

IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE

SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 277/PUN/2021 : A.Y. 2011-12

The Dy. CIT Cir. 1(1) Pune

Appellant

Vs.

Halliburton Technology Industries Pvt. Ltd.
100, 101 Sai Radhe, Kennedy Road Suite 400
Pune-411 001.
PAN; AABCH 7818 P

Respondent

Appellant by : Shri Arvind Desai
Respondent by : Shri Niraj Agarwal

Date of Hearing : 08-06-2022
Date of Pronouncement : ____-06-2022

ORDER

PER PARTHA SARATHI CHAUDHURY

This appeal preferred by the Revenue emanates from order of the Id. CIT(A)-Pune-13, dated 26-03-2021 for A.Y. 2011-12 as per the following grounds of appeal.

1. *The order of the Ld. CTT(A) is contrary to law and to the facts and circumstances of the case.*
2. *Whether on the facts, circumstances of the case and in law, Ld. Commissioner of Income Tax (Appeals) was justified in interpreting the words "so arranged" used in section 80IA(10) to impose burden on A.O. to prove tax avoidance before invoking section 80IA(10) , of the Act when bare reading of the provision does not impose such burden of proving tax avoidance on A.O.?*
3. *Whether on the facts, circumstances of the case and- In law, Ld. Commissioner of Income Tax (Appeals) was justified in interpreting the words according to the object of the provision ignoring the fundamental principle of interpretation of stature that nothing should be added to the words used by legislature?*
4. *Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in imposing burden of proving tax avoidance ignoring the fact that section 80IA(10) of the Act is a "domestic transfer pricing" provision and proving tax avoidance is not one*

of the pre-condition for invoking transfer pricing provisions?

5. *Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in concluding that net profit of the assessee would not be considered "more than ordinary" and disregarding the fact that tax avoidance is resulted because of claiming excessive deduction u/s 10A on net profit component of "more than ordinary profit."*
6. *For these and such other grounds as may be urged at the time of hearing, the order of the Id. CIT(A) may be vacated and that of the AO restored.*
7. *The appellant craves to add, amend, alter or delete any of the above ground of appeal during the course of appellate proceedings before the Hon'ble Tribunal."*

2. The assessee is the group company of the Halliburton Group companies. The parent company is engaged in manufacturing activity and providing service to the energy industry. The assessee company provides research, development and technical support services in the area of upstream oil and gas. Basically it is engaged in the export of IT enabled services (ITES). The assessee is registered as a hundred percent export-oriented undertaking with the **SEEPZ** special economic zone. The assessee has filed its return of income for the year under consideration on 30.11.2011, declaring total income of Rs. **NIL** under the normal provisions and a book profit of Rs. 96,043,389 under section 115JB of the Act. The case was selected for scrutiny and accordingly, notices were issued to the assessee. The learned AO concluded the assessment proceedings vide Order dated 30.03.2015 u/s 143(3) of the Act by making the addition of Rs. 2,88,27,056/- on account of more than ordinary profits under the provision of section 10B(7) of the Act. With the result, the assessee's total income was assessed at Rs. 2,88,27,056/- under normal provisions and returned MAT income was accepted.

3.1 During the assessment proceedings, the AO observed that for the year under the consideration, the assessee company has earned more than ordinary

profits as the operating margin of the assessee company is 22.38% and the operating margins of the comparable is 13.08%. Thus, the AO asked the assessee to show cause as to why the excess profit shown because of close business connection between the group companies should not be excluded from the eligible profit for the purpose of determining the deduction allowable u/s 108 of the Act, and why disallowance u/s 10B(7) of the IT Act r.w.s. 80IA(10) should not be made for the year under consideration. The appellant made a detailed submission in this regard relying upon various judicial precedents thereof.

