आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1051/PUN/2015

निर्धारण वर्ष / Assessment Year : 2011-12

Approva Systems Pvt. Ltd.,
C-501, Pune IT Park,
34 Aundh Road,
Pune – 411020 …. अपीलार्थी/Appellant

PAN: AADCA4150F

Vs.

The Dy. Commissioner of Income Tax,
Circle 1, Pune …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Sunil M. Lala
प्रत्यर्थी की ओर से / Respondent by : Shri Vivek Aggarwal

सुनवाई की तारीख / **Date of Hearing : 14.12.2017**		घोषणा की तारीख / **Date of Pronouncement: 12.03.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the assessee is against the order of CIT(A)-13, Pune, dated 18.05.2015 relating to assessment year 2011-12 against order passed under section 143(3) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case and in law, the learned ("ld") CIT(A) has erred in upholding certain disallowances made by the ld. Assessing Officer ("AO").*

Issues relating to disallowance of deduction under section 10B of Act

2. Disallowance of deduction under section 10B of the Act

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in not allowing deduction under section 10B of the Act amounting to INR 1,80,08,196.

3. Rejection of alternate claim of deduction under section 10A of the Act

WITHOUT PREJUDICE to the claim of deduction under section 10B of the Act, on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in complete disregard to the order of ITAT in appellant's own case for the AY 2009-10.

WITHOUT PREJUDICE to the claim of deduction under section 10B of the Act, on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in denying the alternate claim of deduction under section 10A of the Act on the erroneous ground that the appellant does not fulfill the fundamental condition of claiming the deduction under section 10A of being located in free trade zone.

WITHOUT PREJUDICE to the claim of deduction under section 10B of the Act, on the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the ld.AO on the ground that the appellant has not claimed the deduction under section 10A in the return of income.

4. Disallowance of deduction under section 10B on suo-moto transfer pricing adjustment

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in sustaining the disallowance made by the Id. AO under section 10B of the Act on suo-moto transfer pricing adjustment of Rs.64,07,399 made by the Appellant in the return of income.

Grounds of Appeal relating to Transfer Pricing Adjustment

5. Unjust rejection of Transfer Pricing documentation

5.1 On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld. AO in rejecting the transfer pricing documentation maintained by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("Rules"), thereby undertaking a fresh economic analysis during the course of assessment proceedings

5.2 On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld. AO in rejecting the use of the search process applied by the Appellant in the documentation maintained under section 92D of the Act and in adopting inappropriate filters for undertaking the comparative analysis.

6. Unjust rejection of functionally comparable companies

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in rejecting functionally comparable companies from the final set of comparable companies.

6.1 Unjust rejection of Vama Industries Limited (Software development and services segment) as a comparable company selected in the TP study for FY 2010-11

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in rejecting Vama Industries Limited, a functionally comparable company engaged in undertaking software development activities

6.2 Unjust rejection of DCM Limited (Information Technology service segment) as a comparable company.

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in rejecting DCM Limited (Information Technology service segment) which is engaged in undertaking software development activities by merely stating that only financial extracts were provided by the appellant and not the full annual report.

6.3 Unjust exclusion of CG-VAK Software and Exports Limited on the ground that it is a loss making company

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Id. AO in rejecting CG-VAK Software and Exports Limited (Software Services segment) as it is loss making company after excluding foreign exchange gain without providing adequate/cogent reasons.

7. Not allowing use of multiple yea f data

7.1 On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld. AO in not allowing the use of multiple year data as prescribed under Rule 10B (4) of the Rules.

7.2 On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld. AO in using data which was not available at the time of filing return of income for AY 2011-12, by rejecting Appellant's objections on use of contemporaneous data and ignoring the principles of impossibility of performance as per principles enshrined by the Apex Court.

8. Incorrect computation of Operating Profit/Total Cost ("OP/TC") margin

8.1 Incorrectly treating the loss/gain on account of foreign exchange fluctuations as non-operating in nature for calculating the OP/TC margin

On the facts and in the circumstances of' the case and in law, the learned CIT(A)/the learned AO has erred in treating the loss/gain on account of foreign exchange fluctuations as non-operating in nature for calculating the OP/TC margin of Approva India as well as the comparable companies and thus have erred by not following the ratio laid down by various Appellate Tribunal decisions.

8.2 Incorrect computation of OP/TC margins of comparable companies

On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in not considering the Appellant's grounds in relation to incorrectly computing of OP/TC margins of certain companies.

