INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1751 and 4365/Del/2011
(Assessment Year: 2004-05 and 2005-06)

ACIT, Circle-10(1), New Delhi	Vs.	Denso India Ltd, The Capital Court, 3rd Floor, Left Wing, Olof Palm Marg, Munirka, New Delhi PAN:AAACD4255F
(Appellant)		(Respondent)

Revenue by:	Shri Amrendra Kumar, CIT DR
Assessee by :	Shri Kanchal Kaushal, CA Shri Anubhan Rastogi, Adv
Date of Hearing	11/09/2017
Date of pronouncement	05/12/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the appeals filed by the revenue against the order of the ld CIT(A)-XX, New Delhi dated 19.01.2011 and 29.07.2011 for the Assessment Year 2004-05 and 2005-06.

2. The revenue has raised the following grounds of appeal in ITA No. 1751/Del/2011 for AY 2004-05:-

"1. *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the enhancement of income by the AO by Rs. 29,600,000/- on account of payment of royalty holding that the International related party transactions of the appellant do not satisfy the Arm Length Principle envisaged under the Act.*

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the enhancement of income by the AO by Rs. 17,100,000/- determined by the CUP method after duly making comparison between the import prices of the assessee transactions with Sumitomo Japan and the prices of similar components subsequently localized .

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.1,194,259/- made by the AO on account of NICNET charges paid to M/s Denso Haryana, ignoring that the internet facilities were wholly & exclusively for the business of M/s Denso Haryana and not for the assessee company."

3. The revenue has raised the following grounds of appeal in ITA No. 4365/Del/2011 for AY 2005-06:-

(1) On the facts and circumstances of the case and in law whether the Ld CIT(A) was correct in deleting the addition of Rs. 12,53,92,899/ - made by the A.O. on account of TPO's order under section 92CA(3) on account of adjustments in the ALP of international transactions of the assessee.

(2) On the facts and circumstances of the case and in law whether the Ld CIT(A) was correct in deleting the addition of Rs. 87,82,391/-, by holding it as revenue expenses, as against the said Royalty expenses being treated as capital expenditure by the AO.

(3) On the facts and circumstances of the case and in law whether the Ld CIT(A) was correct in deleting the addition of Rs. 5,12,449/-, by holding it as revenue expenses, as against the said expenses of Application cost being treated as capital expenditure by the AO.

(4) On the facts and circumstances of the case and in law whether the Ld CIT(A) was correct in deleting the addition of Rs 10,44,714/- (Rs.8,95,625 + Rs.1,49,089/-) paid to Denso Corporation, Japan, for Technical Cost & Training fee by treating the same as Revenue expenditure as against being held as Capital expenditure by the AO."

4. The first we take the appeal for AY 2004-05 and narrate the facts that assessee is a public ltd company and Denso Japan held 47.93% equity shares in the company. For the year assessee filed its return of income declaring income of Rs. 240000569/- on 29.10.2004. The assessee has entered into the 'international transaction' related to payment of royalty which was referred to the ld Transfer Pricing Officer u/s 92CA(3) of the Income Tax Act. The assessee has paid royalty of Rs. 5.166 crores to its parent. The assessee has also entered into certain other international transaction of import, export, payment of technical fees, purchase of software and reimbursement of expenses over and above the payment of royalty. Assessee benchmarked these transactions other than reimbursement applying Transactional Net Margin Method (TNMM) as the most appropriate method and adopted profit level indicator of operating profit/ total cost selecting nine comparables and using multiple year data derived at average margin of comparables @3.38% whereas, the assessee's margin was 6.19% and therefore, the international transaction of payment of royalty as per TP Documentation was stated to be at arm's length.

5. The ld Transfer Pricing Officer held that merely on the basis of the agreement between the assessee and AE, it cannot be considered that transactions at are Arm's Length without establishing the commensurate economic benefit for the payment of royalty. Therefore, the ld Transfer Pricing Officer applied the TNMM adopting OP/TC as PLI using single year data with appropriate turnover filters selected three comparables and then determined the margins of the comparables @7.77% against 6.19% of the assessee. Therefore, the ld TPO proposed an adjustment of Rs. 2.96 crores on account of royalty payment at and Rs. 1.71 crores on account of import of goods. The above adjustments were incorporated by the ld Assessing

Officer in the assessment order u/s 143(3) of the Act dated 29.12.2006 determining the total income of the assessee at Rs. 287894828/-. The assessee preferred appeal before the ld CIT (A) who vide order dated 19.01.2011 allowed the appeal of the assessee. Therefore, revenue is in appeal before us.

6. The first ground of appeal is with respect to the adjustment of Rs. 2.96 crores on account of ALP of the royalty.

7. The ld Departmental Representative relied upon the orders of the ld Assessing Officer and TPO.

8. The ld AR relied upon the order of the ld CIT(A) as well as submitted that even if the approach of the TPO or of the ld CIT(A) with respect to PLI is considered the transaction entered into by the assessee falls within (+)/ (-) 5% range and therefore, in view of the Circular No. 12/2011 dated 23.08.2001 no addition can be made. The ld AR submitted a written submission which is as under:-

"1. DENSO India Limited is a public limited company and is held 47.93% by DENSO Corporation, Japan while the balance is held by other promoters, Institutional Investors, and others (including public). Further, among the aforesaid equity holders, Sumitomo Corporation, Japan (hereinafter referred to as 'Sumitomo Japan') held 10.27% shares in the respondent during the assessment year (AY) 2004-05. (Please refer page 8 of paper book for shareholding pattern)

2. DENSO India was engaged in the business of manufacturing and distribution of a wide range of automotive components including Alternators, Starters, Wiper Motors, Fans, Ventilators, Window Washers, Print Motors, Magneto and Capacitor Discharge Ignition (CDI). In addition to the above, it was also engaged into resale of spare parts some of which were imported from overseas group entities.(Re: page 26-31 of paper book for TP study and page 457- 458 for TP order)

3. During the year under assessment, DENSO India entered into the following international transactions with its associated enterprises (AEs) within the meaning of sections 92 to 92F of the Income Tax Act, 1961 ('Act'). (Re: page 458 of paperbook)

Sr. No.	*Transactions entered during the year*	*Amount as per TP Study (Rs. In crores)*	*MAM as per TP Study*
1	*Import of raw material and*	*0.083*	*TNMM*
2	*Export of finished goods (Samples)*	*0.042*	
3	*Payment of royalty*	*5.166*	
4	*Payment of application cost and technical assistance fee*	*2.852*	
5	*Purchase of Software*	*0.016*	
6	*Reimbursement of expenses*	*0.217*	*CUP*

4. The ground wise background and the respondent's contentions to the department's grounds of appeals is as follows:

Re: Ground No. 1 of Grounds of Appeal: Addition on account of Payment of Royalty to AE

1) Background of Transaction

1.1. As detailed in Para 2 above, Denso India is a full-fledged manufacturer of auto components. It depends upon Denso Japan for technical information which is in the nature of designs, engineering data, manufacturing and process data, machinery and facility layouts, testing and quality control data, production and testing equipment data etc. Denso India has also entered into various agreements with Denso Japan for such information. The royalty pertains to product patents, technical information on manufacture and sale of products and know how ranging from 3% of net sales and 5% of export sales along with lump sum payment. (Re: Copies of Agreements on page 331 -406 of paper book for AY 2005-06).