3.2 The assessee's submission was duly considered by the AO, but not found to be acceptable to him. The AO then held that where an assessee has such close connection 'with any other person' and where it earns abnormal profits from the transactions with such other person, the existence of 'arrangement' between the parties to the transactions can be safely inferred. In this case, the Assessing Officer demonstrated that profits earned by the assessee were higher profits having regard to the profitability ratios of similarly placed companies as per Transfer Pricing study report of the assessee and thus, the initial onus placed on the revenue was discharged. As per Transfer Pricing Report the operating margins reported by the comparable companies clearly demonstrated that the assessee declared more than ordinary profits. The AO then held that ordinary profits used in sec. 80IA(10) should be taken to construe reasonable profit from eligible business, which can be ascertained by analyzing the cases of comparable companies. Further, as per the AO, the assessee failed to establish with reliable' and cogent data that the profits shown by it in case of eligible units were "ordinary profits'. On the contrary, having regard to the profit margins declared by the comparable entities, it was 'clear that the profits as disclosed by the assessee SEZ Unit segment were more than the ordinary profits which might have been expected to arise in this line of business

3.3 In view of the above fact, an amount of Rs. 2,88,27,056/- was excluded from the eligible profits in accordance with the provisions of section 10(B)(7) of the Act.

4. When the matter travelled before the CIT(A) the assessee placed detailed written submissions which is on record. The assessee has also relied on the following judicial decisions.

Honeywell Automation India Limited (ITA No. 18/PN/2011)

"In our considered opinion, the result of the Transfer Pricing assessment can at best be taken as an indicator for the Assessing Officer to investigate as to whether or not there exists any arrangement which, has resulted in more than ordinary profits qua the requirements of section 10A(7) r.w.s. 80-IA(10) of the Act. Even if it is accepted that the difference between the; 'operating margins of the assessee and the comparables show existence of more than the ordinary profits in the hands of the assessee, so however, it: was still imperative for the Assessing Officer to establish on the basis of substantive evidence and corroborative material that qua section 10A r. w. s. 80-IA(10) of the Act, the course of business between the assessee and the associated enterprises is so arranged that the business transacted between the produces to the assessee more than the ordinary, profits with the intent of abusing tax concession"

Western Knowledge Systems & Solutions (India) Pvt. Ltd. (TS-269-ITAT (2012) 52 SOT 172 (Chen)

The phrase "more than ordinary profits" referred in section 80IA(10) is different from "arm's length price" as referred u/s 92C of the Act. We therefore, set aside the issue to the file of the A.O with a direction to verify the comparables in the light of the decisions in the case of Tweezerman (India) P. Ltd. and Digital Equipment India Ltd.

• Digital Equipment India Ltd. 1(2006)103 TTJ 329 (Bang)

"In this case, the AO has failed to adduce any evidence or reason to satisfy the invoking of s. 80-1 (9). First of all, a mere substantial profit does not give rise to any valid view that there could be any arrangement. It is a case of joint venture listed Indian company, where all arrangements are open for scrutiny and acceptance not only by digital group worldwide but also from joint venture partners and shareholders. Digital group overseas will not pay undue sum, which it cannot recoup entirely to exclusion of others. Hence nothing can be arranged to the exclusive benefit of overseas partner. One cannot presume the existence of close connection or possibility of an arrangement for earning more than 'ordinary profits. In this case the profits earned is comparable with the profits by other companies in the same industry. Hence there is no case for further verification. "

• Visual Graphics Computing Services (InCJia)4!rPvt. Ltd. [TS-27 4-IT A T-2012 (Chny)]

"Therefore, where in a case, the Transfer Pricing Officer suggests that the operating profit declared by an assessee is compatible to the arm's length price norms and no adjustment is necessary, the operation of all those provisions come to an end. If the, Assessing Officer has to make any other adjustment towards computing deduction available under section 10A, the computation has to be made in the context of section 10A(7) read with section 80-IA(10).