9. *Unjust selection of incomparable companies*

On the facts and circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the Ld. AO in not undertaking an objective comparative analysis and inter-alia selecting companies which are not comparable to the Appellant in terms of functions performed, scale of operations, turnover, extraordinary events, abnormal profit margins and other differences.

10. *Not allowing the Risk adjustment required to OP/TC margin of the selected comparable companies*

On the facts and in the circumstances of die case and in law, the learned CIT(A)/the learned AO has erred in not granting any adjustments for differences in functions undertaken and/or assets employed and / or in risk assumed by the comparable companies vis-a-vis the Appellant, by ignoring the quantification for the differences provided by die Appellant, thereby comparing the OP/TC margin of the comparable companies assuming higher risks with the Appellants captive, risk mitigated operations.

11. *No motive, circumstances, intention of tax evasion by the Appellant*

On the facts and in the circumstances of the case and in law, the learned CIT(A)/learned AO have erred in law by making an addition on grounds of Transfer Pricing to the income declared, ignoring the fact that the Appellant had no malafide intention to shift profits since it is enjoying benefit u/s 10B of the Act.

12. *Incorrect levy of interest under section 234B of the Act*

On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in confirming levy of interest under section 234B of the Act.

3. The assessee has also filed additional ground of appeal No.4A, which is not pressed, hence the same is dismissed as not pressed.

4. The learned Authorized Representative for the assessee at the outset pointed out that ground of appeal No.1 raised in the present appeal is general. Further, grounds of appeal Nos.2, 5 to 12 are not pressed and hence, the only issue which needs adjudication is in grounds of appeal No.3 and 4 and for which, the assessee has also filed modified ground of appeal No.4, which reads as under:-

"On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in sustaining the disallowance made by the ld AO under section 10B of the Act on the suo-moto transfer pricing adjustment of Rs.64,07,399/- made

by the Appellant in the return of income. Alternatively, the Appellant prays that deduction under section 10A of the Act be allowed on the suo-moto transfer pricing adjustment of Rs.64,07,399/- made by it in its return of income."

5. Briefly, in the facts of the case, the assessee was wholly owned subsidiary of Approva US and was providing software development activities and quality assurance services to its associated enterprises on exclusive basis. The assessee also provided software maintenance and support functions like documentation of programme code, IT integration and configuration management to its associated enterprises. For the year under consideration, the assessee had filed original return of income declaring total income of ₹ 5,93,014/- and book profit of ₹ 1,31,04,545/- after claiming deduction under section 10B of the Act at ₹ 1,80,08,196/-. The assessee had paid taxes under the provisions of section 115JB of the Act. The case of assessee was selected for scrutiny. The Assessing Officer noted that the assessee had provided entire services to its associated enterprise namely Approva Corporation, USA. The assessee was remunerated at cost plus margin basis on the entire cost incurred for rendering such software development services. The assessee during the year under consideration had provided software development services amounting to ₹ 14,50,45,119/- to its associated enterprises. The assessee had selected TNMM method as most appropriate method and had voluntarily offered additional income of ₹ 64,07,399/-. The operating profit to total cost ratio was taken as Profit Level Indicator (PLI) in the TNMM analysis. The PLI of assessee after considering voluntary adjustment of ₹ 64,07,399/- was arrived at 10.88%, as per the TP document of assessee. The Assessing Officer held that as the price charged in the international transactions was higher than arithmetical mean price of margins of comparables, the price

charged by the assessee in international transactions in the said segment was treated at arm's length.

6. The issue which needs adjudication before us is in respect of deduction claimed under section 10B/10A of the Act both on regular income and on the additional income offered by way of TP adjustment by the assessee. Accordingly, we restrict our reference to the said issue. The Assessing Officer vide para 4.2 notes that the assessee had claimed deduction under section 10B of the Act which was not admissible as the necessary approval from the Development Commissioner as prescribed by the Ministry of Commerce & Industry, was not obtained by the assessee. The Assessing Officer also noted that the assessee had claimed the benefit of deduction under section 10B of the Act on the profits from voluntary adjustment made to the value of international transactions of ₹ 64,07,399/-. The Assessing Officer in this regard, observed that increased value of international transactions (sales in this case) was not paid into India by the assessee as required by provisions of section 10A/10B of the Act. Consequently, show cause notice was issued to the assessee. Show cause notice also dealt with transfer pricing provisions and other issue which was raised i.e. wrong claim of 10B deduction which was on both counts i.e. being registered STPI unit, was not entitled to claim 10B deduction and also the benefit of said deduction on the profit from voluntary adjustment made to the value of international transactions of ₹ 64,07,399/-. The Assessing Officer vide para 5 at pages 33 onwards discussed the deduction to be allowed under section 10B of the Act. The assessee agitated that the claim of deduction under section 10B of the Act has been allowed in earlier years and since there was no change in facts, the same should be