1.2. For benchmarking its international transaction of payment of royalty covered under class 1 transactions (Sr. No. 1-5 of Table 1) the respondent adopted the following approach:

Particulars	*Result*	*Page*
Most Appropriate Method Applied	*TNMM*	*50*
Profit Level Indicator ('PLI')	*Operating Profit/Total Cost (OP/TC)*	*50*
No. Of Comparables	*9*	*50*
Unadjusted / Working Capital Adjusted Margin of Comparables using multiple yeardata	*4.12%, 3.38%*	*50*
Respondent's Margin (OP/TC)	*6.19%*	*65*

2) Transfer Pricing Assessment Proceedings and Assessment Proceedings

2.1 The Learned Transfer pricing officer ('TPO') vide order under section 92CA(3) of the Act dated 15/12/2006 gave the following observations w.r.t. the international transaction of payment of royalty :

2.2 The Ld. TPO disregarded the detailed submissions and formal agreements between the respondent and its AE's and ruled that the formal agreement between the AE's cannot be a basis for determining the arm's length price of the transactions. Therefore, payment of royalty cannot be justified on the basis of agreement between the respondent and the AE. The real test lies in commensurate economic benefits in which the profits earned by the enterprise over and above the industry average can be considered as income attributable to the payment of royalty.

2.3 Consequently, the Ld. TPO applied TNMM using OP/TC as the PLI for benchmarking the international transaction of payment of royalty using single year data and applied turnover filter 100 crores (selection of comparables having turnover greater than 100 crores against the Assessee's turnover filter of Rs. 50 crores) and selected comparables used in TP proceedings for AY 2003-04 without considering the comparables for AY 2004-05. (Ref: Page 464 to 466 of paper book)

2.4 Thereafter, the Ld. TPO arrived at a set of 3 comparables and determined the arm's length PLI at 7.77% as against the respondent's PLI of 6.19%.

S. No.	*TPO's Comparables*	*OP/TC %*
1	*Amforge Industries Limited*	*9.93*
2	*Hi-Tech Gears Limited*	*9.26*
3	*Subros Ltd.*	*4.12*
Average		*7.77*

2.5 The Ld. TPO proposed an adjustment of Rs. 4.67 crores to the value of international

transaction related to payment of royalty being the differential of arm's length PLI and respondent's PLI (7.77-6.19=1.58%) applied on total cost of the respondent being 295.53 crores. (Detailed calculation on page 466 of paper book)

2.6 The Ld. AO incorporated the order of the Ld. TPO in its order and consequently made an addition of Rs. 2.96 crores on account of royalty and Rs. 1.71 crores on account of international transaction of import of goods from Sumitomo Corporation, Japan which is detailed in the succeeding discussion relating to ground no. 2. (Ref: Page 449-452 of Paper book)

3. Respondent's Appeal before the Learned Commissioner of Income Tax (Appeals) ('CIT (A)')

3.1 The Ld. CIT(A) accepted the respondent's filter of accepting companies having turnover > Rs. 50 cr. and disregarded the TPOs' methodology of accepting companies having turnover> Rs. 100 crores and also granted working capital adjustment vis a vis the comparables selected by the respondent.

3.2 The Ld. CIT(A) held that since the transactions of the appellant with its AE's are on the cost side the PLI should have a base which should not be controlled and therefore OP/Sales is the appropriate PLI for benchmarking the international transaction of payment of royalty (Re: Page 443 of paper book). The Ld. CIT(A) also granted benefit of +/- 5% range as mandated u/'s 92C(2) of the Act which had been ignored by the Ld. TPO/AO.

3.3. Thereafter, the Ld. CIT(A) arrived at a set of 6 comparables and determined the arm's length PLI at 6.44% as against the respondent's PLI of 5.83%.

S. No.	TPO's Comparables	OP/Sales %
1	Amforge Industries Limited	8.26
2	Axles India Ltd.	5.38
3	Hi Tech Gears Ltd.	8.07
4	Mahindra Sona Ltd.	12.87
5	Shardlow India Ltd.	0.35
6	Subros Ltd.	3.72
Average		6.44%

3.4. Keeping in view the above, the Ld. CIT(A) held that the respondent's international transaction with AE's met the arm's length test as the OP/Sales of 5.83% earned by the respondent falls within the +/- 5% range allowed as per proviso to section 92C(2) of the Act. (Re: Page 443 of Paper book)

4) Respondent's Contentions

- *Need for payment of royalty*
- *The Ld. TPO ignored the detailed evidentiary information (designs, drawings, product standards, engineering data etc.) submitted by the Respondent to substantiate the arm's length nature of royalty payment to associated enterprises and wrongly assumed that no significant economic benefit arose to the respondent from receipt of such technical know-how/information. (Refer page 417 and 418 of the paper book).*
- *In fact the respondent has immensely benefitted from the intangibles granted by its AE's and the respondent could not have carried out its business and sold "Denso" products to customers in India without the ongoing technology transfer and continuing right to use such intangibles obtained from its AE's. To substantiate the same, the past 5 year's trend of the sales turnover which shows an 85% jump in the turnover from*

March 1999 to March 2004 is as follows:

Denso India Ltd. (Sales In Rs. Crores)					
Mar - 99	*Mar-2000*	*Mar-01*	*Mar-02*	*Mar-03*	*Mar-04*
169.5	*197.22*	*238.94*	*250.56*	*256.46*	*313.83*

Therefore, from the above, it can be established beyond doubt that the respondent has benefitted immensely from the use of intangibles provided by its AE's.

The Respondent has made use of sophisticated technology developed and upgraded by the AE's on a continuous basis. It is worth mentioning that the respondent has earned an operating profit before royalty payment of Rs. 23.45 crores in FY 2003-04, out of which it has paid a royalty of Rs. 5.16 crores i.e. only about 1 /5th of such profits.