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

• Zavata India Private Limited [(TS-24-ITAT-2013(HYD)-TP)P]

"In this case as already stated above, the transfer pricing study has not resulted in any addition and ALP was accepted. As rightly pointed out by the learned Counsel, the receipts are fixed at US\$ 8.5 per hour and the margin of profit became higher only because the operation costs were less being in the non voice based BPO services. Even though the authorities relied on "arranged" transaction between the assessee and AE, we do not see any such arrangement on the facts of the case. Nor there is any passing of profits directly or indirectly. In view of this, since the assessee's operations are efficient enough to obtain more profits and since the receipts are at arms length and there is no passing of excess profits by the parent company (AE) to the assessee, we are of the opinion that Assessing Officer's action in restricting the profits is not correct." We also do not see any reason to restore it to the Assessing Officer since there is nothing else to examine. Accordingly, we allow the grounds of the assessee and direct the Assessing Officer to treat the profits declared by the assessee as ordinary profits and allow deduction under S. 10A, without any further adjustment.

Viston Technical & Services Centre (P) Ltd. (2012) 24 taxmann.com. 353 (Chen)

"It is thus clearly specified in section 92(3) that where computation of income was done, considering the arm's length price for the international transactions and such computation result in reducing the income chargeable to tax or increasing the loss, as the case may be, then the computation that has to be considered is one done based on the entries made in the books in respect of such international transactions, Assessee here had profits which were in excess of the profits of the comparable cases, There was thus no question of addition of Rs. 10,89,20,652/- based on the TPO order. This addition, therefore, stands deleted"

A. T. Kearney India Pvt. Ltd. [TS-527-ITAT-2014(Del)]

"We find that the AO simply relied on the TP study report submitted by the assessee to form a bedrock for the disallowance of the part of the amount of deduction u/s 10A, without firstly showing that there existed any arrangement between the assessee and its overseas related party, by which the transactions were so arranged as to produce more than the ordinary profits in the hands of the assessee. The assessment year under consideration is 2009-10. Neither the proviso to sub-section (10) existed at that time, nor such a proviso can be applied as we are dealing with an international circumstances, we are of the considered opinion that the impugned order upholding the invocation of sub-sec. (10) of sec. 80IA cannot be countenanced to this extent".

5. Thereafter, the Id. CIT(A) after considering the submissions of the assessee and the assessment order observed that the assessee is engaged in rendering ITES in the nature of technical service to its associate enterprises and has bench marked these international transactions which have been

accepted in the past by the TPO. The Id. CIT(A) further opined that the A.O has not understood the concept of “ordinary profit” and “in the course of business” terms. The A.O has simply taken the mean margin of the comparables which is not ordinary profit in the course of business. There are three comparables having more than profits than the assessee. The basis for arriving at the decision that the assessee is having “more than the ordinary profits” is not sound. The A.O has also not brought forward any proof of any arrangements for the disallowance u/s 10B(7) r.w.s. 80IA(10) of the Act. The Id. CIT(A) relied on various judicial decisions placed before him and allowed the ground of the assessee.

6. Before us, the Id. A.R reiterated the submissions made before the subordinate authorities and submitted that the A.O has relied simply on the T.P study report and formed a bed rock that the assessee has made more profits than some of the comparables. However, the A.O has accepted this as a super profit “earned’ by the assessee without assigning any specific reasons. The Id. A.R further submitted that there are plethora of judicial pronouncements by various co-ordinate Benches of the Tribunal, that in respect of disallowance u/s 10B(7) r.w.s. 80IA(10) of the Act the onus is on the department to prove that there existed an arrangement between the assessee and its associate enterprises to earn more than the ordinary profit. If that is not established then there cannot be any addition and corresponding disallowance under the said provisions.

7. This view has been taken by the Pune Tribunal in the case of Eaton Industries Pvt. Ltd. Vs. The ACIT in ITA No. 2544/PUN/2012 for A.Y. 2008-09 dated 30-10-2017, wherein the Tribunal had observed and held as follows:

9. We find that the Pune Bench of Tribunal in assessee's own case for assessment year 2006-07 had held that the onus was on the Department to prove that there existed an arrangement between the assessee and its associated enterprises to earn more than ordinary profits. The relevant observations of the Tribunal are in para 23, which read as under:-