allowed in subsequent year also. The assessee also made an alternate claim of deduction under section 10A of the Act, without prejudice to its claim of deduction under section 10B of the Act, before the Assessing Officer. Further, in respect of voluntary adjustment, the assessee pointed out that export turnover was defined under Explanation (2)(iv) to section 10B of the Act to mean the consideration in respect of export by the undertaking of articles or things or computer software, received in, or brought into, India by assessee in convertible foreign exchange, in accordance with sub-section (3) ….. Sub-section (3) refers to realization of sale proceeds in convertible foreign exchange. The submission of assessee in this regard was that hence it were sale proceeds that had to be realized in convertible foreign exchange in order to be eligible for deduction under section 10B of the Act. It is further pointed out that sum of ₹ 64,07,399/- represented the transfer pricing adjustment made to the profits of business undertaking and not to the sale proceeds and hence, there was no need to realize the same in convertible foreign exchange. It was also pointed out that in case any disallowance is made under section 92C(4) of the Act by the Assessing Officer, then the assessee is not entitled to claim the deduction under section 10B of the Act; but in the instant case, the assessee itself had disallowed the additional income in the return of income based on transfer pricing review, then on the said amount, the claim of deduction under section 10B of the Act could not be disallowed. Reliance in this regard was placed on the ratio laid down by Bangalore Bench of Tribunal in the case of iGate Global Solutions Ltd. Vs. ACIT (2008) 24 SOT 3 (Bang.). The Assessing Officer in the first instance rejected the claim of deduction under section 10B of the Act and also rejected the alternate plea of claim of deduction under section 10A of the Act. The Assessing Officer also rejected the contention of assessee

that there was no requirement to bring convertible foreign exchange in India and hence, deduction under section 10B of the Act at ₹ 64,07,399/- was disallowed and added to the income of assessee.

7. The CIT(A) noted that the claim of deduction under section 10B of the Act was denied to assessee in assessment years 2009-10 and 2010-11 by the CIT(A) himself. However, the Pune Bench of Tribunal in ITA No.1788/PN/2013 vide order dated 13.01.2015 had restored the matter back to the file of Assessing Officer with direction to give an opportunity to the assessee to substantiate its eligibility for claim of deduction under section 10A of the Act. The CIT(A) observed that though the Tribunal had refrained from adjudicating the allowability of deduction under section 10B of the Act, however, the Tribunal had impliedly upheld the disallowance of deduction claimed under section 10B of the Act. The CIT(A) held that the assessee was not entitled to claim the deduction under section 10B of the Act and also on additional income of ₹ 64,07,399/-. Vis-à-vis alternate claim of deduction under section 10A of the Act, the CIT(A) observed that the said deduction was not available to the assessee as it was not located in Free Trade Zone. Since the assessee had not claimed deduction in the return of income and had not furnished such return of income within period prescribed under section 139(1) of the Act; hence held by the CIT(A) that the assessee is not entitled to claim the aforesaid deduction under section 10A of the Act. In respect of *suo-moto* transfer pricing adjustment of ₹ 64,07,399/-, since the assessee had not brought the said amount in convertible foreign exchange in India, the CIT(A) held that under section 10B(3) of the Act, the deduction is to be granted only on sale proceeds brought into India within prescribed period. Section 10B(iv) of the Act provides

computation formula for arriving at the quantum of deduction. It was thus, held that *Accordingly, suo-moto transfer pricing adjustment can be part of computation formulae as it would add to the amount of business profits, however, it would fail fundamental condition of bringing equivalent amount of foreign currency in India within prescribed period for claiming the deduction.* Therefore, he held that deduction under section 10B/10A of the Act could not be granted on this count. Reliance on the ratio laid down by the assessee on iGate Global Solutions Ltd. Vs. ACIT (supra) was held to be misplaced.