Benefit of +/- 5% range as mandated under proviso to section 92C(2) of the Act to be allowed

The Ld. TPO/AO did not grant the benefit of +/- 5% as mandated u/s 92C(2) of the Act. Once the same is allowed the position will be as follows:

Particulars	*OP/TC*
Operating margin of comparables (as per TP	*7.77%*
+/- 5% Range	*5.47%-*

** Case 2: If the approach of CIT(A) is upheld keeping OP/Sales as the PLI*

(Re: page 443 of Paperbook)

Particulars	*OP/Sales*
Operating profit of the Respondent	*5.83%*
Operating margin of comparables (as per TP	*6.44%*
+/- 5% Range	*5.26-7.42%*

Conclusion. As is evident from the above discussion the respondent's international transaction of payment of royalty to its AE's meets the arm's length standard by satisfying both the need and benefit test as well as within +/- 5% range as mandated by the Act. Therefore, the appellant's ground is liable to be dismissed.

Re: Ground No. 2 of Grounds of Appeal: Addition on account of Imports from Sumitomo Japan

1) Background of Transaction

1.1. During FY 2003-04, the respondent imported various raw materials, parts and components etc. from Sumitomo Japan. These parts were subsequently localised as per Indian market conditions in the later years. Since, Sumitomo Corp. Japan ('SCJ') only held 10.27% share in the respondent company it was not considered to be an associated enterprise of the respondent as it was less than 26% as mandated u/s 92 of the Act and therefore not reported in form 3CEB by the respondent and consequently not separately benchmarked.

2) Transfer Pricing Assessment Proceedings and Assessment Proceedings

2.1 The Ld. TPO did not consider this transaction as an international transaction and did not make a mention of the same in the TP order. However, the Ld. AO considered the same as an international transaction by bringing the same

under the ambit of section 92B(2) of the Act by relying on the order of his predecessor for AY 2002-03. (Re: Page 451 of the Paper book).

2.2 Relying upon the methodology adopted by the TPO/AO for preceding year, the Ld. AO determined Comparable Uncontrolled Price ('CUP') method to be the most appropriate method for benchmarking the international transaction and compared the prices of imported raw material and components from SCJ with that of domestic vendors either during the same year or in subsequent years. (Re: Page 451 and 456 of the Paper book).

2.3 Consequently the AO made an addition to the tune of 1.71 crores to the international transaction of imports of raw material and components from SCJ and reduced this adjustment from the addition of 4.67 crores made to the international transaction of payment of royalty as discussed in para 2.5 and 2.6 above. (Re: Page 452 of paper book)

3) Respondent's Appeal before the Learned CIT(A)

3.1. The Ld. CIT(A) upheld the TPOs' approach of considering the transactions between respondent and SCJ as a deemed international transaction u/s 92B(2) of the Act holding that the relationship between the respondent, its holding co. Denso Japan and SCJ is such that Denso Japan could influence the terms of transaction between respondent and SCJ. (Re: Page 430 of Paper book)

3.2. However, the Ld. CIT(A) observed that CUP is not an appropriate method for determining the ALP of import transaction and therefore, deleted the adjustment on this account pointing out that there are significant differences between the characteristics of the transaction of import of raw materials and components from SCJ and that of local Indian vendors. Therefore, the prices of imported raw materials cannot be compared with prices of locally procured materials. (Re: Page 433,434 of Paper book)

4) Respondent's Contentions

- *The import price would include a very significant element or component constituting intellectual property rights, which are embodied in the parts, components and other items, whereas the prices of the Indian vendors do not include the intellectual property rights element at all as the respondent provides tools, jigs and dies to local Indian vendors from whom it procures localized components.*
- *Manufacturing and other costs incurred by a manufacturer in Japan are far more than the costs that are incurred by any manufacturer in India. All other items of costs such as overheads, transportation facilities and even the cost of factory land and building in Japan are far more than the cost of similar items in India. A far higher income level has the inevitable effect and consequence of generally higher prices for all items in the economy as a whole.*
- *The components imported by DENSO India during the year, which were localised in subsequent financial years, were not at all available in India during the period when imports were made and hence a meaningful comparison is not possible. The majority of the localized components, whose prices the Ld. TPO used as a CUP against the corresponding import prices, were in fact localized in the financial year subsequent to the financial year of import of these components by DENSO India. The use of prices of components localized in the subsequent financial year for comparison by the Ld. TPO is contrary to the Rule 10B(4) of the Indian Income Tax Rules, 1962 (Rules) as*

per which data for only current year or for a period not more than previous two years can be used to determine the arm's length price of an international transaction. Hence, the Indian Transfer Pricing legislation does not permit usage of future years' data for the purposes of comparability;

- *The CUP method requires extremely stringent comparability factors to be met, in the absence of which reliable adjustments need to be made to ensure a just and fair comparison. In the instant case, it is not possible to adjust for the various differentiating factors between the case when DENSO India imports components and the case when the components are subsequently localized, and therefore CUP cannot be applied as the most appropriate method.*

5. *Judicial Reliance: (In Respondent's own case)*

   - *In ACIT vs. Denso India Limited (64 SOTjLBty-th^Don'ble Delhi ITAT upheld the use of CUP and set aside the issue to the file of the AO with the direction to determine the ALP by trying to ascertain the price at which such components or parts were being exported by Denso Japan outside Japan or the price at which they were sold by the AE in the domestic market, if possible or in any other manner. (RE: Para 44 of the order)*

   The key observations of the Hon'ble bench are as follows:

   "39. As there is a high degree of product comparability, in our considered opinion CUP method is the most appropriate method to be followed in the case on hand. The finding of the learned CIT(A) on this issue does not convince us. If there are significant difference in the facts and circumstances between the transactions of import of raw-material and components from Japan vis-a-vis procurement of raw- material and components from local Indian vendors, suitable adjustments can be made for the same. The method itself cannot be rejected. Hence, this issue is decided in favour of the Revenue.

   40. Next issue is whether future data can be taken for the purpose of comparables. On this issue we uphold the order of the Commissioner of Income- tax (Appeals) that the Transfer Pricing Regulations do not contemplate taking into account future data for the purpose of bench marking. Hence in respect of 7 components, the TPO's action in using future data is rightly held as not in consonance with Transfer Pricing Provisions. "

   • In Denso India Ltd. vs. CIT [388 ITR 324] the Hon'ble Delhi High Court upheld the stand taken by the Hon'ble ITAT in respondent's own case (supra) and held that CUP has been rightly applied by the TPO. In reaching such conclusion the court gave the following observation:

   "Now, there can be no dispute that the Assessing Officer would normally accept the figures given, if they do not show features that call for his interference. However, his job also extends to critically evaluating materials and in cases which do require scrutiny, go ahead and do so. In the process, at least in this case, the unusual features which remained unexplained by the assessee, influenced the TPO and the Assessing Officer to resort to transfer pricing adjustment and determine ALP by adopting the CUP method for the procurements from Sumitomo." [Re: Para 16 of the order]

   Therefore, the court did not find an infirmity in this approach and application of CUP method was upheld. However, the respondent reiterates its arguments advanced in para 4(supra), that CUP cannot be applied to this international transaction and the approach of the CIT(A) must be upheld in this regard.

Re: Ground No. 3 of Grounds of Appeal: Addition on account of 'NICENET' charges paid to Denso Haryana for use of intranet facility

1. Background of Transaction

1.1. *During FY 2003-04, the respondent paid an amount of Rs. 11,94,259 towards cost of sharing the intranet facility called NICENET to M/s Denso Haryana.*

2) *Assessment Proceedings*

2.1 *The Ld. AO disallowed the expense considering the agreement pursuant to which these charges were paid as a sham agreement on the ground that it was effective with retrospective effect and specific charges that were to be charged for this service were not mentioned. The Ld. relying on past years took into account that the same addition on the same reasoning was done by the AO in AY 2002-03 and 2003-04.*

3) *Appeal before Ld. CIT(A)*

3.1. *The Ld. CIT(A) relied on the order for AY's 2002-03 and 2003-04 allowed the expenses u/s 37(1) considering that there was no change in facts and circumstances of the case.*

4) *Respondent's Contentions*

- *It is pertinent to note that for AY 2002-03 and AY 2003-04, vide order dated February 27, 2013, the Hon'ble ITAT upheld the order of the CIT(A) which deleted the adjustment made by the Ld. AO on account of NICENET charges to Denso Haryana. [Re: Para 12 of ITAT order]*
- *The observations of the Hon'ble ITAT have been upheld by the Hon'ble Delhi High Court in Respondent's own case in CIT vs Denso India Ltd. (374 ITR 62) [Re: Para 5 of order].*
- *Considering that the facts of the case are same as previous year's it is respectfully prayed that this ground of the department be summarily dismissed."*

9. We have carefully considered the rival contentions. Briefly stated the facts are that the assessee is engaged in the business of manufacturing and distribution of a wide range of automotive components including Alternators, Starters, Wiper Motors, Fans, Ventilators, Window Washers, Print Motors, Magneto and Capacitor Discharge Ignition (CDI). In addition to the above, it is also engaged into resale of spare parts some of which were imported from overseas group entities. As submitted Denso India is a full-fledged manufacturer of auto components. It depends upon Denso Japan for technical information which is in the nature of designs, engineering data, manufacturing and process data, machinery and facility layouts, testing and quality control data, production and testing equipment data etc. Denso India has also entered into various agreements with Denso Japan for such information. The royalty pertains to product patents, technical information on

manufacture and sale of products and know how ranging from 3% of net sales and 5% of export sales along with lump sum payment. The copy of the agreement furnished before us as per page 331 to 406 of the paper book. The dispute between the PLI adopted by the ld Transfer Pricing Officer as well as of the assessee is OP/TC whereas, the ld CIT(A) has adopted the PLI of OP/Sales. Further, the assessee has shown that it has benefitted by the improved sales of its business. The assessee has also shown that it has earned an operating profit of Rs. 23.45 crores in Assessment Year 2004-05 wherein, royalty payment is Rs. 5.16 crores only. Even otherwise assessee has submitted two comparative charts which shows that if the PLI of OP/TC is adopted then operating profit of the respondent company is 6.19% whereas the operating margin of the comparables companies selected by the TPO is 7.77% and the ± 5% range is 5.47% to 7.61% . However, the above addition to the Arm's length price is made by the ld Assessing Officer. The ld CIT(A) has deleted it holding that the appellant has paid similar royalty in Assessment Year 2002-03 and no transfer pricing adjustment was proposed and ITAT has allowed the claim of the royalty as revenue expenditure. We do not subscribe to the finding of the ld CIT(A) as allowance of the expenditure operates in altogether different provisions of the law as well as the determination of arm's length price of international transaction operates in different. Further, as in the impugned assessment order the adjustment on account of arm's length price is made of Rs. 2.96 with respect to the service availed by the assessee. The ld CIT(A) has not given any answer to that fact. Further, the ld Assessing Officer has made an adjustment of Rs. 4.67 crores on the benefit test basis which is not permissible. Further, the comparability analysis made by the TPO is based on the past year, which is also not permissible. In view of this we set aside the whole transaction of determination of ALP of royalty back to the file of the ld Assessing Officer to determine the same in accordance with the law. Further, if the operating profit of the respondent falls into ± 5% range then no addition should be made. In the result ground No. 1 of the appeal of the Revenue is allowed accordingly.

10. Ground No. 2 of the appeal is on account of imports from Sumitomo, Japan . During the year assessee imported raw materials from Japan which were localized as per Indian market condition. As the total share holding of Japanese Company in assessee company was 10.27% it was not considered as international transaction and therefore not reported in TP study documents as well as not separately benchmarked. The ld Assessing Officer held the same to be international transaction u/s 92B(2) of the Act. As held in Assessment Year 2002-03 the AO applied CUP method and compared price of imported raw material with domestic vendor of the same year or in subsequent year and made an adjustment of Rs. 1.71 crores on that

account. On appeal before the ld CIT(A), he upheld that the transaction of import is an international transaction but deleted the adjustment holding that CUP is not an appropriate method.

11. The DR aggrieved, relied upon the orders of the ld Assessing Officer and submitted that CUP is the most appropriate method and therefore, adjustment is correctly made. It was further stated that the ld CIT(A) did not pin point the differences in the material of the local vendors. He further stated that ld CIT(A) has wrongly held that TNMM is to be used. He referred to para No. 27 and 28 of the order of the ld CIT(A) and submitted that these are general remarks.

12. The ld Authorised Representative submitted the same argument as were raised before the ld CIT(A). It was further stated that identical issue is decided in case of the assessee for Assessment year 2002-03 and 2003-04 wherein it has been held that most appropriate method for import of raw material and component is the CUP method.

13. We have carefully considered the rival contentions and also perused the orders of the lower authorities. The ground No. 2 of the appeal of the revenue is squarely covered by the order of the coordinate bench in assessee's own case wherein, the same was considered in para No. 38 and 39 holding that CUP method is the most appropriate method to be followed with respect to the import of raw material and components. Therefore, we also accordingly, upheld CUP method to be adopted for this year. With respect to the adjustment of Rs. 1.71 crores the coordinate bench has held in para No. 48 and 49, the matter was ultimately set aside to the file of the ld Assessing Officer for fresh adjudication in accordance with the law. The coordinate bench has also given a direction to the ld Assessing Officer vide para No. 44 about the comparability analysis. The above decision of the coordinate bench has further been upheld by the Hon'ble Delhi High Court in 388 ITR 244. Therefore respectfully following the decision of the coordinate bench in assessee's own case for earlier years, we also set aside the whole issue back to the file of the ld AO with similar direction for application of CUP method and adopting comparable analysis as directed by the coordinate vide para No. 44 and 45 of the order. Accordingly ground No. 2 of the appeal of the revenue is allowed with above direction.

14. Ground No. 3 of the appeal is with respect to the disallowance of Rs. 1194259/- on account of NICNET charges paid to M/s Denso Haryana, ignoring that the internet facilities were wholly & exclusively for the business of assessee and not for the assessee company as covered by the decision of the Hon'ble Delhi High Court in assessee's own case in 374 ITR

62. Therefore, respectfully following the decision of the Hon'ble Delhi High Court the ground No. 3 of the appeal of the revenue is dismissed.

15. In the result appeal of the revenue for the AY 2004-05 is partly allowed.

16. Now we come to the appeal of the revenue for the Assessment Year 2005-06.

17. The brief facts of the case is that the assessee filed return of income declaring income of Rs. 262158889/- on 30.10.2005. The assessment u/s 143(3) was completed on 29.12.2008 assessing the total income of the assessee at Rs. 403736285/-. The ld Assessing Officer made the following adjustment to the total income of the assessee:-

a. ALP with respect to the international transactions of Rs. 125392899/- and
b. treating part of the international transaction such as royalty etc treating it as capital expenditure and allowing depreciation thereon resulting into net addition of Rs. 14948590/-.

18. On appeal before the ld CIT(A) he directed the ld Assessing Officer to delete the addition on account of ALP vide para No. 6.11 to 6.18 of his order and with respect to the capital expenditure he followed the decision of the coordinate bench in case of the assessee for earlier years and held that these expenditure are revenue in nature. Aggrieved revenue is in appeal before us.

19. The ld Departmental Representative for all the grounds relied upon the order of the ld Assessing Officer whereas the ld AR has submitted his written submission as under:-

"Background

1. *DENSO India Limited is a public limited company and is held 47.93% by DENSO Corporation, Japan while the balance is held by other promoters, Institutional Investors, and others (including public). Further, among the aforesaid equity holders, Sumitomo Corporation, Japan (hereinafter referred to as 'Sumitomo Japan') held 10.27% shares in the respondent during the assessment year (AY) 2004-05.* ***(Please refer page** 8 **of paper book for shareholding pattern)***
2. *DENSO India is engaged in the business of manufacturing and distribution of a wide range of automotive components including Alternators, Starters, Wiper Motors, Fans, Ventilators, Window Washers, Print Motors, Magneto and Capacitor Discharge Ignition (CDI). In addition to the above, it was also engaged into resale of spare parts some of which were imported from overseas group entities* ***(Re: page 17-23 of paper book for TP study and page 178 for TP order)***
3. *During the year under assessment, DENSO India entered into the following international transactions with its associated enterprises (AEs) within the meaning of sections 92 to 92F of the Income Tax Act, 1961 (Act').*

Sr. No.	***Transactions entered during the year***	***Amount as per TP Study (Rs.)***	***MAM as per TP Study***
1	*Purchase of raw material*	*1,83,337*	

2	*Sale of finished goods*	*51,69,561*	
3	*Payment of royalty*	*6,12,80,272*	
4	*Application cost paid*	*35,75,676*	
5	*Technical fees paid*	*62,49,341*	*TNMM*
6	*Technical know-how fees paid*	*6,63,09,460*	
7	*Training fees paid*	*10,40,286*	
8	*IT cost fees paid*	*6,19,261*	
9	*Reimbursement of expenses paid*	*14,735*	
10	*Miscellaneous receipts*	*19,42,702*	

Sr. No.	***Transactions entered during the year***	***Amount as per TP Study (Rs.)***	***MAM as per TP Study***
11	*Reimbursement of expenses received*	*28,00,157*	*CUP*

4. The ground wise background and the respondent's contentions to the department's grounds of appeals is as follows:

Re: Ground No. 1 of Grounds of Appeal: Addition of Rs. 12.53 crores made by the AO on account of TPO's order u/s 92CA (Adjustment in Arm's Length Price ('ALP') of payment of royalty and technical services)

1) Background of Transaction

1.1. As detailed in Para 2 above, Denso India is a full-fledged manufacturer of auto components. It depends upon Denso Japan for technical information which is in the nature of designs, engineering data, manufacturing and process data, machinery and facility layouts, testing and quality control data, production and testing equipment data etc. Denso India has also entered into various agreements with Denso Japan for such information. The royalty pertains to product patents, technical information on manufacture and sale of products and know how ranging from 3% of net sales and 5% of export sales along with lump sum payment. (Re: Copies of Agreements on page 331-406 of paper book).

1.2. For benchmarking its international transaction of payment of royalty and technical services covered under class 1 transactions (Sr. No. 1-8 of Table 1) the respondent adopted the following approach:

Particulars	***Result***	***Page Reference***
Most Appropriate Method Applied	***TNMM***	*33*
Profit Level Indicator ('PLI')	***Operating Profit /Total Cost (OP/TC)***	*40*
No. Of Comparables	***14***	*42*
Working Capital Adjusted Margin of Comparables using multiple year data	***3.79%***	*42*
Respondent's Margin (OP/TC)	***6.84%***	*59*

2) Transfer Pricing Assessment Proceedings and Assessment Proceedings

2.1. The Learned Transfer pricing officer ('TPO') vide order dated 23/10/2008 under section 92CA(3) of the Act gave the following observations w.r.t. the international transaction of payment of royalty, technical services fees, know how fee (hereinafter referred as 'royalty and technical services fees') etc:

2.2 The Ld. TPO disregarded the detailed submissions and formal agreements between the respondent and its AE's and ruled that the formal agreement between the AE's cannot be a basis for determining the arm's length price of the transactions. Therefore, payment of royalty/technical services and know how fees cannot be justified on the basis of agreement between the respondent and the AE. The real test lies in commensurate economic benefits in which the profits earned by the enterprise over and above the industry average can be considered as income attributable to the payment of royalty and technical services fees. (Re: Page 184,185 of Paper book)

2.3 Consequently, the Ld. TPO applied TNMM using OP/TC as the PLI for benchmarking the international transaction of payment of royalty using single year data and applied turnover filter> 100 crores (selection of comparables having turnover greater than 100 crores against the Assessee's turnover filter of Rs. 50 crores) and selected the following comparables: (Ref: Page 188-190 of paper book)

2.4 Thereafter, the Ld. TPO arrived at a set of 6 comparables and determined the arm's length PLI at 10.35% as against the respondent's PLI of 6.84%.

S. No.	***TPO's Comparables***	***OP/TC %***
1	*Amforge Industries Limited*	*9.93*
2	*Axles India Ltd.*	*6.43*
3	*Lifelong India Ltd.*	*3.90*
4	*Napino Auto and Electrical*	*14.92*
5	*Turbo Energy Ltd.*	*18.99*
6	*ZF Steering Gear Ltd.*	*16.08*
Average		***10.35%***

2.5 In doing so the Ld. TPO denied working capital adjustment to comparables and also the benefit of +/- 5% range as mandated u/s 92C(2) of the Act. (Ref: Page 199 and 203 of Paperbook)

2.6 The Ld. TPO proposed an adjustment of Rs. 12.53 crores to the value of international transaction related to payment of royalty and technical services fees being the differential of arm's length PLI and respondent's PLI (10.35-6.84=3.51 %) applied on total cost of the respondent being 356.87 crores. (Detailed calculation on page 205 of paper book)

2.7 Consequently, the Ld. TPO enhanced the income of the respondent by Rs. 12,53,92,899 and loaded the difference on different international transactions as follows: (RE: page 205 of paperbook)

S.No.	***International Transactions***	***Book Value***	***Difference loaded***	***Arm's length price***
1	*Import of raw materials*	*1,83,337*	*1,57,062*	*26,275*
2	*Sale of finished goods*	*51,69,591*	*44,28,710*	*95,98,301*
3	*Royalty paid*	*6,12,80,272*	*5,24,97,881*	*87,82,391*
4	*Application cost paid*	*35,75,676*	*30,63,227*	*5,12,449*
5	*Technical fees paid*	*62,49,341*	*53,53,716*	*8,95,625*
6	*Technical know-how fees paid*	*6,63,09,460*	*5,68,06,310*	*95,03,150*
7	*Training fees paid*	*10,40,286*	*8,91,197*	*1,49,089*
8	*IT cost fees paid*	*6,19,261*	*5,30,512*	*88,749*
9	*Miscellaneous receipts*	*19,42,702*	*16,64,283*	*36,06,985*
	Total	***14,63,69,926***	***12,53,92,899***	

2.8 The Ld. AO incorporated the order of the Ld. TPO in its order and consequently made an addition of Rs. 12.53 crores on account of international transaction of payment of royalty and technical services fees. (Ref: Page 171-173 of Paper book)

3) Respondent's Appeal before the Learned Commissioner of Income Tax (Appeals) ('CIT (A)')

3.1. The Ld. CIT(A) accepted the respondent's filter of accepting companies having turnover > Rs. 50 cr. and disregarded the TPOs' methodology of accepting companies having turnover> Rs. 100 crores. (Ref: Page 120 of Paperbook)

3.2 The Ld. CIT(A) held that since the transactions of the appellant with its AE's are on the cost side the PLI should have a base which should not be controlled and therefore OP/Sales is the appropriate PLI for benchmarking the international transaction of payment of royalty (Re: Page 121 of paper book). The Ld. CIT(A) also granted benefit of +/- 5% range as mandated u/s 92C(2) of the Act which had been ignored by the Ld TPO/AO. (Re: Page 122 of paper book).

3.3. Thereafter, the Ld. CIT(A) arrived at a set of 16 comparables and determined the arm's length PLI at 7.35% as against the respondent's PLI of 6.40%.

S. No.	CIT(A) Comparables	Unadjusted OP/Sales %
1	Amforge Industries Limited	1.77
2	Axles India Ltd.	5.99
3	EL Forge Ltd.	6.76
4	H S I Automotives Ltd.	6.56
5	India Forge and Drop Stampings Ltd.	1.74
6	Kalyani Forge Ltd.	10.55
7	Lumax Automotive Systems	4.19
8	Sona Koya Engineering Systems	7.29
9	Subros Ltd	4.25

S. No.	CIT(A) Comparables	Unadjusted OP/Sales %
10	Lifelong Ltd.	3.75
11	Napino Auto and Electronics Ltd	13.01
12	Turbo Energy Ltd.	15.9
13	ZF Engineering Gear Ltd.	13.85
Average		7.35

3.4. Keeping in view the above, the Ld. CIT(A) held that the respondent's international transaction with AE's falls within the +1-5% range, allowed as per proviso to section 92C(2) of the Act and therefore, international transaction is held to be at arm's length. Relevant extract of CIT (A) (Re: Page 122 of Paper book) is as under:-

6.18. As can be seen from the above calculation, the international transaction of the appellant falls within +/-5% of the ALP determined. Therefore, international transaction is held to be at arm's length. Therefore, ground no. 5 is also held in favor of the appellant.

4) Respondent's Contentions

- *Need for payment of royalty/technical services and know how fees The Ld. TPO ignored the detailed evidentiary information (designs, drawings, product standards,*

engineering data etc.) submitted by the Respondent to substantiate the arm's length nature of royalty and technical services fees payment to associated enterprises and wrongly assumed that no significant economic benefit arose to the respondent from receipt of such technical know-how/information. (Refer page 303- 307 of the paper book).

- *In fact the respondent has immensely benefitted from the intangibles granted by its AE's and the respondent could not have carried out its business and sold "Denso" products to customers in India without the ongoing technology transfer and continuing right to use such intangibles obtained from its AE's. To substantiate the same, the past 5 year's trend of the sales turnover which shows a huge jump in the turnover from March 2000 to March 2005 is as follows:*

Denso India Ltd. (Sales in Rs. Crores)					
Mar-2000	*Mar-01*	*Mar-02*	*Mar-03*	*Mar-04*	*Mar 05*
197.22	*238.94*	*250.56*	*256.46*	*313.83*	*379 33*

Therefore, from the above, it can be established beyond doubt that the respondent has benefitted immensely from the use of intangibles provided by its AE's.

It is also worth noting that the Hon'ble ITAT in the respondent's own case in AY1988- 89 to 1997-98 and later on relied in DCIT vs. Denso India Limited (ITA No. 4798/Del/2004) The Hon'ble ITAT relying on various judicial precedents held that "the more you take the more royalty you pay". It further held that the more assets the assesse will produce, the royalty will increase as the amount of royalty is directly linked with the volume of contract products. In view of the same it was held that the amount of royalty is a revenue expenditure. It can be seen from the table above that the sales of the respondent have kept on increasing thereby entailing payment of royalty and thus satisfying the benefit and need test. The Delhi High Court in CIT vs. Denso India Ltd. (374 ITR 62) also upheld the approach of the ITAT and held royalty to be a revenue expenditure.

- *Benefit of +/- 5% range as mandated under proviso to section 92C(2) of the Act to be allowed*
  In view of the above, the Respondent request your goodself to uphold the order of CIT(A). Further, without prejudice to the above, in case your goodself upholds the order of the Ld.TPO and allows the benefit of +/- 5% range as mandated under proviso to section 92C(2) of the Act, the Respondents margin would fall within the Arm's length range as per the Indian TP regulations.

Conclusion As is evident from the above discussion the respondent's international transaction of payment of royalty and technical fees etc. to its AE's meets the arm's length standard by satisfying both the need and benefit test as well as within +/- 5% range as mandated by the Act. Attention is also drawn to Circular No. 12/2001, dated 23/08/2001 wherein the CBDT has decided that the Assessing officer shall not make any adjustment to the arm's length price determined by the taxpayer, if such price is up by 5% less or up to 5% more than the price determined by the AO. In such cases the price declared by the taxpayer may be accepted. Therefore, the appellant's ground is liable to be dismissed.