"23. Now coming to the facts of the present case where the assessee had shown profits from its Engineering Design & Development Services which was an STPI unit and had shown the net profit range of 72.98%, and the international transaction of the assessee with its Associated Enterprises had been accepted by the TPO in his report under section 92CA of the Act to be at Arm's Length and the Assessing Officer had adopted the said profit margins and after verification had allowed the claim of deduction under section 10A of the Act in respect of the activity of rendering Engineering Design Services. The question is whether deduction claimed under section 10A of the Act could be curtailed. The answer is 'No' in view of the ratio laid down by the Tribunal in Honeywell Turbo Technologies (India) Pvt. Ltd. Vs. DCIT in ITA No.2584/PUN/2012 order dated 10-02-2017 which has been applied by the Tribunal further in Tata Johnson Controls Automotive Limited Vs. DCIT (supra). The onus is upon the department to prove that there existed an arrangement between the assessee and its Associated Enterprises to earn more than ordinary profits and in the absence of the said onus having been discharged by the department and following the parity of reasoning as in Honeywell Turbo Technologies (India) Pvt. Ltd. Vs. DCIT and Tata Johnson Controls Automotive Limited Vs. DCIT (supra), we find no merit in the order of the Commissioner passed under section 263 of the Act in holding that the Assessing Officer while granting deduction under section 10A of the Act has passed the said order without any application of mind. Similar issue of invoking of jurisdiction under section 263 of the Act by the Commissioner curtailing the deduction under section 10B(7) r.w.s. 80IA(8) and 80IA(10) of the Act arose before the Tribunal in Spicer India Ltd. Vs. CIT (supra) and the Tribunal vide order dated 08-07-2015 in similar circumstances had reversed the order of the Commissioner passed under section 263 of the Act."

10. The Tribunal also vide para 25 held that where the transaction had been benchmarked by applying CUP method, which was also applied by the TPO and no adjustment was proposed by the TPO, then there is no merit in disturbing the deduction claimed under section 10A of the Act by applying the provisions of section 10A(7) r.w.s. 80IA(10) of the Act. The relevant para 25 read as under:-

"25. Another aspect of the order of Commissioner is that it has not given any finding and has directed the Assessing Officer to apply the provisions of section 10A(7) r.w.s. 80IA(10) of the Act with respect to operating profit margin to cost, shown by the Engineering Design and Development Services at 270%, vis-à-vis, operating profit margin to cost shown by Business Support Services at 7.39% or any other suitable benchmark found after fresh search, if the Business Support Services was found to be not comparable to the Engineering Design and Development Services, as vehemently argued by the assessee. The order of the Commissioner passed under section 263 of the Act in the above said circumstances lacks jurisdiction for not coming to a

conclusion and directing the Assessing Officer to make enquiries and also carry out fresh search, if necessary. Under the garb of exercise of jurisdiction under section 263 of the Act the Commissioner cannot ask the Assessing Officer to make fishing and roving enquiries. In any case the basis for the exercise of jurisdiction under section 263 of the Act is the result shown by the Engineering Design and Development Services, i.e. operating profit margin to cost at 270%, which are to be applied while applying the TNM method. For the sake repetition it is again pointed out that the TPO has not applied TNM method but has applied CUP method. The information with regard to operating profit margin over cost was provided to the TPO during TP assessment proceedings but has not been applied by the TPO. In any case where the Engineering Design & Development Services were benchmarked on CUP method by the TPO, the same establishes the case of the assessee that the two divisions are separate and distinct and cannot be compared. In the absence of same, there is no merit in the order of the Commissioner in holding that the Assessing Officer has not applied his mind in comparing operating profit margin over cost of two separate divisions of the assessee. It may also be pointed out herein itself that the total turnover of Engineering Design and Development Services was Rs.60.67 crores and under the Design & Development Services the total turnover of international transaction was only Rs.2.66 crores. Because the order of the TPO in this regard has become final and has been accepted by the Assessing Officer under which no addition has been made in the margins shown by the Engineering Design and Development Services, there is no merit in the order of Commissioner in comparing the operating profit margin to cost of the said division shown at 270% with the operating profit margin to cost shown by the BSS segment at 7.39%. Accordingly, the directions of the Commissioner in curtailing the deduction under section 10A of the Act by applying provisions of section 10A(7) r.w.s. 80IA(10) of the Act are not correct and are reversed. The finding of the Commissioner that the assessee had shown higher profits in STPI unit for claiming deduction under section 10A of the Act is thus misplaced. In view thereof we find no merit in the order of the Commissioner passed under section 263 of the Act and reversing the same we hold that the assessee is entitled to deduction under section 10A of the Act in the entirety.”

11. We may further point out that the Hon'ble Bombay High Court in CIT Vs. M/s. Schmetz India Pvt. Ltd. in Income Tax Appeal No.1382 of 2013, judgment dated 24.06.2015 had while deciding the issue of claim of deduction under section 10A of the Act in respect of profits derived from an eligible unit engaged in the business of manufacturing industrial sewing machine needles and export the same to its German parent company, where the assessee was earning margins of 77.91% as against those of the comparables being 60% had upheld the order of Tribunal. The Tribunal had held that the Assessing Officer was not able to prove that there was an arrangement between the assessee and its parent company resulting in extraordinary profits, where the assessee had concentrated on exports to its parent company only, which had resulted in higher profits. The Hon'ble High Court affirming the decision of the Tribunal held that extraordinary profits earned by the assessee could not lead to the conclusion that there was an arrangement between the assessee and its associated enterprises. The relevant extract of the decision of the Hon'ble Bombay High Court is as under:-

“8. So far as question (a) & (b) are concerned, we find that the Tribunal has considered the entire evidence and on facts come to the conclusion that the profits earned by Kandla division of the respondent-assessee is not abnormally high due to any arrangement between the respondent-assessee and its German Principal. The Tribunal correctly held that extraordinary profits cannot lead to the conclusion that there is an arrangement between the parties. This would penalize efficient functioning. Further, the authorities have also recorded a finding that the industrial sewing machine needles imported and traded by the Mumbai division are different from those manufactured & exported by the Kandla division. Consequently, this also negatives any arrangement between the parties to show extraordinary profits in respect of its Kandla division so as to claim deduction under section 10A of the Act. These are findings one of fact. The appellant-revenue have not been able to show that the findings are perverse or arbitrary. In the circumstances, questions (a) and (b) as formulated by the appellant/revenue do not raise substantial questions of law in the present facts and are therefore dismissed.”

12. The decision of the Hon'ble Bombay High Court in CIT Vs. M/s. Schmetz India Pvt. Ltd. (supra) and in CIT Vs. M/s. Schmetz India Pvt. Ltd. (supra) has been approved by the Hon'ble Supreme Court.”

8. In the aforesaid decision, the Tribunal had referred to one decision of Hon'ble Bombay High Court in the case of Schmetz India Pvt. Ltd. in Income-Tax Appeal No. 1382 of 2013 dated 24-06-2015 wherein in a different issue, the Tribunal's order was upheld by the Hon'ble High Court. The Tribunal has held that the A.O was not able to prove that there was an arrangement between the assessee and its parent company resulting in extraordinary profits, where the assessee had concentrated on exports to its parent company only, which had resulted in higher profits. The Hon'ble High Court affirming the decision of the Tribunal held that extra ordinary profits earned by the assessee could not lead to the conclusion that there was an arrangement between the assessee and its associated enterprises. The relevant extract of the decision of the Hon'ble High Court is as follows:

“8. So far as question (a) & (b) are concerned, we find that the Tribunal has considered the entire evidence and on facts come to the conclusion that the profits earned by Kandla division of the respondent-assessee is not abnormally high due to any arrangement between the respondent-assessee and its German Principal. The Tribunal correctly held that extraordinary profits cannot lead to the conclusion that there is an arrangement between the parties. This would penalize efficient functioning. Further, the authorities have also recorded

a finding that the industrial sewing machine needles imported and traded by the Mumbai division are different from those manufactured & exported by the Kandla division. Consequently, this also negatives any arrangement between the parties to show extraordinary profits in respect of its Kandla division so as to claim deduction under section 10A of the Act. These are findings one of fact. The appellant-revenue have not been able to show that the findings are perverse or arbitrary. In the circumstances, questions (a) and (b) as formulated by the appellant/revenue do not raise substantial questions of law in the present facts and are therefore dismissed."

9. The said decision of the Hon'ble Bombay High Court in CIT Vs. M/s. Schmetz India Pvt. Ltd. (supra) has been approved by the Hon'ble Supreme Court.

8. We find that co-ordinate Bench Bangalore in the case of Digital Equipment India Ltd. Vs. dy. CIT (2006) 103 TTJ 329 (Bang) on the same principle has observed and held as under:

"Held that the requirements of section 80-1(9) are:

a) There must be a close connection between the appellant and other person.

(b) The course of business between them should be so arranged that it produces to the appellant more than the ordinary profits from such business.

To satisfy the above tests the Assessing Officer has to adduce evidence and reasons cogently and the same are open to verification by the appellate authorities. The primary rule of evidence is that 'what is apparent is real' unless proved otherwise by the person alleging it otherwise. The manner of satisfaction outlined in the section should be based on evidence and not on surmise or suspicion. The question is not whether the onus is light or heavy but whether the Assessing Officer has discussed objectively the conditions mentioned in the section to disturb the results declared by the appellant. In this case, the Assessing Officer had failed to adduce any evidence or reason to satisfy the invoking of section 80-1(9). First of all, a mere substantial profit does not give rise to any valid view that there could be any arrangement. It was a case of joint venture listed Indian company where all arrangements were open for scrutiny and acceptance not only by Digital Group worldwide but also from joint venture partners and shareholders. Digital Group overseas would not pay undue sum which it could not recoup entirely to exclusion of others. Hence nothing could be arranged to the exclusive benefit of overseas partner. One cannot presume the existence of close connection or possibility of an arrangement for earning more than ordinary profits. In the instant case the profits earned were comparable with the profits earned by other companies in the same industry. Hence there was no case for further verification. The Assessing Officer had compared the profit of software unit with that of hardware unit. Thus the foundation itself was on wrong premise. There cannot be comparison between an orange and an apple. It is known fact that profitability of software units is always higher than that of hardware units. When the profits earned were reasonable and not excessive, there was no reason to sustain the addition. Further was no evidence of existence of any arrangement as contemplated under section 80-1(9). As regards non-existence of separate books, section 80-1(9) nowhere mentions maintenance of separate books. Thus the addition made by A.O in invoking section 10A(6) read with sec. 80-1(9) was not well founded and deserves to be deleted."

9. This decision of the Bangalore Tribunal was considered by the co-ordinate Pune Bench in the case of Honeywell Automation India td. [2020] 115 taxmann.com 326 dated 03-03-2020. The Tribunal observed and held as follows:

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

“The requirements under the section are :

(a) There must be a close connection between the appellant and other person.

(b) The course of business between them should be so arranged that it produces to the appellant more than the ordinary profits from such business.

To satisfy the above test the AO has to adduce evidence and reasons cogently and the same is open to verification by the appellate authorities. The primary rule of evidence is that "what is apparent is real" unless proved otherwise by the person alleging it otherwise. The manner of satisfaction outlined in the section should be based on evidence and not on surmise or suspicion. The question is not whether the onus is light or heavy but whether the AO has discussed objectively the conditions mentioned in the section to disturb the results declared by the appellant. In this case, the AO has failed to adduce any evidence or reason to satisfy the invoking of s. 80-1(9). First of all, a mere substantial profit does not give rise to any valid view that there could be any arrangement. It is a case of joint venture listed Indian company, where all arrangements are open for scrutiny and acceptance not only by digital group worldwide but also from joint venture partners and shareholders. Digital group overseas will not pay undue sum, which it cannot recoup entirely to exclusion of others. Hence nothing can be arranged to the exclusive benefit of overseas partner. One cannot presume the existence of close connection or possibility of an arrangement for earning more than ordinary profits. In this case the profits earned is comparable with the profits earned by other companies in the same industry. Hence there is no case for further verification. The AO has compared the profit of software unit with that of hardware unit. Thus the foundation itself is on wrong premise. There cannot be comparison between an orange and an apple. It is known fact that profitability of software units is always higher than hardware unit. The test whether the appellant has earned more than ordinary profits, in this case, the answer is obvious NO, even as found by the AO. When the profits earned are reasonable and not excessive, there is no reason to sustain the addition Further there is no evidence of existence of any arrangement as contemplated under s. 80-1(9).”

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

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

31. No doubt, there is a close connection between assessee and the associated enterprises and to that extent section 10A(7) r.w.s. 80-IA(10) of the Act has been rightly examined by the income-tax authorities. The second aspect that the course of business was so arranged so as to result in more than ordinary profits is not at all forthcoming from the order of the Assessing Officer. There is no material or evidence referred to in the assessment order to indicate that the course of business has been so arranged so as to inflate profits with the intent to abuse tax concession u/s 10A of the Act. At this point, we may make a reference to the stand of the Assessing Officer that the operating profit margins of the assessee are substantially higher than the average operating margin of the comparables selected by the assessee in its Transfer Pricing Study. This has formed the basis for the Assessing Officer to say that assessee has earned more than ordinary profits which might be expected to arise in such a business. Be that as it may, the aforesaid is not enough to say that the course of business has been so arranged to result in more than ordinary profits. However, from the side of the Revenue, it was pointed out that the Transfer Pricing comparability analysis itself suggests that the profit margins of the assessee are more than the ordinarily accepted margin in this line of business. The moot question is as to whether the same can be considered as a material to indicate that the course of business between the assessee and the associated enterprises has been so arranged, so as to result in „more than the ordinary profits“ within the meaning of section 10A(7) r.w.s. 80-IA(10) of the Act. In this context, we may refer to the decision of the Chennai Bench of the Tribunal in the case of Visual Graphics Computing Services India (P) Ltd. vs. ACIT, 148 TTJ 621 (Chennai), wherein following discussion is relevant :-

“We heard both sides in detail and considered the issue. As far as the present case is concerned, the Transfer Pricing Officer has made a categorical finding that the operating profit reported by the assessee is higher than the profit worked out on the basis of arm's length price. The Transfer Pricing Officer, therefore, concluded that no transfer pricing adjustment is called for in the present case. The Assessing Officer has made the reference to the Transfer Pricing Officer under section 92CA. The reference is made for the purpose of computing income arising from an international transaction with regard to the arm's length price as provided in section 92. Therefore, it is to be seen that the scope and extent of reference made by the Assessing Officer to the Transfer Pricing Officer is confined to the singular purpose stated in section 92. Sections 92A, 92B, 92C, 92CB, 92D, 92E and section 92F are all precisely defining and facilitating provisions ultimately for the purpose of computing the income as stated in section 92. All the above stated sections provided in Chapter X of the Income-tax Act, 1961 belong to a separate code as such, enacted for the purpose of computing income from international transactions having regard to the arm's length price so as to confirm that there is no avoidance of tax by an assessee. Therefore, where in a case,

the Transfer Pricing Officer suggests that the operating profit declared by an assessee is compatible to the arm's length price norms and no adjustment is necessary, the operation of all those provisions come to an end. If the, Assessing Officer has to make any other adjustment towards computing deduction available under section 10A, the computation has to be made in the context of section 10A(7) read with section 80-IA(10).

It is clear that in a case of transfer pricing assessment, it has got two segments. The first segment consists of rules and procedures for computing the income other than the income arising out of international transactions with associate enterprise. The second segment consists of rules and procedures in connection with computation of income from international transactions with associate enterprises on the basis of the arm's length price. The second segment relating to computation of the arm's length price, is a set of rules for the purposes of transfer pricing matters and those procedures and rules can be used only for the purpose serving the object of section 92. When the Transfer Pricing Officer states that there is no need of transfer pricing adjustment, the matter should end there and any other adjustment that the Assessing Officer would like to make with reference to the first segment must be made independent of the order of the Transfer Pricing Office under section 92CA.

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

In fact these issues have already been considered in various orders of the Tribunal. The Income-tax Appellate Tribunal, Chennai "A" Bench in the case of Tweezerman (India) P. Ltd. v. Addl. CIT [2010] 4 ITR (Trib) 130 (Chennai) (133 TTJ 308) has considered the matter in detail and held that the reduction of eligible profits of an assessee as done by the Assessing Officer by invoking the provisions of section 80-IA(10) read with section 10B(7), in the context of the Transfer Pricing Officer's order is unsustainable. The Tribunal has held that the Assessing Officer was not justified to invoke the provisions of section 80-IA(10) read with section 10B(7) so as to reduce the eligible profits on the basis of the arm's length price computed by the Transfer Pricing Officer without showing how he determined that the assessee had shown more than "ordinary profits".

As rightly argued by learned senior counsel the arm's length price is determined on the basis of the most appropriate method. The most appropriate method is chosen either on profit basis method or price basis method. In the latter case, profits are not at all considered. In that method, profit is only a derivative of prices. When profits itself is not worked out, how is it justified to adopt the arm's length price profits to determine what is "ordinary profits" for the purpose of section 10A(7)?

In the facts and circumstances of the case, we hold that the Assessing Officer has erred in reducing Rs.4,48,50,795 from the eligible profits of the assessee under section 10A. The said adjustment made by the assessing authority in computing the deduction under section 10A is accordingly, deleted."

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

“Accordingly, the section only encumbers the A.O. to examine if the profits derived from the eligible business by the assessee is more than the ordinary profits, then the A.O. has to arrive as to what could be the reasonable profit from the such eligible business and such profit has to be then taken as reasonably deemed to have been derived from the eligible business for the purposes of computing deduction under the section.

33. The aforesaid discussion in the assessment order reveals that as per the Assessing Officer, the existence of close connection and more than ordinary profits is enough to assume an arrangement as contemplated u/s 80-IA(10) of the Act. The aforesaid understanding, in our view, is directly contrary to the judgement of the Hon^{ble} Karnataka High Court in the case of H.P. Global Soft Ltd. (supra) and our discussion in the earlier part of this order.

34. In view of the aforesaid, we conclude by holding that in the present case, the Assessing Officer has not proved that any arrangement had been arrived between the parties which resulted in higher profits. Consequently, the re-working of the profits by Assessing Officer by invoking section 10A r.w.s. 80-IA(10) of the Act is not justified. The action of the Assessing Officer to restrict the deduction u/s 10A of the Act to Rs.7,74,60,281/- as against the claim of Rs.36,35,09,382/- is hereby set-aside. Thus, assessee succeeds on this aspect.”

10. That on examination of the aforesaid facts and circumstances and considering the judicial pronouncements placed on record we are of the considered view that the A.O in this case has not brought out why the profits of the assessee will not be considered as ordinary profits in the course of business. The A.O has specifically not demonstrated any proof of arrangement for disallowance under the provisions of sec. 10B(7) r.w.s. 80-IA(10) of the Act. The judicial pronouncements clearly make it mandatory for the Revenue to prove that there is some special arrangement between the assessee and its

associated enterprise to earn extra profit and this burden of proof has not been discharged by the Department. In view thereof, we do not find any reason to interfere with the findings of the Id. CIT(A) and the relief provided to the assessee is sustained.

11. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on this 10th day of June 2022

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Pune; Dated, the 10th day of June 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-13, Pune.
4. The CCIT(IT) West Zone, Mumbai
5. The PCCIT Pune.
6. The PCIT – 1 Pune.
7. D.R. ITAT 'C' Bench
8. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

1	Draft dictated on	08-06-2022	Sr.PS/PS
2	Draft placed before author	09-06-2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	10-06-2022	Sr.PS/PS
7	Date of uploading of order	10-06-2022	Sr.PS/PS
8	File sent to Bench Clerk	10-06-2022	Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		