8. The assessee is in appeal against the order of CIT(A).

9. The first issue which is raised before us is the claim of deduction under section 10B of the Act which was made in the return of income and / or alternate claim of deduction under section 10A of the Act, which was claimed during the course of assessment proceedings. The learned Authorized Representative for the assessee pointed out that the Tribunal had set aside the issue in assessment year 2009-10 to the file of Assessing Officer, who in order giving effect to the order of Tribunal had allowed the benefit of deduction under section 10A. He further pointed out that the Assessing Officer had relied on the ratio laid down by the Hon'ble High Court of Delhi in Regency Creations which was on the deduction claimed under section 10B of the Act. However, subsequently, the Hon'ble High Court of Delhi in Fast Booking (I) (P.) Ltd. Vs. DCIT (2017) 80 taxmann.com 142 (Del) had held that alternate claim could not be rejected. The learned Authorized Representative for the assessee also pointed out that the CIT(A) had stated that the return of income was not filed in time and hence, rejected the claim of deduction. However, the return of income

was filed in time i.e. on 30.11.2011 which is mentioned in the assessment order itself at page 1 and since the assessee was registered with STPI, it was entitled to claim deduction under section 10A of the Act. In respect of income offered *suo-moto* in the return of income on account TP adjustment of ₹ 64,07,399/-, the learned Authorized Representative for the assessee pointed out that assessee was a 100% captive Export Oriented Unit and the foreign exchange on exports was realized in time.

10. The issue which is raised by way of modified ground of appeal No.4 is 10A deduction on additional arm's length price offered. Our attention was drawn to the provisions of section 92(1) of the Act, which defines the computation of income from international transactions having regard to the arm's length price. He further referred to section 92C(4) of the Act i.e. where the TP means adjustment on account of transfer pricing provisions and the proviso provides that no deduction under section 10AA of the Act is to be allowed. Then, he relied on the ratio laid down by the Hon'ble High Court of Karnataka in CIT & Anr. Vs. M/s. iGate Global Solutions Ltd. in ITA No.453/2008, judgment dated 17.06.2014 and also placed reliance on the ratio laid down by the Tribunal in the said case reported in (2008) 112 TTJ 1002 (Bang). The learned Authorized Representative for the assessee further stated that the CIT(A) had observed that Tribunal had not considered the claim of section 10A of the Act, where profits are to be received in foreign exchange. Our attention was drawn to the ratio laid down by Bangalore Bench of Tribunal in M/s. Austin Medical Solutions Pvt. Ltd. Vs. ITO in I.T. (TP) A. No.542/Bang/2012, relating to assessment year 2008-09, order dated 17.07.2015, wherein similar issue of claiming 10A deduction arose on

additional TP adjustment made by assessee *suo-moto*. He then, referred to the computation of aforesaid deduction under section 10A(4) of the Act, which talks of profits of business of undertaking would be export turnover to total turnover. The learned Authorized Representative for the assessee pointed out that CIT(A) held it to be profits of business and when the same could not be added to the export turnover or the total turnover and what is taxed in the hands of assessee is artificial income as per section 92(1) of the Act, then it could not be said that the amount against the same had not been received in foreign exchange and hence, the assessee was not entitled to the benefit of 10A deduction. The learned Authorized Representative for the assessee placed reliance on the ratio laid down by Hon'ble Bombay High Court in CIT Vs. Gem Plus Jewellery India Ltd. (2011) 330 ITR 175 (Bom). The learned Authorized Representative for the assessee here stressed that if there was no turnover, then how there could be a condition of getting foreign exchange and something impossible cannot be asked to be done.

11. The learned Departmental Representative for the Revenue in reply, in respect of claim of deduction under section 10B/10A of the Act relied on the order of CIT(A). In respect of second deduction claimed under section 10A of the Act on additional TP adjustment, the learned Departmental Representative for the Revenue pointed out that the issue stands covered against the assessee by the ratio laid down by the Mumbai Bench of Tribunal in Deloitte Consulting India Pvt. Ltd. Vs. ITO in ITA No.157/Mum/2012, relating to assessment year 2007-08, order dated 15.07.2015. He further stressed that the profits derived from exports shall be the amount which bears to the profits of business.

