income of the assessee. Indisputably, each of the five unit is 100%EOU and carry on the business of computer software. The assessee in its revised return claimed deduction of profits of its Gurgaon unit and carried forward the loss of other units. The AO ,on the other hand, set off loss of other units against profit of Gurgaon unit and allowed the deduction accordingly. In

this connection, the Hon'ble Bombay High Court in their decision in the case of Hindustan Unit Liver Ltd. (supra) while adjudicating a similar issue concluded as under:

> ***24.*** *"There is merit in the submission which has been urged on behalf of the assessee that the Assessing Officer has while re-opening the assessment ex facie proceeded on the erroneous premise that sec. 10B is a provision in the nature of an exemption. Plainly, sec. 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 1.4.2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a hundred 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 hundred 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 AO 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 re-opened is contrary to the plain language of sec. 10B."*

12. As regards decision relied upon by the ld. DR in the case of Petspin India Ltd. (supra),following the view taken in CIT Vs. Himat Singike Ltd.(supra), we are of the opinion that the said decision is not applicable to the facts of the instant case since in the cited decisions the issue related to of set off of unabsorbed depreciation brought forward u/s 32(2) of the Act. The Hon'ble High Court while referring to provisions of sec. 28 to 43D of the Act observed that business profit has to be first determined based on sections 32 to 43D of the Act as provided u/s 29

and it is with reference to the profits so determined, deduction eligible u/s 10B(4) has to be computed. Such are not the facts and circumstances before us since the issue before us relates to deduction u/s 10B(4) of the Act in respect of each unit separately without setting of losses of other units. Therefore, reliance on the cited decision is misplaced.

13. In Honeywell International (P) Ltd. Vs. DCIT,26 SOT 503(Delhi), the ITAT allowed set off of loss of amorphous unit, which was otherwise eligible for deduction u/s 10A of the Act, against the profit of other units as per sec. 70 of the Act.

14 Since the lower authorities did not have the benefit of the view taken in the aforesaid decision Hindustan Unit Liver Ltd. (supra), we consider it fair and appropriate to set aside the order of the ld. CIT(A) and restore the matter to the file of the AO for deciding the issue of deduction u/s 10B of the Act raised in the ground no. 6 in this appeal, afresh in accordance with law in the light of various judicial pronouncements, including those referred to above, after allowing sufficient opportunity to the assessee.. With these observations, ground no 6 in the appeal is disposed of.

15. No additional ground having been raised before us in terms of residuary ground no.7 in the appeal, accordingly, this ground is dismissed.

16. No other plea or argument was made before us.

17. In the result, appeal is allowed but for statistical purposes as indicated hereinabove.

Order pronounced in the court

Sd/-	Sd/-
(I.P. BANSAL)	(A.N. Pahuja)
(Judicial Member)	(Accountant Member)

Copy of the Order forwarded to:-

1. M/s Aithent Technologies Pvt. Ltd.,A-16/9, Vasant Vihar, Vasant Kunj,New Delhi.
2. Income Tax Officer,Ward 1(1),C.R. Building,New Delhi.
3. CIT(A)-VI, New Delhi.
4. CIT concerned.
5. DR, ITAT,'A' Bench, New Delhi
6. Guard File.

BY
ORDER

Deputy/Asstt.
Registrar