

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.547/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

The Deputy Commissioner of Income Tax,
Circle-9, Pune

.... अपीलार्थी/Appellant

Vs.

Man Trucks India Pvt. Ltd.,
501-502, Kapil Zenith,
Survey No.55, Hissa No.1,
Behind Maratha Mandir,
Bhavdhan Khurd, Pune – 411 021

.... प्रत्यर्थी / Respondent

PAN : AAECM6932E

आयकर अपील सं. / ITA No.582/PUN/2014
निर्धारण वर्ष / Assessment Year : 2009-10

Man Trucks India Pvt. Ltd.,
501-502, Kapil Zenith,
Survey No.55, Hissa No.1,
Behind Maratha Mandir,
Bhavdhan Khurd, Pune – 411 021

.... अपीलार्थी/Appellant

PAN : AAECM6932E

Vs.

The Deputy Commissioner of Income Tax,
Circle-9, Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Pankil Sanghvi,
Shri Kunal Sawardekar &
Shri Mohit Kumar Bathwal

Revenue by : Shri Rajeev Kumar, CIT
Shri Sandeep Garg &
Shri Suhas Kulkarni, CIT

सुनवाई की तारीख / Date of Hearing : 04.01.2018	घोषणा की तारीख / Date of Pronouncement: 03.04.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The cross-appeals filed by the assessee and the Revenue are against the order of the Deputy Commissioner of Income Tax, Circle-9, Pune dated 20.01.2014 relating to assessment year 2009-10 passed against order under section 143(3) r.w.s.144C(13) of the Income Tax Act, 1961 (in short 'the Act').

2. The cross-appeals filed by the assessee and the Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The Revenue in ITA No.547/PUN/2014 has raised the following grounds of appeal :-

"1. Whether the DR Panel was correct in law in not considering Tata Motors as comparable only on the basis of Turnover when as per Rule 10B(2), turnover is not one of the comparability factor defined therein and when the FAR have been carefully calibrated for comparison with assessee and it was accepted in the assessment proceedings (As per the SCN dated 16.01.2013 company has not objected to the use of TATA motors as comparable)

2. Whether the DR Panel was correct in law to allow working capital adjustment to the profit level indicator of the comparables when:

2. a) it has not been demonstrated or proved that the pricing of the product and services in case of comparables or even in case of the assessee company was actually determined in the basis of the working capital;

2. b) the Comparables have been identified following the provisions of Rule 10A(a), Rule 10B(2), Rule 10B(3) and Rule 10B(1) comparing functions, assets and risks,

wherein there is no case for any adjustment; which needs to be made to the financial results of either assessee company or the comparables.

2. c) it has not considered the fact that the profit level indicator used for comparison was operating profit before interest and thus any impact of credit policy on interest cost was automatically excluded from the case of the assessee companies and the comparables;

2. d) it allowed the claim of the assessee in routine manner despite the fact that the OECD guidelines in general and specifically in para 3.47 to 3.54 do not consider such adjustments to be applied in an automatic and routine manner?

3. Whether the DR Panel was correct in law in allowing proportionate adjustment when the International Transactions are common to both the segments and have to be aggregated to arrive at an ALP and when capacity adjustments have granted to Assessee Company?

4. The assessee in ITA No.582/PUN/2014 has raised the following grounds of appeal :-

"The following grounds of appeal are independent of and without prejudice to one another.

1. On the facts and circumstances of the case, and in law, the learned Deputy Commissioner of Income-tax, Circle - 9, Pune ('the AO'), the learned Additional Commissioner of Income-tax (Transfer Pricing - II), Pune ('the TPO') and the Hon'ble Dispute Resolution Panel, Pune ('the DRP') erred in making an adjustment of Rs. 41,08,97,570 to the Appellant's total income based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').

Purchase of Raw Materials / Components

2. On the facts and circumstances of the case, and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in confirming the rejection of the Appellant's transfer pricing analysis to determine the Arm's Length Price ('ALP') of the Appellant's international transactions with its AEs pertaining to purchase of raw materials / components ('import of parts')

2.1. On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in disregarding the comparison of surcharges over material cost charged by the Associated Enterprises ('AEs') towards the aforesaid parts with the gross profit over material cost earned by traders of automotive components.

2.2. On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in alleging that the approach adopted by the Appellant with respect to the import of parts is not supported by comparable, verifiable and contemporaneous data as required under Rule 1 OB(4) of the Income-tax Rules, 1961 ('the Rules').