12. The learned Authorized Representative for the assessee in rejoinder pointed out that Mumbai Bench of Tribunal in Deloitte Consulting India Pvt. Ltd. Vs. ITO (supra) had not considered the provisions of section 10A(4) and 92(1) of the Act i.e. artificial income to be taxed in the hands of assessee, which could not stretch to the turnover. He further stressed that stretching of notional income to the turnover of business was not correct. In this regard, he stated that order of Mumbai Bench was *per incurium* the provisions of section. He again referred to provisions of section 92(1) of the Act which talked about income and not turnover and hence, the observations of authorities below were held to be not cogent. Under proviso to section 92C of the Act, where the TPO makes disallowance, it is provided that the assessee would not get 10A deduction. However, in the final analysis, he placed reliance on the decision of the Hon'ble High Court of Karnataka in CIT & Anr. Vs. M/s. iGate Global Solutions Ltd. (supra). He also pointed out that the decision of non-jurisdictional was binding on the Tribunal as laid down by the Hon'ble Bombay High Court CIT Vs. Smt. Godavaridevi Saraf (1978) 113 ITR 589 (Bom). He also relied on the decision of Pune Bench of Tribunal in ACIT Vs. Aurangabad Holiday Resorts (P.) Ltd. (2009) 118 ITD 1 (Pune) and on other decisions on this issue.

13. We have heard the rival contentions and perused the record. The first issue which arises by way of ground of appeal No.3 is whether the assessee is entitled to claim the deduction under section 10B or 10A of the Act. The assessee in the return of income had claimed the deduction under section 10B of the Act. However, during the course of assessment proceedings, the assessee filed an alternate claim that since the unit was registered under STPI,

the assessee was entitled to claim the deduction under section 10A of the Act. Both the authorities below have denied the deduction under section 10B of the Act. Further, on one reason or the other had also denied the alternate claim of assessee under section 10A of the Act. However, we find that the Tribunal in assessee's own case in ITA No.1788/PN/2013, relating to assessment year 2009-10, order dated 13.01.2015 had held that the assessee was not entitled to the claim of benefit under section 10B of the Act, but the assessee was held to be eligible to claim the deduction under section 10A of the Act, for which the matter was restored back to the file of Assessing Officer. The Tribunal in ITA No.1921/PUN/2014, relating to assessment year 2010-11, vide order dated 25.01.2017, following the earlier order of Tribunal in assessment year 2009-10 had also similarly held and had remitted the issue back to the file of Assessing Officer to verify the claim of assessee vis-à-vis eligibility of deduction under section 10A of the Act and passed the order accordingly. The assessee during the course of hearing has placed on record the copy of order passed under section 143(3)/254 of the Act by the Assessing Officer giving effect to the order of Tribunal relating to assessment year 2009-10. The Assessing Officer vide order dated 03.03.2017 has allowed the claim of assessee under section 10A of the Act. The issue thus, stands settled in the case of assessee, wherein as against original claim of deduction under section 10B of the Act in the return of income, the alternate plea of claim of deduction under section 10A of the Act raised during the course of assessment proceedings has been allowed in the hands of assessee.

14. The issue arising in the present appeal before us is identical and following the same parity of reasoning, we direct the Assessing Officer to verify

the claim of deduction under section 10A of the Act in the case of assessee and decide the same in line with directions in assessment years 2009-10 and 2010-11. The Assessing Officer shall afford reasonable opportunity of hearing to the assessee and decide the issue in line with the issue being decided in assessment year 2009-10 in the order giving effect to the order of Tribunal dated 03.03.2017.

15. Now, coming to the second claim of deduction under section 10B/10A of the Act on TP adjustment of ₹ 64,07,399/-. The assessee on its own motion had offered adjustment on account of transfer pricing provision to the extent of ₹ 64,07,399/-. The computation of income is placed at page 40 of the Paper Book. The assessee claims that on the aforesaid additional income offered, it is entitled to claim the benefit of deduction under section 10B/10A of the Act. We may point herein itself that in the return of income, the assessee had claimed the said deduction under section 10B of the Act. However, during the course of hearing before the authorities below, the said claim was revised to 10A deduction. The question thus, which arises before us is whether the assessee is entitled to claim 10A deduction on the additional TP adjustment offered by the assessee on its own motion in the return of income. The assessee was 100% Export Oriented Unit which was captive service provider to its associated enterprises. The total exports were to the associated enterprises and the plea of assessee in this regard is that foreign exchange due on exports has been received in India in time. In order to adjudicate the issue, we need to take into consideration the provisions of section starting with section 92(1) of the Act. The Chapter X of the Act lays down the special provisions relating to avoidance of tax. Under section 92 of the Act, any income arising from

international transactions shall be computed having regard to the arm's length price. In other words, section provides computation of income from international transactions having regard to the arm's length price. The income which is so computed in respect of international transactions entered into by the assessee is notional income in the hands of assessee. This is the basic point which has to be kept in mind while adjudicating the issue raised in the present appeal.

16. Under section 92CA of the Act, where a person has entered into an international transaction in any previous year with its associated enterprises, then in order to benchmark the arm's length price of such an international transaction and to compute its arm's length price under section 92C of the Act, reference is to be made to the TPO by the Assessing Officer under the specified conditions, who in turn has to compute the said arm's length price in the hands of assessee.

17. Section 92C(4) of the Act provides that where an arm's length price is determined under sub-section (3), then the Assessing Officer may compute total income of assessee having regard to the arm's length price so determined. In other words, the Assessing Officer is empowered to compute total income of assessee in relation to international transactions undertaken by the assessee with its associated enterprises. The proviso therein provides that no deduction under section 10A/10AA or 10B or Chapter VI-A of the Act shall be allowed in respect of such amount of income, by which the total income of assessee had been enhanced after computation of arm's length price of international transactions. The income so determined by the Assessing Officer by following

the procedure laid down in Chapter is to be added as additional income of assessee, on which no deduction under section 10A/10AA or Chapter VI-A of the Act is to be allowed.

18. However, in the facts of present case before us, it is not the Assessing Officer or TPO who has determined the additional income on account of transfer pricing provisions. The assessee on its own motion has offered additional income on account of transfer pricing provisions to the extent of ₹ 64,07,399/-. The said income was offered as part of business profits of assessee and was declared as income from business in the computation of income filed by the assessee. The issue which arises is whether on such additional income, the assessee is entitled to claim the benefit of section 10B/10A of the Act. In the first instance, in the paras hereinabove, the assessee is found to be entitled to claim the deduction under section 10A of the Act, which has also been allowed to the assessee in earlier years. Consequently, we restrict our observations to the aforesaid claim whether to be allowed or not in the case of assessee under section 10A of the Act. In this regard, there is need to look at the computation provisions provided in sub-section (4) to section 10A of the Act. The said sub-section reads as under:-

> *"10(A)(1)..*
> *(2)...*
> *(3)...*
> *(4)For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking."*

19. As per said sub-section, the profits derived from the export of articles or things or computer software, shall be the amount which bears to the profits of business of the undertaking, the same proportion as the export turnover in

respect of such articles or things or computer software, bears to the total turnover of business carried on by the undertaking. Thus, the first step we have to look at the profits derived from export of articles or things of computer software and the profits of business of undertaking. The additional income is on the basis of artificial / notional income computed in the hands of assessee under the provisions of section 92(1) of the Act. The case of CIT(A) is that the assessee has failed to bring into country the export proceeds in foreign exchange in respect of such additional income offered and consequently, no deduction under section 10A of the Act is to be allowed. The connected aspect of the issue is that there is no dispute in the minds of authorities below that it is profits of business. Such profit of business is neither export turnover nor the total turnover of assessee but is artificial income which needs to be taxed in the hands of assessee. Consequently, we hold that the said artificial income cannot be part of export turnover or total turnover though it will be part of profits of business. *Simile* which follows is that in the absence of it being offered as export turnover or total turnover, then there could not be any condition for getting foreign exchange to India. The assessee has computed the additional income by following the transfer pricing provisions and has offered the same to tax as its business profits. Once it has been so offered to tax, it forms part of profits of business and while computing the deduction under section 10A(4) of the Act, the said profits have to be taken into consideration and the deduction so computed.

20. We find that on similar facts the Bangalore Bench of Tribunal in the case of iGate Global Solutions Ltd. Vs. ACIT (supra) had allowed the deduction

under section 10A of the Act in respect of transfer pricing adjustment *suo-moto* offered by the assessee. The relevant findings of Tribunal are as under:-

> *"17. We have heard both the parties. Before proceeding further, it will be relevant to reproduce section 10A(1).*
>
> > *"Section 10A. Special provision in respect of newly established undertakings in free trade zone, etc.—(1) Subject to the provisions of this section a deduction of such profits and gains as are derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee :*
> >
> > *Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Finance Act, 2000, the undertaking shall be entitled to deduction referred to in this sub-section only for the unexpired period of the aforesaid ten consecutive assessment years :*
> >
> > *Provided further that where an undertaking initially located in any free trade zone or export processing zone is subsequently located in a special economic zone, by reason of conversion of such free trade zone por export processing zone into a special economic zone, the period of ten. consecutive assessment years referred to in this sub-section shall be reckoned from the assessment year relevant to the previous year in which the (undertaking began to. manufacture or produce such articles or things or computer software) in such free trade zone or export processing zone :*
> >
> > *Provided also that for the assessment year beginning on the 1-4-2003, the deduction under this sub-section shall be ninety per cent of the profits and gains derived by an undertaking from the export of such articles or things or computer software :*
> >
> > *Provided also that no deduction under this section shall be allowed to any undertaking for the assessment year beginning on the 1-4-2010 and subsequent years."*
>
> *18. Section 10A(4) has also been amended with effect from 1-4-2001. Before amendment, the profit derived from export of articles or things was the amount which bears to the profit of the business, the same, proportion as the export turnover in respect of such article or thing or computer software, bears to the total turnover of the business. With effect from 1-4-2001, instead of profits of the business, the words 'profit of the business of the undertaking have been substituted. The word 'undertaking' has not been defined under section 10A. The words 'industrial undertaking' have been defined in the book Law Lexicon by Venkataramiya, at p. 1133 it has been defined as under :—*
>
> > *"The expression 'industrial undertaking' must have a technical and economic content. An industrial undertaking would normally be in its ordinary excitation some industrial concern or enterprise for adventure*

which is undertaking to be done by the person concerned. The definition of 'industrial undertaking in section 3(d) of the Industrial Development and Regulation Act. 1951, means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government. CIT v. Textile Machinery Corpn. Ltd. (1971) 11 ITJ 105 at pp. 112, 113 (Cal.) 75 CWN 186 (Cal.): AIR 1971 Cal. 1, see also Union of India v. Sakseria Cotton Mills Ltd. [1973] 75 Bom. L.R. 100 at p. 105."

19. Industrial undertaking has been defined in section 33B of the Income-tax Act for that section. As per this definition, industrial undertaking' means an undertaking, which is mainly engaged in the business of generation or distribution of electricity or another form of power or in the construction of ships or in the manufacture or processing of goods or in mining. Hence, the meaning of 'industrial undertaking' is not restricted to one unit. The undertaking is to be considered as consisting of a number of units provided all the units are engaged in any of the activities mentioned in Explanation to section 33B. Industrial undertaking has also been defined in Explanation to section 10(15).

20. Before us, it has not been clarified that Pune unit is an independent unit and is in no way related with the activities carried out at Bangalore or Chennai unit. In absence of the facts, it is not possible to say that Pune unit was an independent undertaking engaged in the business of software development, which was in no way related to the software development done at Bangalore or Chennai unit. In case, the Pune unit is found to be independent, then loss from such unit is to be independently calculated. In case such unit is associated with the activities, which are carried out at Bangalore or Chennai unit, then Pune unit will be considered as part of that undertaking. Hence, the issue of ascertaining as to whether Pune unit was an independent unit or a unit associated with activities of other two units is restored back on the file of the Assessing Officer. In case it is found that it is part of the other two units and is associated with the activities done in other two units, then it will be considered as part of the same undertaking and loss will be adjusted. However, in case, if it is found, it is an independent unit, then it will be treated as independent undertaking and the assessee cannot be forced to have exemption in respect of such independent undertaking. In that case the loss will (not) be adjusted against other income.

21. The last grievance is in respect of not allowing deduction under section 10A on the adjustment made by the assessee to the arm's length price.

22.In the instant case, the assessee company entered into transaction with associated enterprise. The assessee company determined arm's length price and accordingly made adjustment to the income because arm's length price determined was more than the consideration, at which the transactions were shown in the books of account. The deduction under section 10A has not been allowed as per proviso to section 92C(4). As per this proviso, no deduction under section 10A or 10B or under Chapter VI-A is to be allowed in respect of amount of income, by which the total income of the assessee is enhanced after computation of income under the sub-section. The. learned Authorised Representative during the course of proceedings has referred to the word 'enhanced'. In case the income is enhanced, then deduction is not permissible. However, in the instant case, income has not been enhanced because the same was already returned by the assessee.In the Memo Explaining the Provisions of Finance Bill, 2006, it has been mentioned as under :—

[2006] 201 CTR (St) 147 : [2006] 281 ITR (St) 196

> *"Under sub-section (4), it has been provided that on the basis of arm's length price so determined, the Assessing Officer may compute the total income of an assessee. The first proviso to sub-section (4) provides that where the total income of the assessee as computed by Assessing Officer is higher than the income declared by the assessee, no deduction under section 10A or section 10B or under Chapter VI-A will be allowed in respect of the amount of income, by which the total income of the assessee is enhanced after computation of income under sub-section."*
>
> *23. From the Memo Explaining the Provisions of Finance Bill, 2006 as well as from the literal meaning of the word 'enhanced', it is clear that if income increased, as a result of computation of aim's length price, then such increase is not to be considered for deduction under section 10A.In the instant case, the assessee himself has computed the arm's length prices and has disclosed the income on the basis of arm's length prices. It is not a case, where there is an enhancement of income due to determination of arm's length price. Hence, it is held that assessee was entitled to deduction under section 10A in respect of income declared in the return of income on the basis of computation of arm's length price."*

21. The Hon'ble High Court of Karnataka in its order in the case of CIT & Anr. Vs. M/s. iGate Global Solutions Ltd. (supra) considered the following substantial question of law raised by the Revenue.

> *"(4) Whether the Tribunal was correct in holding that deduction u/s. 10A of the Act is allowable in respect of income computed on the arm's length price by ignoring the proviso to Section 92(4) of the Act""*

22. The Hon'ble High Court in paras 5 and 6 of its order held as under:-

> *"5. In so far as substantial question of law No.4 is concerned, the error committed by the Assessing Officer was relying on Section 92(C)(4) to a case where Arm's Length Price was determined by the assessee, whereas the said provision applies to a case where Arm's Length Price was determined by the Assessing Officer. That mistake has been corrected by the Tribunal by setting aside the order passed by the Commissioner as well as the assessing authority.*
>
> *6. In that view of the matter, we do not see any error committed by the Tribunal in the impugned order. Therefore, the said question is also answered in favour of the assessee and against the Revenue."*

23. The issue thus, has been decided by the Hon'ble High Court of Karnataka in the case of CIT & Anr. Vs. M/s. iGate Global Solutions Ltd. (supra), wherein the assessee's claim for deduction under section 10A of the

Act in respect of *suo-moto* TP adjustment made by the assessee, has been allowed.

24. The Bangalore Bench of Tribunal in a later decision in the case of Austin Medical Solutions Pvt. Ltd. Vs. ITO (supra) has applied the said proposition of the Hon'ble High Court of Karnataka (supra) and had allowed the deduction claimed under section 10A of the Act in respect of *suo-moto* TP adjustment amounting to ₹ 28,61,352/- while determining the arm's length price of international transactions.

25. The learned Departmental Representative for the Revenue on the other hand, had placed reliance on the ratio laid down by Mumbai Bench of Tribunal in Deloitte Consulting India Pvt. Ltd. Vs. ITO (supra), which does not stand because of the ratio laid down by the Hon'ble High Court of Karnataka on the said issue. Though the said decision is of non-jurisdictional High Court, but the same is binding on the Tribunal in the absence of any contrary decision of the jurisdictional High Court as held by the Hon'ble Bombay High Court in CIT Vs. Smt. Godavaridevi Saraf (supra). The learned Authorized Representative for the assessee has also placed reliance on various decisions of different Benches of Tribunal for the proposition that the decision of non-jurisdictional High Court is binding on the Tribunal. However, the issue stands covered by the jurisdictional High Court and applying the said proposition and in view of our decisions in the paras hereinabove on other issues raised in the present appeal, we hold that the assessee is entitled to claim the aforesaid deduction under section 10A of the Ac on additional income offered on account of *suo-moto* adjustment on account of transfer pricing provisions. The provisions of

section 92C(4) of the Act are not attracted. The modified ground of appeal No.4 raised by the assessee is thus, allowed.

26. The learned Authorized Representative for the assessee has not pressed remaining grounds of appeal and hence, the same are dismissed.

27. In the result, the appeal of the assessee is partly allowed.

Order pronounced on this 12th day of March, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 12th March, 2018.

GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-13, Pune;
4. आयकर आयुक्त / The CIT-I, / CIT (IT/TP), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune