

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1807/Del./2015
(ASSESSMENT YEAR : 2010-11)**

M/s. Yutaka Autoparts India Pvt. Ltd., vs. ITO, Ward 27 (4),
1005, Roots Tower, Plot No.7, New Delhi.
District Center,
Near Nirman Vihar Metro Station,
Laxmi Nagar,
Delhi – 110 092.

(PAN : AAACY2991H)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Gaurav Garg, CA

Ms. Shweta Gupta, CA

Shri Harshit Khurana, CA

REVENUE BY : Shri Sanjay Kumar Yadav, Senior DR

Date of Hearing : 06.06.2018

Date of Order : 04.07.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Yutaka Autoparts India Pvt. Ltd. (for short 'the taxpayer'), by filing the present appeal sought to set aside the impugned order dated 12.01.2015, passed by the AO under section 144C read with section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2010-11 in consonance

with the orders passed by the Id. DRP/TPO on the grounds inter alia that :-

“1. In law and facts and circumstances of the case, the Assessing Officer ('AO')/Dispute Resolution Panel CDRP' has erred in making an addition of Rs.19,357,801 to the total income of the appellant on account of adjustment in the Arm's Length Price ('ALP') of the international transactions.

2. In law and facts and circumstances of the case, Ld. Transfer Pricing Officer ('TPO')/ DRP erred in not considering foreign exchange gain as a part of operating income while computing the operating margins of the Appellant and the comparable companies.

3. In law and facts and circumstances of the case, Ld. TPO erred in computing the margins of the companies considered as comparable by it and also upheld by Ld. DRP for the purpose of Transactional Net Margin Method.

4. In law and facts and circumstances of the case, Ld. TPO/ DRP erred in considering certain ~ companies as comparable to the Appellant on the following grounds:

a. Applying export turnover filter of less than equal to 30% of the sales and disregarding export turnover filter of less than equal to 10% of the sales applied by the Appellant in the transfer pricing documentation, without acknowledging the fact that Appellant is only dealing in domestic market and is having negligible export sales. Following companies do not qualify the export turnover filter of less than equal to 10% of total sales and thus should be rejected:

- i. ANG Industries Ltd*
- ii. Elofic Industries Ltd*
- iii. Wabco- JVS (India) Ltd*
- iv. Brakes India*

b. Considering following companies having diversified operations and serving different market area as comparable

- i. ANG Industries Ltd*
- ii. Elofic Industries Ltd*
- iii. Wabco-IVS (India) Ltd*

5. *Without prejudice to the above, and in law and on facts and circumstances of the case, the Ld. TPO/ DRP erred in not giving adjustment on account of high depreciation to the total cost in the case of the appellant.*

6. *Without prejudice to the above, and in law and on facts and circumstances of the case, Ld. TPO/ DRP erred in not considering Cash profits for the purpose of Transactional Net Margin Method in order to provide for excessive depreciation in the case Appellant vis-a -vis the comparable companies.*

7. *In law and on facts and circumstances of the case, in the interest of justice, Appellant may be allowed to adduce additional evidence as may be necessary in support of the grounds raised hereinabove after following due procedures laid down in the Income Tax (Appellate Tribunals) Rules, 1963.”*

2. Briefly stated the facts necessary to adjudicate the issues in controversy are : the taxpayer is a group company of Honda Group and is a wholly owned subsidiary of Yutaka Giken Company Limited, Jaman (Yutaka, Giken, Japan) along with its nominee. The taxpayer is into manufacturing and assembling of auto components, broadly deals in products as under :-

- (i) *Exhaust Systems – It includes exhaust manifolds, catalytic converter and silencer.*
- (ii) *Braking System Products – It includes the Brake Discs (the main components of disc brake are brake pads, caliper & rotor).*

3. During the year under assessment, the taxpayer entered into international transactions with its Associate Enterprises (AE) as under:-

<i>Description of Transactions</i>	<i>Method Selected</i>	<i>Value of Transactions (in INR)</i>
<i>Purchase of raw material, components & consumables</i>	<i>CPM</i>	<i>25,11,78,477</i>
<i>Purchase of fixed assets</i>	<i>CPM</i>	<i>34,26,522</i>
<i>Guarantee fees & collaterals paid</i>	<i>CUP</i>	<i>17,33,223</i>
<i>Sale of finished goods</i>	<i>CUP</i>	<i>9,37,876</i>
<i>Technical support services</i>	<i>CUP</i>	<i>18,04,928</i>
<i>Royalty expenses</i>	<i>CUP</i>	<i>78,58,339</i>
<i>Other miscellaneous purchases</i>	<i>CMP</i>	<i>1,88,306</i>
<i>Share application money received</i>	<i>-</i>	<i>11,00,00,000</i>

4. The taxpayer used to place orders to different AEs for import of proprietary parts for manufacturing products in India as per its requirement. Yutaka, Giken, Japan has assisted the taxpayer in setting up the manufacturing facilities and continuously to monitor the quality standards followed by the taxpayer. For braking systems, the taxpayer gets design and propriety paint from its AE and manufactures the product. Yutaka, Giken, Japan continues to monitor the quality standards observed by the taxpayer. The taxpayer in order to benchmark its international transactions compared its entity level margin (OP/Sales) with external comparable and computed its margin at 1.06% as against margin of the comparables at 2.34% and claimed its international transactions at arm's length.

5. The taxpayer by applying Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with Operating Profit / Sales (OP/Sales) as the Profit Level Indicator (PLI) for benchmarking at entity level, chosen six comparables using multiple years data and computed its average margin at 2.34%. However, during TP proceedings, the taxpayer updated its margin of six comparables with OP/Sales at 2.77%. However, TPO, after selecting 7 comparables having average OP/Sales at 8.56% as against taxpayer's margin of 0.87%, proposed enhancement of Rs.4,19,64,587/-. However, subsequently TPO rectified the adjustment under section 154 of the Income-tax Act, 1961 (for short 'the Act') vide order dated 18.03.2014 at Rs.2,21,29,016.

6. Assessee carried the matter before the Id. DRP by raising objections who has granted partial relief to the taxpayer by treating claim received, jobwork charges and sundry balances written off as operating but ratified the remaining findings returned by the TPO. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Undisputedly, the TPO has accepted the TNMM as the MAM with OP/Sales as PLI at entity level for benchmarking the international transactions applied by the taxpayer and proposed enhanced TP adjustment at Rs.4,19,64,587/- (subsequently reduced to Rs.2,21,29,016/- by virtue of the order dated 28.03.2014 passed u/s 154 of the Act). TPO by applying TNMM as the MAM with OP/Sales as PLI at entity level selected 9 comparables having average of 8.56%, which are as under :-

<i>S.No.</i>	<i>Company Name</i>	<i>OP/Sales %</i>
<i>1.</i>	<i>Hind Composites</i>	<i>3.19</i>
<i>2.</i>	<i>IAI Industries</i>	<i>-0.46</i>
<i>3.</i>	<i>ANG Inds</i>	<i>15.54</i>
<i>4.</i>	<i>Elofic Inds.</i>	<i>14.88</i>
<i>5.</i>	<i>WABCO India</i>	<i>22.97</i>
<i>6.</i>	<i>C M Smith</i>	<i>2.71</i>
<i>7.</i>	<i>Brakes India</i>	<i>9.31</i>
<i>8.</i>	<i>Mubea Suspension India Ltd.</i>	<i>6.31</i>
<i>9.</i>	<i>Sharda Sejong</i>	<i>2.60</i>
	<i>Average</i>	<i>8.56</i>

9. TPO computed the ALP of international transactions concerning sale of finished goods, purchase of raw material and other miscellaneous expenses as under :-

<i>Sales</i>	<i>Rs.54,57,03,341</i>
<i>ALP Profit @ 8.56%</i>	<i>Rs.4,67,12,206</i>
<i>Margin Shown</i>	<i>Rs.47,47,619</i>
<i>Difference</i>	<i>Rs.4,19,64,587</i>

The arm's length price of the international transaction related to the purchase of raw material and other miscellaneous expenses is determined at Rs.20,92,13,890 as against Rs.25,11,78,477 determined by the assessee. The assessing officer shall enhance the income of the assessee by Rs.4,19,64,587."

10. It is also not in dispute that after the order passed by the Id. DRP adjustment in ALP of international transactions comes to Rs.19,35,801/-.

11. The taxpayer, after raising different grounds, sought to consider foreign exchange gain as part of the operating income while computing operating margin of the taxpayer as well as the comparable companies; challenged computation of margin of the companies considered as comparables and also challenged inclusion of ANG Industries Ltd., Elofic Industries Ltd., WABCO – TVS (India) Ltd. and Brakes India as comparables on ground of export turnover filter and being into diversified operations. The taxpayer without prejudice also claimed to consider adjustment on account of high depreciation to the total cost in the case of the taxpayer and also claimed to consider cash profits for the purpose of TNMM in order to provide for excessive depreciation in case of taxpayer vis-à-vis comparable companies. We would discuss all the issues raised by the taxpayer under specific grounds as under.

GROUND NO.1

12. Ground No.1 is general in nature, hence does not require any specific adjudication.

GROUND NO.2

13. TPO has not returned any specific findings in treating foreign exchange gain as non-operating while computing the operating margin. Ld. DRP by ratifying the decision taken by TPO also considered foreign exchange gain as non-operating by applying the Safe Harbour Rules.

14. However, it is the case of the taxpayer that Safe Harbour Rules are not in case of the taxpayer qua AY 2010-11 and it is required to be treated as operating while computing the operating margins of the taxpayer as well as comparable companies and relied upon the decision rendered by *Hon'ble Delhi High Court in Cash Edge India Pvt. Ltd. vs. ITO – ITA 279/2016 order dated 04.05.2016 available at page 258 to 261 of the Paper book and Pr. CIT-2 vs. M/s. Fiserv India Pvt. Ltd. – ITA 17/2016 order dated 06.01.2016 available at page 262 to 267 of the Paper book.*

15. Hon'ble Delhi High Court in case cited as *Cash Edge India Pvt. Ltd.* (supra) decided the identical issue qua AY 2010-11 in favour of the assessee by returning following findings :-

“7. As far as the question, i.e., foreign exchange fluctuation element is concerned, the records clearly reveal that the Safe Harbour Rules came into force later whereas the facts of this case pertain to the assessment year 2010-11 (Financial year 2009-10). As a consequence, the impugned order cannot be interfered with. No question of law thus arises. The appeal is consequently dismissed.”

16. Similarly, Hon'ble Delhi High Court in case cited as *Fiserv India Pvt. Ltd.* (supra) also decided the identical issue pertaining to AY 2009-10 in favour of the assessee by returning following findings :-

“10. As regards question (ii) it is pointed out by learned counsel for the Assessee that the Safe Harbour Notification dated 18th September 2013 relied upon by the Revenue is prospective and did not apply to the AY in question. Even otherwise the Court finds that the decisions relied upon by the ITAT in the impugned order covers this issue in favour of the Assessee as far as the AY in question is concerned. Consequently, the Court declines to frame any question on the issue.”

17. Moreover, in taxpayer's own case for AY 2012-13, CIT (A) vide order dated 26.12.2017, available at page 202 of the paper book, allowed the taxpayer to consider foreign exchange gain as part of operating income. So, the Revenue is also legally bound to follow the rule of consistency.

18. In view of what has been discussed above, we are of the considered view that in order to compute the operating margin of the taxpayer, foreign exchange gain is to be considered as part of operating income for computing the operating margin of taxpayer as well as comparable companies. So, Ground No.2 is determined in favour of the taxpayer.

GROUND NO.3

19. The taxpayer by raising ground no3 sought to compute the margin of the company considered as comparable by the taxpayer for the purpose of TNMM. The taxpayer pointed out differences in margin in tabulated form as under :-

<i>S.No.</i>	<i>Name of Company</i>	<i>Margin as computed by the assessee (OP/Sales)</i>	<i>Margins as per the order of the Ld. TPO (OP/Sales)</i>	<i>Annual Report copy reference to paper book</i>
<i>1</i>	<i>ANG Industries</i>	<i>15.33%</i>	<i>15.54%</i>	<i>Annexure 37, Pg.619 to Pg. 651</i>
<i>2</i>	<i>Brakes India</i>	<i>8.14%</i>	<i>9.31%</i>	<i>Annexure 38, Pg.651 to Pg. 705</i>
<i>3</i>	<i>Hindustan Composites Limited</i>	<i>3.02%</i>	<i>3.19%</i>	<i>Annexure 41, Pg.812 to Pg. 821</i>
<i>4</i>	<i>Wabco India</i>	<i>20.15%</i>	<i>22.97%</i>	<i>Annexure 40, Pg.764 to Pg. 811</i>

20. When there are apparent discrepancies in the margin in OP/Sales computed by TPO as well as taxpayer, the TPO is directed to verify the margin and to reconsider the same to bring on record the correct margin of the aforesaid comparable companies. So, Ground No.3 is determined in favour of the taxpayer for statistical purposes.

GROUND NO.4

21. The taxpayer has sought exclusion of four companies viz. *ANG Industries Ltd., Elofic Industries Ltd and Wabco- JVS (India) Ltd. and Brakes India* on two grounds : (i) that these companies as comparables do not qualify the export turnover filter of equal to 10% of the sales; (ii) that these companies are having diversified operations and serving different market area as comparable.

22. Undisputedly, during the year under assessment, the taxpayer's export sales is merely 0.17%. It is also not in dispute that the taxpayer in its TP analysis applied "export sales not more than 10%" as one of the filters so as to eliminate the company working in different geographical market and relied upon Rule 10B(ii)(d) of the Income-tax Rules, 1962 (for short 'the Rules') which are extracted as under for ready perusal :-

"(2) For the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:—

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail."

23. It is the case of the taxpayer that during the year under assessment, the taxpayer was into manufacturing and employing of auto components like enhanced system and braking system for sale to the original manufacturing equipments (OEM's) in India. When we examine the percentage of export sales to the total sales of the comparable companies, it is not near to the taxpayer. For ready perusal, details of percentage of export sales to total sales of the comparable companies as provided by the taxpayer on the basis of annual reports is extracted as under :-

<i>S.No.</i>	<i>Name of Company</i>	<i>Export sales (in Cr.)</i>	<i>Sales</i>	<i>Export Sales / Sales %</i>	<i>Reference to Annual Report</i>
<i>1</i>	<i>ANG Industries</i>	<i>32.89</i>	<i>110.63</i>	<i>29.73</i>	<i>Pg.631 to Pg. 637 of Paper Book</i>
<i>2</i>	<i>Elofic Industries</i>	<i>28.53</i>	<i>110.63</i>	<i>29.07</i>	<i>Annexure 38, Pg.651 to Pg. 705</i>
<i>3</i>	<i>WABCO – TVS</i>	<i>76.06</i>	<i>591.25</i>	<i>12.86</i>	<i>Annexure 41, Pg.812 to Pg. 821</i>
<i>4</i>	<i>Brakes India</i>	<i>289.74</i>	<i>1885.56</i>	<i>15.18</i>	<i>Annexure 40, Pg.764 to Pg. 811</i>

24. TPO, on the other hand, rejected the companies having export sales more than 30% of the total sales as against 10% filters proposed by the taxpayer. So, the TPO has principally agreed with the contention raised by the taxpayer that in view of the provisions contained under Rule 10B(2)(d), companies operating in same geographical location and having similar size of markets can be

compared. However, TPO rejected the contention of the taxpayer to reject the companies having export sales more than 10% of the total sales simply for the reason that by putting different income bar at 10% would lead to a very narrow set of comparables, hence used the filter to reject the company having 30% income from export. Ld. DRP also concurred with the view taken by the taxpayer. The taxpayer relied upon the decision rendered by the coordinate Bench of the Tribunal in case of *Gharda Chemical Ltd. vs. DCIT – ITA No.2242/Mum/2006 available at page 508 to 524 of the paper book and ACIT vs. Rhoida Chemicals India P. Ltd. – ITA No.2242/Mum/2006 available at page 525 to 534 of the paper book.*

25. Coordinate Bench of the Tribunal in case of *Gharda Chemical Ltd.* (supra) observed that for the purpose of comparability, factors like location of parties, availability of raw material, demand & supply and acquisition are also necessary to be considered. Operative part of the order is extracted as under :-

“16. The importance of the “similar circumstances” cannot be lost sight of in this context because a round cannot be compared with a square and a rectangle with a triangle. In other words the uncontrolled transactions which are contemplated for comparison should be alike, if not identical. Similarity between the two sets of transactions can be judged by the quality, grade and quantity of the material. In addition, the factors like the location of the parties, availability of raw material; demand and supply equation also play pivotal role in finding out as to whether the two are really comparable or not.”

26. Identical issue has been decided by the coordinate Bench of the Tribunal in case of *ACIT vs. Rhoida Chemicals India P. Ltd.* (supra) and on the basis of export filter, comparable was ordered to be excluded by returning following findings :-

“13. Insofar as the rejection of other filtration criteria adopted by the assessee with regard to the companies having export sales being less than 20% of the total sales, it is seen that assessee’s exports are around 13%, therefore, the selection criteria of 20% of the export does not seems to be correct one. At the same time also, the TPO’s rejection of this criteria is also not correct that it should be taken as “Nil” or zero percentage. Therefore, we are of the considered opinion that the second criteria for selection of comparable companies should be the companies having export sales of in and around 13% which would be quite appropriate. Thus, we direct the TPO to look for the comparable companies, which are having export turnover percentage of around 13% of the total sales and accordingly, select the comparable companies using this criterion. While doing so, the TPO will take into account the export turnover out of total sales, gross of excise duty excluding commission and other income.”

27. Keeping in view the facts and circumstances of the case and by following the order passed by the coordinate Bench of the Tribunal, we are of the considered view that all the four comparable companies viz., *ANG Industries Ltd., Elofic Industries Ltd., Wabco- JVS (India) Ltd. and Brakes India*

having export sales of 29.73%, 29.07%, 12.86% and 15.18% to the total sales are not even near to the taxpayer which is having a meager export sale of 0.17% and since the comparable companies are operating in entirely different geographical market, the same cannot be a valid comparable vis-à-vis the taxpayer.

28. Moreover, the companies which are otherwise not comparable cannot be taken as comparable merely on the ground that it will lead to very narrow set of comparables. More so, the Revenue in taxpayer's own case for AY 2012-13 has accepted the turnover filter of 25% of sales for identifying the comparable companies and has rejected ANG Industries and Sundaram Brake Linings Ltd. which are also comparable during the year under assessment vide order passed by Id. CIT (A) for AY 2012-13 made available by the taxpayer at page 195 of the paper book.

29. The Id. AR for the taxpayer further challenged the inclusion of *ANG Industries Ltd., Elofic Industries Ltd and Wabco- JVS (India) Ltd.* by the TPO for benchmarking the international transactions on ground of their diversified operation as well as diversified market. TPO selected all the three companies as comparables on the ground that the same are dealing in products which are comparable to the taxpayer. We would examine their comparability as under.

ANG INDUSTRIES LTD. (ANG)

30. The taxpayer brought on record the diversified operation of ANG as per information available on website and in the annual reports; that ANG is a diversified engineering and manufacturing company with interest in heavy steel fabrication, tractors and trailers, tipper body building, specialized containers and automotive components for heavy commercial vehicles; that ANG is having various divisions viz. HCV Division, Trailer and Body Building, Heavy Steel Fabrication and Agricultural Component. Furthermore, as per annual report, ANG is serving the key infrastructure sectors of power, construction and surface transport – roadways & railways.

31. Diversified operation and diversified market of ANG makes it incomparable with the taxpayer which is undisputedly producing two products, namely, Exhaust System and Braking System.

32. Coordinate Bench of the Tribunal in case cited as *M/s. Carlyle India Advisors Ltd. vs. DCIT – ITA No.7367/Mum/2012 order dated 07.02.2014* excluded the company as comparable on the ground that the same is engaged in diversified activities and segmental reporting is not available. So, in these circumstances, we find ANG chosen by the TPO/DRP not a valid comparable.

ELOFIC INDUSTRIES LTD (ELOFIC)

33. The exclusion of Elofic has been challenged by the taxpayer firstly on ground of export sales to total sales to the tune of 29.07%, which has already been discussed in the preceding paras and secondly, on ground of diversified market as the filters manufactured by Elofic share a common bond of trust, durability and performance and find application in multifarious segments like automobiles, agriculture, industrial, small engines, two-wheelers, earthmoving, marine, auton air-conditioning, industrial heating and petrochemical. Keeping in view the diversified market of Elofic and failing the export income to total sales filter, we do not find Elofic as a valid comparable.

WABCO- JVS (INDIA) LTD. (WABCO)

34. The taxpayer also challenged the inclusion of WABCO on ground of failing the export income filter and on the ground that it is catering to after-market segment and the company is carrying out significant research and development activities. Annual report, relevant page 772, shows that WABCO has commissioned 156 authorized service centers at strategic locations across the country, to provide quicker and better service on air brake aggregates. Further, to improve availability of quality service in rural areas, the

company also commissioned 145 certified workshops. These initiatives would result in improved service practices, availability of genuine parts and generate additional revenue for the company. Furthermore, annual report at page 769 of the paper book shows that WABCO is carrying out significant research and development activities in specific areas and is deriving benefits from R&D activities as under :-

“B. TECHNOLOGY ABSORPTION

Research & Development (R & D)

1. Specific areas in which R & D is carried out by the company.

Existing activities:

(a) Double diaphragm spring brake actuator (DDSBA) type 20/24 and upgraded version of type 16/24 for disc brake validated and production ready for European Market. These devices are designed for high level of robustness against dust and water entry.

(b) Automatic slack adjuster (ASA) with patented adjustment mechanism developed and validated for European market.

(c) New Air Processing and Distribution Assembly (APDA) which was in promotion phase last year is now fully developed, validated and production ready. This product contributes to clean working environment for long life of pneumatic systems on vehicle.

(d) Improved and redesigned D2 governor valve with patented sealing solution developed and validated for US market.

(e) Design activity kicked off on fourteen valve devices for North American OEMs as part of market expansion strategy. These devices deliver best in class performance, capable of operating in higher temperature and corrosive environment.

(f) New Life Compressor II generation (NLC II) which was under promotion phase last year is now developed and

undergoing customer validation. This is a unique patented solution for improved performance at reduced cost to the customer compared to the previous generation NLC I.

(g) New initiative for engineering excellence based on Model Based Engineering (MBE) launched. Mathematical models for flow simulation of valves and compressor performance simulation developed and validated, which is expected to significantly reduce design lead time for new products.

(h) Indigenous environmentally friendly technology developed for achieving corrosion resistance of products (480 hours of neutral salt spray) to match expectations of global customers.

(i) New welding process developed to achieve extended life of brake chamber parts critical to safety.

(j) Kicked off development of Automated Manual Transmission (AMT) for Indian customers. This technology will significantly reduce driver fatigue and improve fuel efficiency.

(k) Electronically Controlled Air Suspension (ECAS), which was promoted last year in Indian Market introduced in production vehicles.

(l) ABS adapted and successfully introduced in trailer systems and off-highway dumpers to significantly improve road safety.

(m) Continued focus on cost reduction based on process and design change to reduce material content has yielded significant benefits.

(n) Significant effort at cost reduction through transferring production of brake chambers from Europe to India with locally developed parts, which are fully validated to global customer standards. “

35. Aforesaid facts, provision of catering to after market segment by WABCO and carrying out significant R&D activities benefiting the company makes it incomparable to the taxpayer which is a routine manufacturer. So, we order to exclude WABCO. So, ground no.4 is determined in favour of the taxpayer.

GROUND NO.5

36. Without prejudice, the taxpayer challenged the order passed by TPO/DRP in not providing adjustment on account of high depreciation to the total cost in the case of the taxpayer. The Id. AR for the taxpayer contended that it is the second year of production whereas all the companies selected by the TPO are very old/senior in the business and claimed depreciation to the total cost. The taxpayer brought on record complete data showing depreciation rate with respect to sales in the year under assessment as under :-

<i>S.No.</i>	<i>Company Name</i>	<i>Sales (in cr.)</i>	<i>Depreciation (in cr.)</i>	<i>Depreciation / Sales %</i>
<i>1</i>	<i>Hind Composites Ltd.</i>	<i>89.9</i>	<i>3.85</i>	<i>4.28%</i>
<i>2</i>	<i>C M Smith & Sons Ltd.</i>	<i>102.09</i>	<i>3.485608</i>	<i>3.41%</i>
<i>3</i>	<i>Mubea Suspension India Ltd.</i>	<i>62.92</i>	<i>1.71</i>	<i>2.72%</i>
<i>4</i>	<i>Sharda Sejong Auto Components Ltd.</i>	<i>254.45</i>	<i>7.06</i>	<i>2.77%</i>
<i>5</i>	<i>IAI Industries Ltd.</i>	<i>21.67</i>	<i>0.9893</i>	<i>4.57%</i>
<i>6</i>	<i>ANG Industries Ltd.</i>	<i>106.73</i>	<i>5.16</i>	<i>4.83%</i>
<i>7</i>	<i>Elofic Industries Ltd.</i>	<i>99.21</i>	<i>2.46</i>	<i>2.48%</i>
<i>8</i>	<i>WABCO TVS (India) Ltd.</i>	<i>591.26</i>	<i>14.44</i>	<i>2.44%</i>
<i>9</i>	<i>Brakes India</i>	<i>1885.56</i>	<i>55.35</i>	<i>2.94%</i>
	<i>Average Depreciation</i>			<i>3.38%</i>
	<i>Yutaka India (Assessee)</i>	<i>5.57</i>	<i>5.34</i>	<i>9.79%</i>

37. The taxpayer followed Written Down Value (WDV) method for providing depreciation in its books of account and for this

reason, high depreciation was charged in the initial year of operation and quantum of depreciation get reduced gradually. So, the taxpayer in its TP study provided for adjustment in its own margin by adjusting the depreciation expenses to make the ratio of depreciation to sales in the case of taxpayer equivalent to that of average depreciation to sales in case of comparable companies.

38. It is contended by Id. AR for the taxpayer that in taxpayer's own case for AY 2009-10 in ITA No.1120/Del/2014, the Tribunal recognised the difference in the capacity in which the taxpayer is operating and the capacity in which comparable companies are operating granted the taxpayer's claim for capacity utilization.

39. However, TPO rejected the contention raised by the taxpayer without providing any reasons and considered the operating margins earned by the taxpayer as margins earned from international transactions. Ld. DRP also rejected the claim of the taxpayer on the ground that the depreciation to the total cost ratio depends on the asset size vis-à-vis other expenses and as such, a reasonable accurate and reliable adjustment cannot be made.

40. The taxpayer relied upon the decision rendered by the coordinate Bench of the Tribunal in the cases of *Outsource Partners International P. Ltd. vs. DCIT - ITA No.337/Bang/2015*, *M/s. Infineon Technologies India Ltd. vs.*

ACIT – ITA No.657/Bang/2011, Amdocs Business Services Pvt. Ltd. vs. DCIT – ITA No.1412/Pune/11, ACIT vs. M/s. FIAT India Pvt. Ltd. – ITA No.1848/Mum/2009 and E.I. Dupont India (P) Ltd. vs. DCIT – ITA No.5336/Del/2010.

41. Keeping in view the fact that in taxpayer's own case for AY 2009-10, difference in capacity in which the taxpayer is operating and the capacity in which comparable companies are operating were recognised, we are of the considered view that the issue is required to be sent back to the TPO to decide in the light of the revenue's own order in taxpayer's own case for AY 2009-10 and in view of the decisions rendered by the coordinate Benches of the Tribunal (supra). So, ground no.5 is determined in favour of the taxpayer for statistical purposes.

GROUND NO.6

42. The taxpayer challenged the order passed by the TPO/DRP in not considering cash profits for the purpose of TNMM in order to provide for excessive depreciation in case of the taxpayer vis-à-vis comparable companies. The taxpayer provided the analysis of the cash profit earned by it as under :-

<i>Particulars</i>	<i>Actual</i>	<i>Cash Profits</i>
	<i>Amount in Rs.</i>	<i>Amount in Rs.</i>
<i>Sales</i>	<i>545,703,341</i>	<i>545,703,341</i>
<i>Other Operating income</i>		
<i>Sundry balances W/off</i>	<i>1,910,317</i>	<i>1,910,317</i>
<i>Claim received</i>	<i>111,661</i>	<i>111,661</i>
<i>Job work charges</i>	<i>40,589</i>	<i>40,589</i>
<i>Foreign exchange gain</i>	<i>1,719,684</i>	<i>1,719,684</i>
<i>Total operating income</i>	<i>549,485,592</i>	<i>549,485,592</i>
<i>Cost of sales</i>	<i>378,562,282</i>	<i>378,562,282</i>
<i>Employee cost</i>	<i>27,624,330</i>	<i>27,624,330</i>
<i>Manufacturing & Administration</i>	<i>78,923,208</i>	<i>78,923,208</i>
<i>Bank charges</i>	<i>2,245,939</i>	<i>2,245,939</i>
<i>Depreciation</i>	<i>53,402,064</i>	
<i>Total Operating expenses</i>	<i>540,757,823</i>	<i>487,355,759</i>
<i>Operating profit</i>	<i>8,727,769</i>	<i>62,129,833</i>
<i>Non Operating income</i>		
<i>Interest received</i>	<i>35,410</i>	<i>35,410</i>
<i>Depreciation</i>		<i>53,402,064</i>
<i>Non Operating expenses</i>		
<i>Interest on loan</i>	<i>19,258,549</i>	<i>19,258,549</i>
<i>PBT</i>	<i>(10,495,370)</i>	<i>(10,495,370)</i>
<i>OP/Sales</i>	<i>1.60%</i>	<i>11.39%</i>

43. The taxpayer relied upon the decision rendered by the coordinate Bench of the Tribunal in cases of *ACIT vs. Gates India (P) Ltd. – ITA No.75/Del/2011 order dated 31.07.2017* and *Schefenacker Motherson Ltd. vs. ITO – 123 TTJ 509 (Delhi)*.

44. The ld. DR for the Revenue supporting the order passed by the TPO/DRP contended that the taxpayer is required to choose

one of the method provided u/s 92C of the Act for computing the ALP under TNMM and the mandate for determining the ALP under TNMM as given as per Rule 10B(1) of the Act and further contended that the cash profit cannot be used in place of net operating profit for the purpose of TNMM in order to provide for excessive depreciation in the case of the taxpayer vis-à-vis comparable companies.

45. Coordinate Bench of the Tribunal in *ACIT vs. Gates India (P) Ltd.* (supra) held that, ***“Only in the specific and exceptional circumstances where the assessee has demonstrated that either in the case of the assessee or in the case of comparable companies there exists an exceptional circumstances under which the depreciation provided by the assessee is either excessive in comparison to the comparables or depreciation provided by the comparable companies is exceptionally very low. The cash profit can be considered under TNMM”***.

46. Coordinate Bench of the Tribunal in *Schefenacker Motherson Ltd.* (supra) while deciding the identical issue also held as under :-

“19. In the present appeal, ALP of transactions carried was to be determined by comparing net profit of the taxpayer (tested party) with mean net profit of comparables. Only receipts and expenditure, having connection with international transactions, were

required to be taken into account. Any receipt or expenditure having no bearing on price or margin of profit could not be taken into consideration. It is evident from statutory provisions quoted above that it is nowhere provided that deduction of depreciation is a must. Depreciation can be taken into account or disregarded in computing profit depending upon the context and purpose for which profit is to be computed. There is no formula which would be applicable universally and in all circumstances. "Net profit" used in r. 10B can be taken to mean commercial profit as held by the TPO and confirmed on appeal by the learned CIT(A). But depreciation in such profit on commercial principles as to be the "actual" amount by which the assets of business got depleted between the two dates separated by a year. It cannot be depreciation under tax or companies rules or as per policy of the company. In the case in hand, Revenue authorities went wrong in disregarding the context and purpose for which the "net profit" was to be computed. Depreciation, which can have varied basis and is allowed at different rates is not such an expenditure which must be deducted in all situations. It has no direct connection or bearing on price, cost or profit margin of the international transactions. Principles emphasized in the case of Bangalore Clothing {supra} by Bombay High Court are attracted here. Object and purpose of the transfer pricing to compare like with the like, and to eliminate differences, if any, by suitable adjustment is to be seen. Therefore, there was justification on the part of the taxpayer in pleading that profits be taken without deduction of depreciation as depreciation was leading to large differences in margins for various reasons."

47. When the taxpayer has brought on record the complete analysis of cash profits earned by the taxpayer to be compared with complete analysis of cash profit earned by the comparable companies extracted in the preceding paras, we are of the

considered view that the issue is required to be decided afresh by the TPO in the light of the decision rendered by the coordinate Bench of the Tribunal in *ACIT vs. Gates India (P) Ltd. and Schefenacker Motherson Ltd. vs. ITO* (supra). So, ground no.6 is allowed for statistical purposes.

GROUND NO.7 & 8

48. Grounds No.7 & 8 are general in nature, hence do not require any specific adjudication.

49. Resultantly, the appeal filed by the taxpayer is allowed for statistical purposes.

Order pronounced in open court on this 4th day of July, 2018.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Dated the 4th day of July, 2018
TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.