It is also worth noting that once this adjustment is deleted the rest of the adjustments made by the Ld. AO will become academic.

- *Re: Ground No. 2-5 of Grounds of Appeal: Enhancement of income treating various expenses as capital in nature*

1. Transfer Pricing Assessment Proceedings and Assessment Proceedings

As detailed in Table 2 (supra) the Ld, TPO/AO made a pro rata adjustment on various payments made by the respondent to its AE's for royalty and technical fees etc. received The Ld. (Re: Point no. 2.7 above). The Ld. AO held that these payments have been made to acquire intangible assets being technical knowhow, patents, trademarks and other business or commercial rights of similar nature. After perusal of various agreements and details on record, the LD. AO held that the following payments are capital in nature: (Re: page 172 of paper book)

S.No.	International Transactions	Amount treated as capital expenditure
1	Royalty paid	87,82,391
2	Application cost paid	5,12,449
3	Technical fees paid	8,95,625
4	Technical knowhow fees paid	95,03,150
5	Training fees paid	1,49,089
6	IT cost fees paid	88,749

2. Appeal before CIT(A)

The Ld. CIT(A) held that the above expenses are revenue in nature and deleted the additions made by the Ld. AO. The reasoning given by the Ld. CIT(A) w.r.t each item of expense is as follows:

S.No.	International Transactions	Reason for Deletion of adjustment	Page Reference
1	Royalty paid	Relied on the order of the ITAT in respondent's own case in ITA No. 4798/Del/2004 (AY 2001-02)	127
2	Application cost paid	Relied on the order of the ITAT in respondent's own case in ITA No. 4798/Del/2004 (AY 2001-02) and held that there has been no acquisition of a capital asset. Also, there has been no	129
3	Technical fees paid	Relied on the order of the ITAT in respondent's own case in ITA No. 4798/Del/2004 (AY 2001-02)	132
4	Technical knowhow fees paid	Treated the same as capital in nature and directed the AO to grant depreciation on the same	140
5	Training fees paid	Relied on the order of the ITAT in respondent's own case in ITA No 4798/Del/2004 (AY 2001-02)	132

S.No.	International Transactions	Reason for Deletion of adjustment	Page Reference
6	IT cost fees	Held the same to be recurring expenses and therefore	141

3. Respondent's Contentions

It is humbly submitted that these issues have already been decided in favor by the Hon'ble ITAT and upheld by the Hon'ble High Court of Delhi in the appellant's own case The ground wise contentions are as follows:

Ground No. 2: Deletion of adjustment amounting to Rs. 87,82,391 on account of royalty by holding the same as revenue expenditure

The respondent humbly submits that this issue is squarely covered in favour of the respondent in its own case in DCIT vs. Denso India Limited (ITA No. 4798/Del/2004) (AY

2001-02) and followed in ACIT vs. Denso India Limited (64 SOT 191) wherein the Hon'ble

Delhi ITAT held the same to be a revenue expenditure. The observations of the ITAT are as

follows: [Ref: Page 13-14 Para 6 of Case Law Compendium]

> *" Further we may refer the decision of the Apex Court in the case of Gotan Lime Syndicate v. CIT [1966] 59 ITR 718 in which it was also laid down that the amount of royalty has to be allowed as revenue expenditure, as the said expenditure was in relation with the excavation of raw material. More you take the more royalty you pay. This ratio is again applicable in the case as amount of royalty In the case is directly linked with the volume of contract products. The more assets will produce, the amount of royalty will increase. In case assessee stops manufacturing of contract products the amount of royalty will not be payable. In view of the above ratio the amount of royalty which is linked with the volume of production is allowable as revenue expenditure. On the basis of above discussion the cumulative result is that amount of royalty being paid was allowable as, revenue expenditure in view of the case law referred to by the Id counsel and discussed above and it cannot be treated as capital expenditure. The ground is allowed accordingly. "*

The Hon'ble Delhi High court also upheld the order of the Hon'ble ITAT in the case of CIT vs. Denso India Limited (374 ITR 62) and held as follows: [Re: Para 4 on Page 45 of Case Law Compendium]

> *"Question No. 1*
>
> *4. The assessee in terms of its arrangement with parent company-Denso Japan had to remit royalty at different rates. These were sought to be brought to tax on the ground that expenditure was not revenue but it was capital in nature as it would result in enduring benefit. The CIT (Appeals) disagreed and after analyzing the nature of the transaction held that the amounts paid correctly belonged to the revenue stream and for all the previous years the amount was treated as revenue expenditure, i.e. for A Y. 1988-89 to 1997-98. In a previous year i.e. ITA No. 479/Del./2004 decided by the IT AT on 20.03.2008, it was held after an elaborate analysis of case law and agreement on the record that the royalty was revenue expenditure and could not be treated as capital expenditure. The extract of that decision appears in para 6 of the impugned order. It is not disputed that no new fact or development took place or was taken into account by the A.O. Considering that consistently for 12 years identical payments were treated as revenue expenditure and in fact are entitled to be treated as such this Court is of the opinion that the question of law has to be answered against the revenue and in favour of the assessee."*

Hence, it is prayed that the ground of the appellant be summarily dismissed.

Ground No. 3: Deletion of adjustment amounting to Rs. 5,12,449 on account of application cost by holding the same as revenue expenditure

It is submitted that as per the terms of Application works consignment agreement Denso Japan shall assist in providing application work in relation to modification or application or design work regarding the products required to make the basic underlying technology compatible with the Indian market and customer specific requirements not covered by any of the basic agreement. It is further submitted that the issue is covered in favour of the respondent in its own case in CIT vs. Denso India Limited (344 ITR 566) wherein the Hon'ble High Court has held the same to be of revenue nature. The observations of the Hon'ble HC are as follows: [Re: Para 20 on page 56 and Para 23 on page 58 of Case Law Compendium]

> *"20. For the purposes of standardizing the modification to suit the requirement of the clients of the assessee, namely, manufactures of automobiles, technical fee was paid*

for the services rendered, which payment was described as 'fee for the application works' under the agreement.

In view of aforesaid discussion, the Tribunal was justified in its opinion that the payment in question was allowable as a revenue expenditure and not as a capital expenditure allowable for deprecation under section 32. ”

Hence, it is prayed that the ground of the appellant be summarily dismissed.