Sale of Vehicles and Spare Parts

3. On the facts and circumstances of the case, and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in rejecting the use of the internal

Transactional Net Margin Method ('TNMM') to determine the ALP of the Appellant's sale of vehicles / spare parts to its AE ('the sale of vehicles')

Aggregation of Transactions

4. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in aggregating the import of parts, sale of vehicles and professional fees paid and thereby performing an entity-level TNMM analysis to determine the ALP of the Appellant's international transactions.*

Incorrect Rejection of Comparable Companies

5. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in incorrectly rejecting company which is comparable to the Appellant while determining the ALP of the international transactions of the Appellant.*

Restricting the Adjustment Proportionate to the International Transaction

6. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred in incorrectly computing the adjustment while following the direction of the Hon'ble DRP to restrict the adjustment with respect to transfer pricing grounds to the proportion of the value of the international transactions.*

Import of Capital Goods

7. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred in making and the Hon'ble DRP further erred in upholding the adjustment with respect to the import of capital goods from the AEs.*

7.1. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred in wrongly making an adjustment to the Appellant's income on account of transfer pricing adjustments on account of import of capital goods of Rs. 18,05,882 instead of making an adjustment of Rs. 85,992 being depreciation on capital goods of Rs. 18,05,882 as directed by the Hon'ble DRP.*

Benefit of +/- 5% Variation

8. *On the facts and circumstances of the case, and in law, the learned AO / TPO erred in denying and the Hon'ble DRP further erred in confirming the denial of the benefit of 5% variation as provided by the Proviso to Section 92C(3) of the Act.*

Relief

- a) *The Appellant prays that the addition made by the learned AO/TPO and upheld by the learned DRP be deleted.*
- b) *The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."*

5. Briefly, in the facts of the case, the assessee for the year under consideration had furnished the return of income declaring total loss of (-)

Rs.133,91,04,484/-. The assessee was engaged in the manufacture of heavy commercial vehicles ranging from 16 tons to 49 tons. The assessee was subsidiary of Force Motors Ltd. with its registered office at Akurdi, Pune and the plant at Pithampur, M.P. The assessee had amortized the lease charges over the period of lease and claimed deduction of Rs.12,30,600/-. The Assessing Officer in view of the orders of earlier years, treated the lease premium paid for the land as capital in nature and added sum of Rs.12,30,600/- in the draft assessment order. The Assessing Officer in view of the international transactions entered into by the assessee made a reference under section 92CA(1) to the Transfer Pricing Officer (TPO). The TPO vide order under section 92CA(3) of the Act made an adjustment of Rs.42,99,42,818/- to the arm's length price in respect of international transactions of the assessee with its associated enterprises as under:-

- "a) Rs.41,66,47,000/- in respect of international transactions relating to Manufacturing, imports, exports and knowhow and Professional Fees*
- b) Rs.1,32,95,818/- relating to transactions of import of fixed assets."*

6. The Assessing Officer further disallowed sum of Rs.56,595/- out of telephone expenses which included phone lines given to the employees at various levels including field staff. Another disallowance proposed in the hands of assessee was on account of repairs to buildings. The assessee had incurred an expenditure of Rs.13,43,920/- and as per the Assessing Officer, this included major repairs of capital in nature and hence, 15% of the expenses were treated as capital in nature at Rs.2,04,493/- and depreciation on the said amount was allowed @ 10%. The assessee filed objections before the Dispute Resolution Panel (DRP) against the order of TPO, who in turn, gave directions under section 144C(5) of the Act. The TPO in line with the directions given by the DRP, Pune excluded Tata Motors from the final list of comparables. The TPO as per the direction No.3 of

DRP, with regard to adjustment regarding the import of capital goods, confirmed an amount of depreciation on value of Rs.18,05,882/-. Further, working capital adjustment was allowed and the TP adjustment on account of proportionate adjustment was restricted to Rs.40.76 crores and amount of depreciation on value of Rs.0.18 crores. Accordingly, the Assessing Officer made an addition of Rs.40.94 crores in the order passed under section 143(3) r.w.s. 144C(13) of the Act. The other additions on account of amortization of lease charges of Rs.12,30,600/-, disallowance of telephone expenses and repairs of Rs.56,595/- and Rs.2,04,493/- and allowance of depreciation on civil maintenance works capitalized at Rs.6,20,449/- were also considered in the said order and net loss in the hands of assessee was re-computed.

7. The assessee is in appeal against the order of Assessing Officer. The Revenue has filed an appeal against the directions given by the DRP.

8. We proceed to take up both the issues simultaneously. The assessee has raised the grounds of appeal against the adjustment of Rs.41.08 crores. The assessee has raised the grounds of appeal against the upward adjustment made on account of international transactions undertaken by the assessee.

9. The Revenue is in appeal against the directions of DRP in excluding Tata Motors on the basis of turnover and then directing the Assessing Officer / TPO to allow working capital adjustment to the PLI of comparables and allowing proportionate adjustment, where the international transactions were common to both the segments and should have been aggregated to arrive at the arm's length price especially when capacity adjustment had been granted to the assessee.

10. The learned Authorized Representative for the assessee pointed out that JV was entered into between Force Motors Ltd. and Man Group of companies for the manufacture of trucks i.e. cargoline shell trucks. This was the second year of operations. He further pointed out that the manufacturing plant in India was for manufacturing the trucks for Indian market only, so the quality of trucks manufactured was slightly on different model. It was further pointed out by the learned Authorized Representative for the assessee that certain raw material was imported, wherein the assessee hired the services of its associated enterprises to buy raw material. It was further pointed out that the assessee was importing specific material which was used for all trucks. The first issue pointed out by the learned Authorized Representative for the assessee was that the capacity of manufacturing facility of the assessee was to manufacture 24000 trucks, against which the assessee could sell in India only 700 trucks. So, capacity utilization was less. Because of low sale of trucks in India, the assessee ventured into exporting of trucks to the developing countries. In this regard, the assessee took help of its associated enterprises for booking the orders, wherein the assessee gets orders from Germany for developing countries. The said trucks could not enter Germany because of emission norms and were directly sent to South African countries. Some parts were being imported and used for both the domestic and export markets. He further pointed out that the TPO had aggregated all the transactions and applied entity-wise TP provisions i.e. the first transaction was import of raw material, wherein cost of third party materials was charged to the Indian entity by its associated enterprises and surcharge for handling was also charged; but in respect of other supplies, the associated enterprises had not charged any surcharge. The learned Authorized Representative for the assessee pointed out

that the assessee had applied CUP method for import of raw material and before the TPO, screen shots were filed, since there was no paper invoices in Europe and only electronic invoices were issued. The TPO rejected the same. Before the DRP, the assessee claimed that it had filed additional evidence i.e. certificate from the CA (WTS – certified accountant) to certify the amount paid by the associated enterprises to external vendors and also the amount paid by the assessee to associated enterprises. Our attention was drawn to the additional evidence Paper Book consisting of pages 1 to 24, copy of the certificate and it was pointed out that the DRP had admitted the additional evidence vide paras 2.1.33 to 2.1.38 and no adverse comments were made. However, the DRP does not rely on the said additional evidence; it talks of screen shots only and does not refer to the certificate of CA filed by the assessee. The DRP concluded saying that there was no explanation before the Assessing Officer, which was factually incorrect. The learned Authorized Representative for the assessee in the alternate, pointed out that even if surcharge is taken as mark up, then also the transaction was within +/- 5% range. He explained that the cost of raw material which is not in dispute to the sourcing person plus mark up was the cost of goods to the assessee. He further pointed out that the search was undertaken by picking NAC Code for trucks, wherein our attention was drawn to the list of comparables, who were wholesale traders of motor parts at page 55 of the Paper Book and it was pointed out that at page 80 of Paper Book, it is clear that NAC Code 4531 was applied. He referred to the additional evidence at page 2, wherein margin analysis was undertaken and the assessee had paid surcharge between 13% to 20% as against mean of the comparables at 36.10%. The average surcharge of assessee worked out to 18.97% which was much lesser than the margins of externals. In respect of order of DRP/Assessing Officer, there were three specific errors i.e. additional evidence

filed before the DRP was not considered and even the evidence filed before the Assessing Officer was not considered by him and matter was decided on the basis of orders of Assessing Officer / TPO.

11. In respect of grounds of appeal, the learned Authorized Representative for the assessee pointed out that the first ground of appeal raised by it was general in nature. The issue in ground of appeal No.2 was against the adjustment made on account of purchase of raw material / imports. In respect of ground of appeal No.3, it was pointed out by the learned Authorized Representative for the assessee that because of excess capacity available in the manufacturing unit, vehicles were sold to the developing countries, for which the services of associated enterprises were utilized. The assessee had applied internal TNNM method, where margins of sale in the Indian market and exports to developing countries were considered. He referred to the additional evidence filed before the DRP, where the segmental on actuals were filed; the sales were actual and material cost comes from the system. He referred to the observations of DRP that the goods sold in India and goods sold to Germany could not be compared. The learned Authorized Representative for the assessee referred to para 2.1.40 at pages 15 and 16 of the order of DRP. He referred to the additional evidence filed before the Tribunal at pages 194 to 196 to pointed out that majorly the sales were being made to the developing countries i.e. South Africa, Ethiopia and Indonesia. He stressed that no trucks were sold to Germany but the invoices were in the name of German associated enterprises, but the goods were shipped directly to the customers. He pointed out that assessee manufactures cargoline shell trucks in this year. As per norms, trucks in Europe should comply with Euro-V norms in the said year. Our attention was drawn to the website details in this regard. It was stressed by the assessee that the emission

norms in Germany were higher and the assessee could not cater and hence, it was only catering to the developing countries. He also pointed out that the third aspect of the issue is the certificate of WTS-certified accountant, which is additional evidence filed at page 194 of the Paper Book that negative margins at level of MTB, wherein Germany associated enterprises was helping but not enhancing the value charged by the assessee. He referred to the order of DRP, wherein in para 2.1.42, they had commented that FAR was dissimilar and had made comparison of risk vis-à-vis domestic sales and exports of the assessee. The learned Authorized Representative for the assessee referred to the page 66 of the Paper Book and pointed out that mechanism of raising the bills, wherein to the cost of trucks, surcharge @ 25% was added and which was re-valued and the assessee takes hit of Euro 500. The learned Authorized Representative for the assessee referred to the order of DRP in para 2.1.43 and pointed out that the comparison was made between the controlled transactions with uncontrolled transactions and it was pointed out that the raw material was either imported or bought in domestic market, the cost remained the same for both the segments, but only the export transaction was through associated enterprises. He stressed that since both the transactions were tainted which are being benchmarked by the Assessing Officer / TPO /DRP and are controlled, then the aggregation approach was not correct. The transactions of imports and exports were to be benchmarked separately. In respect of imports, the learned Authorized Representative for the assessee pointed out that CUP method or external CPM method could be applied. However, in respect of exports, internal TNMM method merits to be applied. The issue in ground of appeal No.5 raised by the assessee was for application of TNNM method and it was pointed out that the results of assessee were comparable to Force Motors, wherein the RPT was less than 25%, hence, could not be rejected.

However, he fairly pointed out that the issue would become academic if the earlier ground of appeal No.4 is allowed.

12. In respect of issue raised vide ground of appeal No.7, the learned Authorized Representative for the assessee pointed out that the DRP had allowed the said aspect in favour of the assessee but the Assessing Officer has not calculated it correctly. In this regard, he made a request that the Assessing Officer be directed to compute the international transactions correctly. The issue in ground of appeal No.8 is charging of interest was held to be consequential. In conclusion, he stressed that where the trucks are being sold to the developing countries though the orders were through Germany company, but the trucks were straight away sent to the developing countries and hence, the items manufactured by the assessee for the domestic market and its exports should be benchmarked by applying internal TNMM method as the same items were sold. In respect of role of associated enterprises, it was pointed out that certain raw material was procured through associated enterprises, which in turn, associated enterprises charged the purchase cost along with minor surcharge and handling charges from the assessee and the said transaction was at arm's length price. Reliance was placed on the ratio laid down by the Bench of Tribunal in bunch of appeals in *Wriggley India Pvt. Ltd. Vs. Addl.CIT and others* in ITA No.5224/Del/2010 and others, relating to assessment year 2006-07, consolidated order dated 31.12.2014.

13. The learned Departmental Representative for the Revenue in reply, pointed out that there were no guidelines to compare the mark up charged by the associated enterprises. Reference was made to the order of TPO under paras 9.4 and 9.5 at pages 19 and 20 in this regard. For application of CUP method, the

learned Departmental Representative for the Revenue pointed out that the geographical comparison had to be seen. Referring to the page 154 of the Paper Book, the learned Departmental Representative for the Revenue pointed out that on the basis of manufacturing process, neither CUP method nor CPM method were the most appropriate methods but the TNM method should be applied. He further pointed out that there was no basis for payment of surcharge to the associated enterprises, since the charges vary, so CUP method could not be applied. Our attention was drawn to the charges charged by the associated enterprises in the bills placed at pages 7 and 12 of the Paper Book. Referring to the order of TPO at page 6, the learned Departmental Representative for the Revenue pointed out that where the transactions were inter-dependent, so had to be considered and aggregated, wherein the payment of technical knowhow / reimbursement of expenses were inter-linked to the main transaction. In respect of import of goods, where the assessee was following Cost plus Mark up i.e. Cost plus Mark up, plus other expenses, the learned Departmental Representative for the Revenue was of the view that because of fundamental differences in RPT, CUP or CPM method was not correct method. He further pointed out that the assessee in any case was protected where he gets cost plus 25%. He stressed that the external TNM method was to be applied and all the transactions had to be aggregated.

14. The learned Authorized Representative for the assessee in rejoinder pointed out that looking at the trading situation, where the associated enterprises buys raw material from third party and selling the same to the assessee, then Cost plus Mark up was the right method. He stressed that surcharge was a kind of mark up, so if CPM method is applied, then Cost plus Mark up. Our attention was drawn to the WTS certificate placed at Annexure A, which talks about factual aspects of the

case. Referring to the OECD guidelines and other principles on inter-dependence, the learned Authorized Representative for the assessee pointed out that if the transactions were so inter-dependant, then no aggregation of the transactions. He referred to the order of TPO and pointed out that he has failed to give a finding that there is no other way but aggregation and in the absence of the same, he pointed out that the order of TPO was incorrect. In respect of export to associated enterprises, the learned Authorized Representative for the assessee pointed out that by this mechanism, the assessee was making less profit in India as far as Cost Plus Mark up was concerned. He stressed that where the profile was same and the transaction was same, wherein the assessee was manufacturing and selling trucks, both in the domestic market and in the developing countries, then internal TNMM method had to be applied. He stressed that all the transactions were independent, so there is no question of aggregation of the said transaction.

15. Coming to the appeal filed by the Revenue, the learned Departmental Representative for the Revenue pointed out that the issue was against exclusion of Tata Motors and allowing working capital adjustment and also proportionate adjustment to be made on account of international transactions. He referred to his earlier arguments and pointed out that for aggregation and TNNM, he placed reliance on his earlier submissions and under internal TNNM method, all factors are taken care of and no further adjustment needs to be made.

16. The learned Authorized Representative for the assessee pointed out that against exclusion of Tata Motors, where the turnover of assessee was about Rs.161 crores, then Tata Motors having total turnover of over Rs.25,000 crores was not comparable. Reliance in this regard was placed on the ratio laid down by

the Hon'ble Bombay High Court in CIT Vs. M/s. Pentair Water India Pvt. Ltd. in Tax Appeal No.18 of 2015, judgment dated 16.09.2015. In respect of working capital adjustment, where TNNM method was applied, the learned Authorized Representative for the assessee placed reliance on the ratio laid down by the Pune Bench of Tribunal in Demag Crames & Components (India) (P.) Ltd. Vs. DCIT (2012) 17 taxmann.com 190 (Pune). In respect of proportionate international transactions adjustment, the learned Authorized Representative for the assessee placed reliance on the decision of Hon'ble Bombay High Court in CIT Vs. ALSTOM Projects India Ltd. in Income Tax Appeal No.362 of 2014, judgment dated 14.09.2016 and the Pune Bench decision in Tasty Bite Eatables Ltd. Vs. ACIT in ITA No.1682/PN/2011, relating to assessment year 2007-08, order dated 10.06.2015. Both the learned Counsels have filed written submissions which are placed on record.

17. We have heard the rival contentions and perused the record. The assessee was a JV between Force Motors Ltd. and Man Group of Companies in Germany. The assessee was engaged in the manufacture of heavy commercial vehicles i.e. cargoline shell trucks. The assessee had made sales of its trucks both in the domestic market and had exported the same to developing countries markets. The claim of assessee before the authorities below and even before us is that the cargoline shell trucks manufactured by it were special line of trucks which were specifically meant for Indian market and other developing countries markets. The reason for the same, the emission norms followed by the assessee while manufacturing the said trucks. The trucks were manufactured as per the emission norms of Euro – III. The associated enterprise of the assessee was in Germany, which was sourcing the raw material to be used for the manufacture of trucks both

in the domestic market and in the exports to the developing countries. The assessee was raising the bills on the said Germany company i.e. on its associated enterprises for export of finished goods, but the trucks were being sent to the developing countries by the assessee directly. The reason for the same was that the trucks in Europe had to be manufactured as per the Euro-V norms which were more stricter emission norms. The assessee was not in the manufacturing line of such trucks which could fulfill the norms of Euro-V emission norms. The case of assessee before us is that under such circumstances, the trucks manufactured by the assessee could not enter Germany and were being sent to the developing countries like South Africa, Ethiopia and Indonesia directly from India and hence, no geographical difference. In this regard, the assessee has furnished the evidence of delivery of the trucks to such countries directly to the customers of developing countries as against the bills raised by the associated enterprises in Germany. The goods undoubtedly, were sold through associated enterprises, wherein the assessee and its associated enterprises decided on a pricing mechanism of the material of trucks cost plus 25%, less Euro 500, towards warranty expenses borne by the associated enterprises. Before the DRP, the assessee had submitted segmental Basis of Material (SBM) as additional evidence which showed that it had earned gross margins on material cost in export segment at 24.19% and in domestic segment at 4.05% and hence, claimed that the transactions were at arm's length price. The objection of DRP was firstly to the geographical differences between Germany market and Indian market and secondly, to the FAR of export segment and the domestic segment being different. Further, two segments could not be compared on account of common controlled import transactions. The comparability was also rejected as no such segmental details were made available to Assessing Officer / TPO and were absent in TP

study report. The assessee on the other hand, claims that there were no geographical differences since the products which were exported to markets were similar, as the products used in India and the countries to which the trucks were exported, where the emission norms for vehicles was similar to India. The emission norms in South Africa, Indonesia and India were less stricter than those in Germany. On such grounds, the geographical differences pointed out by the DRP do not stand as the market in which the goods were sold were comparable.

18. The assessee undoubtedly, had sold the products through its associated enterprises but the products sold by the assessee within domestic market and those exported to the markets of developing countries followed the same emission norms and had no difference in the product. The assessee in this regard has filed the evidence of emission norms applied in European Union and in Asia with special reference to Indonesia and also in South Africa, wherein emission norms are similar and consequently, cannot be said to have geographical differences. Even otherwise, geographical differences would not be relevant where the products were exported to markets similar to Indian markets, where emission norms were less stringent than as compared to Germany. Accordingly, we find no merit in the approach of DRP / TPO for rejecting the internal comparables available on geographical grounds.

19. Now, coming to the second argument of the DRP and the TPO that FAR is dissimilar, so in respect of marketing and selling functions, wherein the sale in domestic market, the assessee has to engage in marketing activities, whereas for sales made through its associated enterprises, no marketing functions are performed by the assessee. The assessee explained that in case any adjustment

has to be made for this function, then this would result in reduction in the margins of domestic segment but this would not change the conclusion that the export transaction was at arm's length price. We find merit in the said plea of assessee. Similarly, in respect of after sales function, where the said services were provided for sales made in the domestic market and the assessee was not performing any after sales function for sales made through its associated enterprises, there cannot be said to be any dissimilarity. The assessee pointed out that 500 Euros per truck were reduced from the sale price for each truck exported and an adjustment on this account would mean that sum of 500 Euros per truck is to be added to the export segment. However, in case such an adjustment is made, then it would enhance the margins of export segments and there cannot be dissimilarity on this account. In respect of bad debts risk, contract risk and product liability risk, the learned Authorized Representative for the assessee pointed out that the adjustment, if any, for such risk had to be made from the sales price of trucks in the domestic segment, that means, reduction in margins in domestic segment. However, the same would not affect the margins of exports. The last risk is foreign exchange risk, which is in respect of sales made to the associated enterprises, but since the sales shown in the segmental account does not take into consideration the foreign exchange fluctuations, hence, no adjustment on this account is to be made in the hands of assessee. In view thereof, it cannot be said that FAR of sales in domestic segment and exports to associated enterprises were dissimilar.

20. Another factor which was noted was difference in pricing mechanism, wherein the assessee against the exports to associated enterprises was being reimbursed on cost plus mark-up and in the domestic market, the goods were sold on a price fixed by the assessee. The assessee was engaged in the manufacture

of same cargoline of trucks, wherein there were same inputs to manufacture the trucks for both the segments, then the margins achieved by the assessee on common unit cost can be compared in order to benchmark the arm's length price of international transactions of the assessee. Where the assessee was using same inputs to manufacture the trucks for both the segments, the contention of Revenue that controlled transactions could not be compared to controlled transactions was also to be considered and hence not comparable. The contention of assessee was where comparison was available at hand, then an endeavour should be made to use the internal comparables available. The margin of assessee in the field of export of finished goods and spares was higher as against the margins earned by the assessee in the domestic segment, was further argument.

21. Another aspect which was pointed out by the assessee by way of additional evidence before the DRP was the certificate from WTS (certified accountant). They had worked out that the associated enterprises had earned negative contribution of (-) 1.34% by selling the assessee's trucks as against the income earned by the assessee in India on account of sale through associated enterprises, vis-à-vis trucks sold directly in domestic market. In respect of FAR analysis, which was the reason on which internal comparability was rejected by the DRP, the case of assessee before us is that where the assessee was selling the same product in both the segments, difference in FAR could not obviate the internal comparability. The learned Authorized Representative for the assessee has furnished tabulated details in this regard and has stressed that even if the differences are considered but since the business of assessee in both the segments was manufacture and sale of trucks, then the mere difference in pricing mechanism would not vitiate the comparability of two segments. Another contention of the DRP for rejecting the

CUP method was that the controlled transaction could not be compared to controlled transactions. The assessee was of the view that it was also erroneous although the assessee uses the same inputs to manufacture the trucks for both the segments and what had to be benchmarked the margins achieved by the assessee on common unit cost.

22. In the facts of present case, where there is no product dissimilarity and the geographical differences, if any, does not affect the quality of products sold by the assessee because of identical technical similarity, the issue arises is whether two transactions are comparable. Further, FAR dissimilarity, if any, warrants adjustments in the domestic segment since the assessee was selling the products through its associated enterprises on cost plus mark-up and had not to bear any risk, then the margins shown by the assessee in the export segment, need no adjustment. As pointed out in the paras hereinabove, adjustment, if any, is to be made in the domestic segment, wherein the assessee has already shown lower margins.

23. The next approach adopted by the TPO which was upheld by the DRP for benchmarking the transactions was aggregation of transactions. The Courts have held that where the transactions are so closely inter-linked that there cannot be individually benchmarked, then the aggregation approach should be applied. However, transaction by transaction comparison approach is preferable to the aggregation approach. The TPO while applying the TNM method had also aggregated the transaction of import of raw material with the export of trucks to benchmark the arm's length price of international transactions.

24. The first transaction which was benchmarked by the TPO was the import of raw material / components by applying TNM method and comparing the margins shown by the assessee with the margins of external comparable companies. The assessee on the other hand, has pointed out that the said transaction of import of raw material is to be benchmarked by applying CUP method. However, before the DRP, it changed the stand that CPM method may be applied. The learned Departmental Representative for the Revenue has strongly objected to the same and pointed out that the CPM method is applicable where there is cost plus mark-up. However, in the case of assessee, the mark-up charged by the associated enterprises consist of both direct as well as indirect cost, which is clearly evident from the TP study report and hence, the method adopted by the assessee was incorrect and needs to be rejected. The second aspect for rejection was that the assessee had failed to give any evidence to establish the reasonableness of surcharges. The assessee claimed that the associated enterprises were charging cost plus the actual expenses incurred on the said items less 500 and hence the import of raw material from associated enterprises was at arm's length price. The plea of assessee before us was that where the associated enterprises were charging at material cost i.e. charged by third party vendors plus nominal surcharge to cover cost of inbound freight, material handling, quality inspection, etc., then the same cannot be said to be not at arm's length price. In this regard, the assessee filed some screen shots from associated enterprises account i.e. electronic invoices raised by the suppliers for supplying the items to the associated enterprises, which in turn, were imported by the assessee. The said submission was not accepted by the TPO, since these were screen shots and could not be verified. The assessee before the DRP in this regard, submitted a certificate from WTS (certified accountant), which states that the material cost and surcharge on

the parts sold to the assessee by the associated enterprises i.e. surcharge in the case of Germany at 18.79% and Austria at 18.53%. The additional evidence had been accepted by the DRP but the transfer pricing analysis adopted by the assessee was rejected.

25. The plea of assessee before us is neither the DRP nor the Assessing Officer in the remand report had made any adverse comments on the additional evidence filed i.e. WTS certificate. Accordingly, even if it is assumed that surcharge is not cost but it represents profits, then also the transaction of assessee was at arm's length price. The learned Authorized Representative for the assessee also pointed out that similar price was accepted in assessment years 2007-08 and 2008-09 by the TPO vide his order in para 9.5 at page 20. The TPO however, rejected the CUP method for the reason that verifiable and contemporaneous data was not available.

26. The case of the Revenue on the other hand, before us was that the assessee in the TP study report as well as in the proceedings before the TPO had benchmarked the import of raw material transactions with CUP method. However, before the DRP, it had submitted certain additional evidences vide letter dated 12.04.2013, whereby the assessee had changed the method from CUP to CPM. The learned Departmental Representative for the Revenue in this regard, pointed out that the submissions of assessee were not consistent with the provisions of the Income Tax Rules, where though the assessee was arguing for CPM method but in reality, the assessee was trying to compare the mark up charged by the associated enterprises on sale of raw material with mark up charged on similar uncontrolled transactions. In this regard, the learned Departmental Representative for the Revenue pointed out that under the CPM method, comparison was made of gross

profit mark up in controlled transactions with the gross profit mark up in uncontrolled transactions. On the other hand, the assessee has not made correct application of CPM by comparing the mark ups charged by the associated enterprises and determine the arm's length price. Where the assessee had failed to establish the reasonableness of surcharge charged by the associated enterprises, the learned Departmental Representative for the Revenue pointed out that there was no justification in the percentage of surcharges nor had the assessee done any external benchmarking to justify the charges. In respect of reliance on the WTS filed by way of additional evidence before the DRP, the case of Revenue is that the same was not authentic and could not be relied upon and where the agreed upon procedure was not in public domain, the same could not be accepted in transfer pricing analysis. Another difference which was pointed out by the learned Departmental Representative for the Revenue was the method of applying surcharge by the associated enterprises which dependent on various factors and thus, varied. Because of such mark up variations arising due to inbound freight, mode of transport, packing material, then in such scenario, authenticity, reliability and basis of comparison would fail.

27. In view of the submissions made by both the parties and after considering the facts of the case, we find that the assessee has been changing its stand with regard to application of most appropriate method. The assessee has stressed that its transaction of import of raw materials is to be benchmarked separately by applying CPM method before the DRP. In this regard, the assessee has placed reliance on additional evidence filed before the DRP i.e. WTS Certificate. The plea of assessee is that CPM is to be applied with its current associated enterprise as tested party as goods were supplied at cost with surcharge. But the assessee in

WTS Certificate mentions that surcharge varied from 13% to 20%. The import of raw materials is an independent transaction, wherein the assessee had purchased the said raw materials from its associated enterprises, which in turn, were consumed both for domestic sales and export sales. The total value of raw materials and parts imported were worth ₹ 93 crores during the year. We find merit in the plea of assessee that the said transaction of assessee is an independent transaction, which merits to be benchmarked by applying most appropriate method. However, in view of changing stand of the assessee before the authorities below, we deem it fit to restore this aspect of benchmarking the transaction of import of raw materials, back to the file of Assessing Officer / TPO, who shall take into consideration not only the submissions of assessee in this regard but also the additional evidence filed before the DRP. It may be reiterated that though the additional evidence was filed but the same was not considered by the DRP before deciding the said issue against the assessee. Another aspect which needs to be kept in mind is the acceptance of said pricing / margins by the TPO in assessment years 2007-08 and 2008-09. The principles of *res judicata* are not applicable to the Income Tax proceedings but the consistent approach should be adopted while benchmarking international transactions undertaken by the assessee. Accordingly, we direct the Assessing Officer to consider the same and work out the adjustment, if any, in the hands of assessee.

28. Now, coming to the transaction of export of finished goods i.e. cargoline trucks to associated enterprises and whether the same is to be compared with internal comparable available i.e. goods sold in domestic market. The first aspect is with regard to margins earned by the assessee in the domestic market and vide international transactions. It may be pointed out that no segmental details were

prepared by the auditor. The segmental details of margins earned by the assessee in domestic and international market on the finished products has been prepared by the assessee, which lacks certification. We have already decided the issue of there being no geographical difference on the goods sold in domestic market and the goods which were exported through associated enterprises to the developing countries. The assessee has worked out the margins in domestic segment at 0.06% and in the export segment at 24.19%. The assessee is cost plus entity, wherein it is exporting finished products to its associated enterprises on cost plus margin of 25%. Under the transfer pricing provisions, an endeavour is to be made to compare like with like. In the case of assessee, it is undisputed that input cost both for domestic sector and export sector is same. However, the assessee was remunerated on cost plus basis in respect of its exports to associated enterprises, whereas in respect of domestic sales normal margins were earned. We have already decided the issue in the paras hereinabove that geographical differences do not stand as the market in which the goods were sold were comparable. Further, we have also held that it could not be said that FAR of sales in domestic segment and exports to associated enterprises were dissimilar; in addition to the same, is the input costs which are same and identical. In such circumstances, where comparable is available to the assessee by way of domestic sales made by it, then the margins of same should be applied in order to benchmark the margins earned by assessee for export segment. Accordingly, we hold that internal TNMM method should be applied as most appropriate method to benchmark the international transactions of export of trucks undertaken by the assessee. However, the Assessing Officer is directed to verify the stand of assessee as to the margins earned in domestic segment and in the export segment. The assessee is also directed to file segmental details in this regard before the Assessing Officer for

necessary verification. Hence, we hold that aggregation approach applied by the Assessing Officer / TPO in the circumstances was not correct approach and also the method applied i.e. external TNMM on the aggregated transactions is not upheld.

29. Before parting, we may also deal with objections of authorities below and the learned Departmental Representative for the Revenue that the transactions undertaken by the assessee by way of import of raw materials and its use as input cost made the transactions between domestic sales and export of cargoline trucks as controlled transactions. However, we find no merit in the said stand of authorities below since we have already noted that input costs are same. Since we have already held that two transactions are to be benchmarked separately, there is no merit in the said stand of authorities below and the same is dismissed. Consequently, the ground of appeal No.2 against adjustment made on account of purchase of raw materials / imports is allowed for statistical purposes. Similarly, ground of appeal No.3 raised by the assessee in respect of benchmarking of international transactions of export of vehicles is allowed for statistical purposes. The ground of appeal No.4 against aggregation of transaction stands dismissed. The issue in ground of appeal No.5 against rejection of comparable companies becomes academic in nature. Similarly, ground of appeal No.6 becomes academic. In respect of ground of appeal No.7, the learned Authorized Representative for the assessee has pointed out that the DRP had allowed the said plea of assessee vis-à-vis depreciation to be allowed on capital goods; but the Assessing Officer has failed to compute the same. Accordingly, we direct the Assessing Officer to follow the directions of DRP and compute adjustment being depreciation on capital goods, as directed by the DRP. The ground of appeal No.8

against adjustment range of +/- 5% variation is to be considered by the Assessing Officer / TPO while computing adjustment, if any, in the hands of assessee.

30. Now, coming to the appeal of Revenue, wherein the ground of appeal No.1 raised is against exclusion of Tata Motors, which becomes academic in nature, since we have held the internal TNMM method to be most appropriate method.

31. The ground of appeal No.2 raised by the Revenue against the order of DRP in allowing working capital adjustment stands reversed as no external comparables are applied as we have directed the Assessing Officer to apply internal TNMM method.

32. The issue in ground of appeal No.3 is against allowance of proportionate adjustments to international transactions or at entity level. The said issue stands covered by the decision of Hon'ble Bombay High Court in CIT Vs. ALSTOM Projects India Ltd. (supra) and following the same, we hold that adjustment, if any, is to be made in respect of international transactions. Accordingly, the ground of appeal No.3 raised by Revenue is dismissed. The grounds of appeal raised by Revenue are partly allowed.

33. In the result, both the appeals of assessee and Revenue are partly allowed.

Order pronounced on this 3rd day of April, 2018.

Sd/-
(ANIL CHATURVEDI)

लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक Dated : 3rd April, 2018.

GCVSR

Sd/-
(SUSHMA CHOWLA)

न्यायिक सदस्य / JUDICIAL MEMBER

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

1. The Appellant;
2. The Respondent;
3. The DIT (Intl. Taxation), Pune;
4. The DRP, Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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