Ground No. 4: Deletion of adjustment amounting to Rs. 10,44,714 on account of Technical cost and Training fees by holding the same as revenue expenditure

It is submitted that the issue is covered in favour of the respondent in its own case in CIT vs. Denso India Limited (64 SOT 191) wherein the Hon’ble ITAT relying on its own order for AY 2001-02 in the respondent’s case has held the same to be of revenue nature. The observations of the ITAT are as follows: [Re: Para 13 on Page 18 of Case Law Compendium]

“13. Ground No. 6 is on the disallowance of technical service expenses being paid to Denso Corp., on the ground that the same is capital in nature. The issue is covered in favour of the assessee by the Tribunal in assessee's own case for the A. Y. 2001-02 wherein it has been held as under:- "10. With regard to deletion of addition of Rs. 1.05 crores, being the expenses incurred for technical services provided by Denso Corporation, Japan, we found that during the course of assessment, the Assessing Officer has disallowed Rs. 12.60 crores, the same was rectified u/s 154 and the same was reduced to Rs. 10.58 lakhs. We found that assessee has Incurred these expenditure for conducting training of its employees in India as it facilitated the assessee's trading and manufacturing operation in India under agreement with Denso Corporation, Japan. After considering the verdict of Hon'ble High Court reported at 159 ITR 673 (2003-TIOL-278-HC-KOL-IT), 160 ITR 35 and 124 ITR 1 (2002- TIOL-238-SC-IT), the CIT(A) deleted the addition and held that assessee has incurred the above expenditure for training of its employees which facilitated the assessee's trading operation to be carried on more efficiently or more profitably. No interference is required in the order of the CIT(A) for deleting the disallowance of expenditure incurred on training of the employees."

14 Respectfully following the same we uphold Para 10.4.3 of the CIT(A)'s order and dismiss this ground of appeal. ”

Hence, it is prayed that the ground of the appellant be summarily dismissed.

Ground No. 5: Deletion of adjustment amounting to Rs. 88,749 on account of IT Cost fees / Training fees by holding the same as revenue expenditure

The above expenditure has been incurred on account of Annual maintenance contract for the software of financial reporting to Denso, Japan. These expenses are recurring annual fees incurred for upkeep and maintenance of existing software and not for acquiring any new equipment.

Conclusion: In view of the above discussion, it is prayed that the grounds raised by the appellant be summarily dismissed.”

20. The first ground of appeal is pertaining to the addition of Rs. 125392899/- being adjustment on account of TPOs order u/s 92CA(3) with respect to the Arm’s length price of international transaction. The assessee has entered into the 11 international transactions with its associated enterprise and except reimbursement the assessee adopted TNMM as the most appropriate method determining the profit level indicator operating profit/ total cost selecting 14

comparables whose working capital adjusted margin adopting multiple year data was worked out at 3.79% whereas the margin of the respondent was calculated at 6.84% and hence, the TP study documentation of the assessee showed that international transactions are at arm's length.

21. On reference, the ld Transfer Pricing Officer held that international transaction with respect to payment of royalty of Rs. 61280272/- cannot be clubbed with other international transactions and according to him there is no economic benefit derived by the assessee from the payment of royalty. Therefore, the ld Transfer Pricing Officer selected 6 comparables determining their PLI at 10.35% whereas, the PLI of the assessee was 6.84% proposed an adjustment of Rs. 12.53 crores.

22. The ld CIT(A) held that operating profit/ sales is the correct PLI for benchmarking the international transaction of royalty and he arrived at PLI of 16 comparables at 7.35% against the PLI of the assessee of 6.4% and consequently after giving benefit of ± 5% deleted the above adjustment. Therefore, revenue aggrieved is in appeal before us. The above ground identical to ground No. 1 of the appeal of the revenue for AY 2004-05 which has been decided by us setting aside the whole issue to the file of the ld AO/TPO, therefore, for similar reasons we set aside this ground of appeal also to file of the AO/TPO for fresh adjudication with similar direction. In the result ground No. 1 of the appeal of the revenue is allowed accordingly.

23. Ground No. 2 of the appeal is against the deletion of the addition of Rs. 8782391/- by the ld CIT(A) holding it as revenue expenditure whereas, the ld Assessing Officer treated the same as capital expenditure. The ld AO/TPO held that the royalty payment of Rs. 61280272/- and treated proportionate adjustment of Rs. 8782391/- as capital expenditure. The above issue has been fairly decided in favour of the assessee by the coordinate bench for AY 1988-89 to AY 1991-92. Further, the Hon'ble Delhi High Court in assessee's own case in ITA No. 767 and 796/Del/2014 vide order dated 13.01.2015 has held that royalty paid by assessee to its parent company was revenue expenditure and cannot be treated as capital expenditure. The Hon'ble Delhi High Court in para no. 4 has held that such payment is revenue in nature. Therefore, respectfully following the decision of Hon'ble Delhi High Court in assessee's own case in 374 ITR 62 we confirm the finding of the ld CIT(A) that royalty is revenue expenditure. Ground No. 2 of the appeal of the revenue is dismissed.

24. Ground No. 3 of the appeal of revenue is against deletion of addition of Rs. 512449/- holding it as revenue expenditure being an application cost which was treated by the ld Assessing Officer as capital expenditure. The ld CIT(A) also deleted the above disallowance based on

the previous judicial precedents available in case of the assessee. The identical issue is decided in ITA NO. 4798/Del/2004 for AY 2001-02 wherein, the above application cost was allowed as revenue expenditure. Further, it has been stated that there is no disallowance for AY 2006-07 and 2007-08 by the ld Assessing Officer. The above issue in assessee's own case for AY 2001-02 wherein, technical fees paid has been held to be revenue in nature. We do not find any reason to deviate from the same and hence, respectfully following the decision of the coordinate bench, we direct the ld Assessing Officer to treat Rs. 512449/- being technical application cost as revenue expenditure. Accordingly, ground No. 3 of the appeal of the revenue is dismissed.

25. Ground No. 4 and 5 of the appeal both relates to holding of revenue expenditure of technical cost, training fee and IT cost fees as revenue expenditure whereas, the ld Assessing Officer treated the same as capital expenditure. The above issue is also squarely covered by ground No. 4 in appeal of the assessee's own case in ITA No. 4798/Del/2004, wherein, vide para No. 10 all these expenditure have been held to be revenue in nature. Therefore, respectfully following, we also direct the ld Assessing Officer to treat these expenditure as revenue expenditure instead of capital expenditure as held by him. In the result ground No. 4 and 5 of the appeal of the revenue are dismissed.

26. Ground No. 6 is with respect to disallowance of Rs. 1235907/- deleted by the ld CIT(A) on account of nice net facility provided by Denso Haryana treating it as capital expenditure by AO and ld CIT(A) reversed it holding to be revenue expenditure. This issue is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in assessee's own case in 374 ITR 62 wherein the above deduction was allowed. Therefore, respectfully following the decision of the Hon'ble Delhi High Court we direct the Assessing Officer to delete the above disallowance. In the result ground No. 6 of the appeal is dismissed.

27. In the result the appeal of the revenue for AY 2005-06 is partly allowed.

Order pronounced in the open court on 05/12/2017.

-Sd/-	-Sd/-
(BHAVNESH SAINI) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated:05/12/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi