आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.5781/Mum/2016

(**निर्धारण वर्ष** / Assessment Year: 2011-12)

Assistant Commissioner of Income Tax-13(2)(1) Room No.146, 1st Floor Aaykar Bhavan, M.K.Road Mumbai -400 020	**बनाम**/ Vs.	**Sodexo Food Solutions India Private Limited** 1stFloor, Gemstar Commercial Complex Ramchandra Lane Extension Kanchpada, Malad(W) Mumbai-400 064
स्थायी लेखा सं./PAN	:	**AAACR-2547-Q**
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./I.T.A. No.5707/Mum/2016

(**निर्धारणवर्ष** / Assessment Year: 2011-12)

Sodexo Food Solutions India Private Limited 1stFloor, Gemstar Commercial Complex Ramchandra Lane Extension Kanchpada, Malad(W) Mumbai-400 064	**बनाम**/ Vs.	**Assistant Commissioner of Income Tax-13(2)(1)** Room No.146, 1st Floor Aaykar Bhavan, M.K.Road Mumbai -400 020
स्थायी लेखा सं./PAN	:	**AAACR-2547-Q**
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Nimesh Vora, Ld. AR
Revenue by	:	Rignesh Das, Ld. JCIT-DR

सुनवाई की तारीख/ **Date of Hearing**	:	05/09/2018
घोषणा की तारीख / **Date of Pronouncement**	:	03/10/2018

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. These are cross appeals for Assessment Year [AY] 2011-12 which contest the order of the Ld. Commissioner of Income-Tax (Appeals)-58 [CIT(A)], Mumbai, *Appeal No.CIT(A)-58/Arr.283/2013-14* dated 02/06/2016 on different grounds of appeal. First we take up assessee's appeal *ITA No.5707/Mum/2016* wherein the assessee is aggrieved by confirmation of disallowance of *Gate Expenses* of Rs.2,98,472/- & confirmation of disallowance of Rs.12,77,575/- for delayed payment of employee contribution to *PF / ESIC.*

2. The assessee being *resident corporate entity* engaged in the business of *Catering and House-keeping services* was assessed for impugned AY u/s 143(3) vide order dated 30/01/2014 passed by *Ld. Additional Commissioner of Income Tax-8(3), Mumbai [AO]* wherein the income of the assessee has been assessed at Rs.17.79 crores after certain additions / disallowances as against returned income of Rs.4.40 crores filed by the assessee on 15/10/2011.

3.1 Facts *qua* the subject matter of assessee's appeal are that during assessment proceedings, it was noted that the assessee debited a sum of Rs.2,98,472/- under the head *catering and gate expenses* which were disallowed in earlier years as they were found to be illegal payments in the form of *tips* paid to certain authorities at the *docks* and therefore, not allowable in terms of Section 37(1). The Ld.CIT(A) has confirmed the same, against which the assessee is under appeal before us. The Ld. Auhtorized Representative for Assessee [AR], *Shri Nimesh Vora,* at the

outset, fairly conceded that the issue stood covered against the assessee by the order of this Tribunal for several earlier AYs starting from AY 1999-2000. In view of the admitted position, this ground stand dismissed.

3.2 The second addition arises out of the fact that upon perusal of *Tax Audit Report,* it was noted that the assessee delayed the payment of *employees' contribution to provident fund / state insurance / Labor Welfare Fund* aggregating to Rs.107.48 Lacs, the details of which have already been extracted in the quantum assessment order at *Page Number-8.* Therefore, the same were disallowed in terms of provisions of Section 2(24)(x) *read with Section 36(1)(va).* After adjusting the *suo-moto* disallowance of Rs.0.24 Lacs as made by the assessee, the balance amount of Rs.107.24 Lacs was added to the income of the assessee. Upon further appeal, Ld. first appellate authority granted partial relief by holding that the contribution deposited within the due date including grace period of 5 days was eligible for deduction whereas the payment made beyond that date were rightly disallowable. The Ld. AO was directed to re-compute disallowance afresh. The Ld. CIT(A) while adjudicating the same placed reliance on the decision of Hon'ble Kerala High Court rendered in *Merchem Ltd. [61 Taxmann.com 119].* Aggrieved, the assessee is in further appeal before us.

3.3 The Ld. AR submitted that the issue stood covered in assessee's favor by the following binding judicial pronouncements, the copies of which have been placed on record:-

(i) *Pr. CIT v Rajasthan State Beverages Corporation Ltd [2017] 84 taxmann.com 173 (Rajasthan HC). Special Leave Petition filed in Pr. CIT v*

Rajasthan State Beverages Corporation Ltd [250 Taxman 16(SC) was dismissed by the Supreme Court [Page 301 to 304 of legal paper book].

(ii) CIT v Hindustan Organics Chemicals Ltd [366 ITR 001 (Bombay HC)] [Page 305 to 309 of legal paper book]

(iii) CIT v Ghatge Patil Transports Limited [368 ITR 749 (Bombay HC)] [Page 310 to 314 of legal paper book]

Besides the judgment of Hon'ble Kerala High court as relied upon by Ld. CIT(A), the Ld. DR could not put forward any other contrary judgment. Upon due consideration, we find that the issue stood squarely covered in assessee's favor by the decision of our jurisdictional Hon'ble Bombay High Court rendered in *CIT Vs. Ghatge Patil Transports Ltd. [supra]* wherein the matter has been concluded in the following manner:-

> ***"14.*** *From a reading of above, it is clear that the employer-assessee would be entitled to deduction only if the contribution to the employee's welfare fund stood credited on or before the due date and not otherwise. It transpires that Industry once again made representations to the Ministry of Finance to remove this anomaly. The result was that an amendment was inserted which came into force with effect from 1st April, 2004 and two changes were made in section 43B firstly by deleting the second proviso and further amendment in the first proviso which reads as under:—*
>
> *"**Provided** that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return."*
>
> ***15.*** *In this manner, the amendment provided by Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employees' Welfare Funds on the other. All this came up for consideration before the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (supra). The Tribunal in the case at hand relied upon the said judgment. There is no reason to fault the order passed by the Tribunal. We are of the view that the decision of the Supreme Court in Alom Extrusions Ltd. (supra) applies to employees' contribution as well as employers' contribution. Question Nos.2, 3 & 4 are accordingly answered in favour of the assessee and against the revenue."*

Therefore, respectfully following the decision of jurisdictional High Court in preference to adverse decision of Kerala High Court as relied upon by Ld. first appellate authority, we delete the impugned addition as made by

Ld. AO subject to verification of the fact that all the payments have been made before due date of filing of return u/s 139(1). The *suo-moto* disallowance of Rs.0.24 Lacs as made by the assessee shall remain undisturbed. The Ld. AO is directed to verify the fact that impugned payments were deposited by the assessee before due date of filing of return of income with a direction to assessee to provide requisite details in this regard. The ground stand allowed.

3.4 Resultantly, the assessee's appeal stand partly allowed.

Revenue's Appeal ITA No. 5781/Mum/2016

4. The revenue is aggrieved by certain relief provided by Ld. CIT(A) to the assessee, which could be tabulated in the following manner:-

Ground No.	***Nature of Additions / disallowances***	***Remarks***
1.	*Disallowance u/s 14A*	*Rs.5,41,294/-*
2.	*Deposits written-off*	*Rs.19,56,730/-*
3.	*Professional / Non-compete fees paid to Raju Shete*	*Rs.97,26,905/-*
4. to 6.	*Transfer Pricing Adjustment*	*Rs.10,49,74,001/-*

5.1 Facts qua revenue's appeal are that during assessment proceedings, it was noted that the assessee held exempt dividend income yielding investments of Rs.4.83 Crores at *year-end,* which called for disallowance u/s14A. The assessee defended the same vide reply dated 04/12/2013, *inter-alia,* by submitting that the investments were old investments and further, no exempt income was earned by the assessee against the same during the impugned AY and therefore, no disallowance was called for. However, not convinced, Ld. AO, *inter-alia,* replying upon judgment of Special Bench Delhi Tribunal rendered in *Cheminvest Ltd. Vs ITO 121 ITD 318* computed aggregate disallowance

of Rs.5.41 Lacs u/s 14A *read with* Rule 8D(2) which comprised-off of interest disallowance of Rs.2.99 Lacs u/r 8D(2)(ii) and expense disallowance of Rs.2.41 Lacs u/r 8D(2)(iii).

5.2 Aggrieved, the assessee contested the same with success before Ld. CIT(A) wherein the addition was deleted by observing that no exempt income was earned by the assessee during the impugned AY and therefore, no disallowance was called for in terms various judgments of Hon'ble Punjab & Haryana High Court as well as Delhi High Court. Aggrieved, the revenue is in further appeal before us.

5.3 After hearing respective representatives, we find that it is an undisputed fact that no exempt income has been earned by the assessee during the impugned AY and therefore, no disallowance was called for u/s 14A as per catena of judgments of Higher Judicial Authorities in assessee's favor, the details of some of which are as follows:-

No.	***Case Law***	***Judicial Authority***	***Citation***
1.	*PCIT Vs Ballarpur Industries Ltd*	*Hon'ble Bombay High Court*	*ITA No. 51 of 2016*
2.	*CIT Vs Chettinad Logistics Pvt. Ltd.*	*Hon'ble Madras High Court*	*80 Taxmann.com 221*
3.	*CIT Vs. Holcim India P. Ltd.*	*Hon'ble Delhi High Court*	*111 DTR 158*
4.	*Cheminvest Ltd Vs CIT*	*Hon'ble Delhi High Court*	*378 ITR 33*
5.	*PCIT Vs IL&FS Energy Dev. Co. Ltd.*	*Hon'ble Delhi High Court*	*84 Taxmann.com 186*
6.	*PCIT Vs Empire Package Pvt. Ltd.*	*Hon'ble Punjab & Haryana High Court*	*81 Taxmann.com 108*
7.	*CIT Vs Lakhani Marketing Inc.*	*Hon'ble Punjab & Haryana High Court*	*2015 4 ITR-OL 246*
8.	*CIT Vs Hero Cycles Ltd*	*Hon'ble Punjab & Haryana High Court*	*323 ITR 518*
9.	*CIT Vs. Winsome Textiles Ind. Ltd.*	*Hon'ble Punjab & Haryana High Court*	*319 ITR 204*
10.	*CIT Vs Corrtech Energy Pvt Ltd*	*Hon'ble Gujarat High Court*	*223 Taxmann.com 130*

The revenue is unable to bring on record any contrary judgment to controvert the same. Respectfully following the wisdom of higher judicial authorities, we confirm the stand of Ld. first appellate authority. This ground stand dismissed.

6.1 The second issue pertains to deposits written-off for Rs.19.56 Lacs which mainly comprised-off of *forfeiture of security deposits* paid by the assessee on account of termination of lease before stipulated lock-in-period. The details of the write-off as extracted at *Page-10* of the quantum assessment order is as follows:-

Sr. No.	***Nature of advance/deposit written off***	***Amount written off (In Rs.)***	***Remarks***
1.	*Security Deposit forfeited (3 parties in Gurgaon)*	*12,00,000/-*	*Lease terminated before expiry of lock-in-period*
2.	*Security Deposit forfeited (1 party in Pune)*	*7,50,000/-*	*Lease terminated before expiry of lock-in-period*
3.	*Not furnished*	*6,730/-*	*Delay in furnishing TDS certificate*
TOTAL		*19,56,730/-*	

The said security deposits paid by the assessee against various premises taken on lease have been forfeited in view of the fact that respective leases were terminated by the assessee before expiry of lock-in-period and therefore, claimed as deduction. The said write-offs, in the opinion of Ld. AO, did not satisfy the conditions of Section 36(1)(vii) *read with Section 36(2)* and therefore, the same were not allowable. The Ld. AO also fortified his stand by observing that the said loss was capital in nature and hence not allowable.

6.2 Aggrieved, the assessee contested the same before Ld. first appellate authority wherein the relief was granted to the assessee by placing reliance on the stand of Ld. CIT(A) in immediately preceding AY. Aggrieved, the revenue is in further appeal before us.

6.3 The Ld. AR, drawing our attention to the lease documents placed in the *paper-book* submitted that certain security deposits were given by the assessee to landlords for acquiring the rented premises to be used

for business purposes. Since the assessee had vacated the same before the lock-in-period as stipulated in the respective lease agreements, the said security deposits were adjusted / forfeited against the compensation for the non-use of premises as per the lock-in-period and the same being irrecoverable were written-off in the books of accounts. Therefore, the same being incurred for business purposes and written-off during the course of business and hence, rightly allowed u/s 37(1). Per *Contra,* Ld. DR placed reliance on the stand of Ld. AO.

6.4 Upon careful consideration, we find that factual matrix is not under dispute. The security deposits made by the assessee have been adjusted / forfeited by the landlords on account of the fact that the premises were not used for minimum lock-in-period as stipulated in the respective agreements. It is also undisputed fact that the premises were being used for business purposes. The Ld. AO, himself, in the alternative, opined that the said expenditure was capital in nature which demonstrates that the genuineness of the same was also not under doubt. Under these circumstances, we find that the expenditure was not capital in nature since the same did not bring into existence any new asset or benefit of enduring in nature. The same, being incurred during the course of business, were revenue in nature and therefore, allowable to the assessee. This ground stand dismissed.

7.1 The root of third addition lies in the fact that the assessee paid *professional fees* of Rs.60 Lacs to an individual *Raju Shete* which was payable in 4 quarterly installments of Rs.15 Lacs each. It was submitted that *Raju Shete* was the previous owner director of an entity namely *M/s Radhakrishna Hospitality Services Private Limited* which was taken over

by the assessee company and therefore, the payment was necessary for continued patronage of earlier customer base and employees in the transition period. After analyzing the relevant details / agreement, the Ld. AO noted that *Raju Shete* was offered the position of *Non-Executive Chairman* of a group of entities including the assessee for a period of four years to assist in the retention efforts with existing clients and employees. The compensation payable was for Rs.60 Lacs per annum *plus* reimbursement of business expenses not exceeding Rs.40 Lacs per annum. The Ld. AO, upon perusal of relevant confidential correspondence dated 10/03/2009, reached a conclusion that the payment was more in the nature of *non-compete fees* for agreeing not to compete in similar line of business and the same was primarily related to the acquisition process and hence, capital in nature. The reasoning of Ld. AO has been given in *para-9.2,* the perusal of which reveal that the payment was agreed to be paid by *Sodexo SA, France* to *Shri Raju Shete* upon acquiring the business / companies from *Shri Raju Shete* and was in continuation to the acquiring of Shares. Resultantly, aggregate amount of Rs.97.26 Lacs comprising of annual compensation of Rs.60 Lacs *plus* reimbursements of Rs.37.26 was held to be capital in nature and therefore, not allowable. In the alternative, it was noted that the agreement stipulated rendering of services not only to the assessee but to other group entity viz. *RHKS Food & Allied Services Private Limited* as well and therefore, entire payment could not be allowed to the assessee. In the absence of adequate bifurcation, the whole amount was disallowed.

7.2 The Ld.CIT(A) concluded the matter in assessee's favor by observing as under:-

> *9.4 The submissions made by the appellant has been examined. It is seen that the business of the company in which Mr. Shete was a director, was taken over by the appellant company. In order to ensure smooth transition and to stabilize the activities of the appellant, an agreement was entered into by the parent company of the appellant with Mr. Shete appointing him non-executive Chairman for a period of four years for a consideration of Rs.60,00,000 per annum and expenses to the extent of Rs.40,00,000/-.*
> *9.5 The AO has placed his reliance on the agreement to conclude that the payment represented non-compete fee paid to Mr. Shete and hence a payment which was capital in nature. The business activity of the appellant has been examined. It is seen that the appellant is in hospitality business which requires a very intimate knowledge of the clients and is extremely sensitive to even small errors or mis-management. The operations include supplying catering and other services to airlines etc. which have serious quality standards. Hospitality business is not a business which can be created overnight but is an outcome of goodwill generated over years. Hence, the submission made by the appellant that the presence of Mr. Shete was required for the purpose of its business so as to ensure that the clients were retained and there was no disturbance in the services being offered, is found to be valid explanation. In a business take over, it is not unusual to retain key employees in order to ensure that the business continues to run smoothly.*
> *9.6 There is no inference by the AO that Shri Raju Shete has not rendered professional services during the year. If he has functioned as non-executive Chairman of the company and provided suitable guidance to the company, the payment made to him for these services are liable to be treated as professional charges.*
> *9.7 The clause relating to non-compete in the agreement which has been relied on by the AO to conclude that the payment was capital in nature is also examined. In my view, such a clause would automatically form a part of such agreement as a senior appointee of the company cannot be expected to start his own venture of the same nature while he is in employment of the company.*
> *9.8 In order to ascertain the treatment given by Shri Raju Shete, his return of income for AY 2011-12 were called. It was seen that he has offered the amount to tax as professional income and paid taxes thereon.*
> *9.9 In light of the fact presented above, there is no reason to treat the payment made to Shri Raju Shete as capital expenditure. The amount represents professional charges paid to him and is allowable as revenue expenditure. The ground no.17 to 19 is decided accordingly. Ground No.20 to 22 is not adjudicated in light of this decision.*

Aggrieved as aforesaid, the revenue is in further appeal before us.

7.3 We have heard the rival contentions and perused relevant material on record. The basic facts are not under dispute. The assessee, vide

agreement dated 10/03/2009, appointed *Shri Raju Shete* as non-executive chairman of the group of entities for a period of 4 years starting from 01/09/2009 . The terms envisaged payment of Rs.60 Lacs as professional fees and further reimbursement of expenses not exceeding Rs.40 Lacs. *Shri Raju Shete* was the owner director of the entity namely *Radhakrishna Hospitality Services Private Limited* which was taken over by the assessee and as stated, with a view to preserve existing clients / business, aforesaid arrangement was made with *Shri Raju Shete.* The Ld. AO disallowed the same by treating the same as non-compete fees and opined that the same was capital in nature. The Ld. CIT(A), after examining the various agreements / correspondences and Income Tax Returns of the stated individual, reached a conclusion that the aforesaid payment was nothing but professional fees paid by the assessee and hence, allowable to the assessee as business expenditure.

7.4 As per the directions of the bench, the assessee, vide letter dated 19/09/2018, has placed on record the relevant extract of the *Share Sale Agreement* dated 10/03/2009 whereby *Sodexo SA* has acquired the entity namely *Radhakrishna Hospitality Private Limited [RHKS-renamed as Sodexo Food Solutions India Private Limited or SFS i.e. the assessee]* and *RKHS Food & Allied Services Private Limited* from the existing shareholders. *Shri Raju Shete* is a part of selling shareholder *[non-compete parties]*. In terms of Clause 8.5(c) of the said agreement, the non compete parties are entitled for additional compensation of US$1 million, the break-up of which has been provided in *Schedule-X-non-compete consideration allocation* of the said agreement. Upon

perusal of the same, we find that *Shri Raju Shete* is entitled for compensation of US $ 6 Lacs. The allegations of Ld. AO are exactly this. The Ld. AO has opined that the amount stated to be paid by the assessee to *Shri Raju Shete* forms part of acquisition process and therefore, capital in nature and not allowable to assessee u/s 37(1). The terms of the agreement, as produced before us corroborate the same. This being the case, the Ld. CIT(A), in our opinion, fell in error in providing relief to the assessee merely on the basis of *Income Tax Returns* of *Shri Raju Shete.* The payment made by the assessee should breach the threshold conditions of Section 37(1) that the expenditure was incurred wholly and exclusively for the business purposes of the assessee before becoming eligible to be claimed as deduction. The stated payments, *prima facie,* seems to be part of acquisition process only and therefore, it become imperative to find out the exact nature of services being rendered by *Shri Raju Shete* to the assessee company. Therefore, reversing the stand of Ld. CIT(A), the matter stand remitted back to the file of Ld. AO for re-adjudication in the light of acquisition agreement dated 10/03/2009 as filed before us. The complete onus to demonstrate that the impugned expenditure qualify for deduction as per law rest with the assessee.

7.5 Proceeding further, it is also pertinent to note the terms of correspondence dated 10/03/2009, as placed on *Page Numbers 169 to 173* of the *paper book*, provided for rendering of services for a group of entities which are referred to as *Combined Entities* and the services are not restricted exclusively to assessee only. All these entities have separate legal existence. Therefore, if the said expenditure is, at all,

found admissible, the deduction to the assessee could be allowed only to the extent of services being rendered by the stated individual for the benefit of the assessee only and not for other entities. The Ld. AO is directed to delve into the same, if found necessary.

7.6 This ground stand allowed for statistical purposes.

8.1 The Last addition arises out of *Transfer Pricing [TP] Adjustment*. The perusal of international transactions as reported by assessee in *Form No. 3CEB* revealed that the assessee made / received aggregate payment of Rs.11.28 Crores to its various *Associated Enterprises [AE]* situated in *Singapore / France / Malaysia etc.* on account of *procurement services, trademark fees, payment of technical assistance, receipt of manpower services, corporate guarantee and reimbursement of expenses*. In its *TP* study dated 25/11/2011, the assessee adopted entity level *Transactional Net Margin Method [TNMM]* as the *most appropriate method [MAM],* the assessee being the tested party with *Profit Level Indicator [PLI]* as *Operating Profit / Operating Revenue*.

8.2 In assessee's TP Study, the margins of tested party were reflected as 0.68% as against -10.52% reflected by 7 comparables, the details of which have already been extracted at *Para-10.4* of the quantum assessment order. In view of the same, no adjustment was offered / proposed. The margin of -10.52% was arrived on the basis of three years data viz. Financial Year [FY] 2008-09, 2009-10 & 2010-11 out of which the data for 2010-11 was incomplete. The Ld. AO rejected the three years data and opined that only the data of relevant FY was to be considered for comparability analysis. Based on data for FY 2011-12, the assessee arrived at margin of -20.91% for six comparables and in the

process excluded the seventh comparable namely *Brigade Hospitality Services Limited* in view of the fact that there were significant related party transactions carried out by the said entity. The exclusion of the same was accepted. However, in the final analysis, Ld. AO computed margin of 3.056% of five entities after excluding a super loss making entity namely *Hotel Corporation of India Limited* which reflected abnormal loss margin of -140.76% during the impugned AY. Resultantly, the average margin of 3.056% of five entities as pitied against assessee's margin of 0.68% resulted into impugned addition of Rs.10.49 Crores in the hands of the assessee, as computed in the following manner:-

Total Operating Cost	=	*Rs.441,80,97,681/-*
ALP @ 3.056% on total operating cost	=	*Rs.13,50,17,065/- --(a)*
Less: ALP Profit as determined by the assessee in the return	=	*Rs.3,00,43,064/ --(b)*
Total Adjustment to be made (a)-(b)	=	*Rs.10,49,74,001/-*

8.3 Aggrieved, the assessee agitated the same with success before Ld. CIT(A) vide impugned order wherein the plea of proportionate adjustment was accepted. Before Ld. CIT(A), it was pointed out that the volume of international transactions with AEs constituted only 2.19% of the total payments and the adjustments, if any, were required to be made with respect to international transactions only as carried out by the assessee with its AE and could not be extended to all the transactions of the assessee at an entity level, which had third party transactions as well. The Ld CIT(A), while concurring with the aforesaid submissions of proportionate adjustment concluded the matter in assessee's favor by observing as under:-

10.5 The second issue relates to proportionate adjustment claim made by the appellant. The appellant has quoted a series of judgment in support of its claim that the adjustment is required to be restricted to the level of %age of the international transaction in the total turnover of the appellant.

10.5.1 The correct approach in a case where the transaction value is significantly lower than the total turnover of the appellant, while conducting TP study, would be to carry out transaction based study. This would ensure that the adjustments are automatically limited to the transaction value. In the present case, the appellant itself has resorted to entity level TNMM for benchmarking related party transactions which constitute a very small fraction of total turnover. Hence, prima facie, the method selected by the appellant is not correct. The various transactions should have been benchmarked separately. However, it is seen that he AO has accepted the method and has proceeded to benchmark the transactions on the basis of /arithmetic mean of overall margin of the comparables.

10.5.2 Under such circumstances, there has been an overwhelming judicial approval for restricting the adjustment to that %age of turnover which the transactions have with the turnover. In the present case, the total value of transactions is Rs.11,28,82,570/-. The turnover of the appellant is Rs.4,44,81,42,358/-. Hence, the international transaction is 2.54% of the total turnover. Hence, the adjustment will have to be restricted to a level of 2.54% of the adjustment computed on entity level. The AO has computed all of Rs.10,49,74,001/- at entity level. The proportionate adjustment will be 2.54% of this amount or Rs 26,63,974/-.

10.5.3 The total transaction value is Rs.11,28,82,570/-. If the adjustment falls within --/- 5% of this amount, then the adjustment is covered by the safe harbour provided by the proviso to section 92C(2) of the Act. 5% of the international transaction comes to Rs.56,44,129/-. It is seen that the suggested adjustment is less than 5% of the international transaction and hence covered by the second proviso to section 92C(2) of the Act.

10.5.4 In light of the above facts, the adjustment proposed by the AO is directed to be deleted. The grounds are decided accordingly.

Aggrieved, the revenue is in further appeal before us.

8.4 The Ld. AR on the strength of various judicial pronouncements supported the stand taken by Ld. first appellate authority which has been controverted by Ld. Departmental Representative.

8.5 We find the dispute in a narrow compass in the sense that the only question to be adjudicated is whether the factual matrix justified proportionate adjustment as granted by Ld. first appellate authority or

not. The assessee had applied entity level *TNMM* to benchmark the international transactions which has been accepted by Ld.AO and hence, there is no dispute as to the methodology as well selection of comparables. The computed margins are also not under dispute. Another undisputed fact that the assessee's transactions with its AEs constituted very insignificant proportion i.e. little above 2.54% whereas the rest of the transactions are third party transactions calculated with reference to total operating turnover [Rs.11.28 Crores of international transactions as a % of Total Operating turnover of Rs.444.81 Crores]. The adjustment has been computed by Ld. AO with reference to total operating cost base on gross basis which explain that how the adjustment of Rs.10.49 Crores has been arrived at against aggregate international transactions of Rs.11.28 Crores carried out by the assessee with its AE during impugned AY. In other words, the Arm's Length Price of transactions of Rs.11.28 crores has been computed as mere Rs.0.79 crores since the *TP adjustment* as proposed by Ld.AO was Rs.10.49 Crores. The same, in our opinion, is fallacious and not justified and therefore, we find strength in the argument of proportionate adjustment as reiterated before us by Ld.AR. The Ld. CIT(A) rightly restricted the adjustment to the extent of international transactions vis-à-vis turnover of the assessee. Our view is duly supported by the ratio of catena of decisions rendered by higher judicial authorities including jurisdictional Bombay High Court, the copies of which have been placed on record. Some of them could be tabulated as under:-

No.	Case Law	Judicial Authority	Citation
1.	CIT Vs Tata Jewels Exports Private Ltd	Hon'ble Bombay High Court	381 ITR 404
2.	CIT Vs Firestone International Pvt. Ltd.	Hon'ble Bombay High Court	378 ITR 558
3.	Thyssen Krupp Industries India Pvt. Ltd. Vs ACIT	Mumbai Tribunal	55 SOT 497 as approved by Bombay High Court in revenue's appeal 381 ITR 413]
4.	Hindustan Unilever Ltd Vs ACIT	Mumbai Tribunal	22 ITR(T) 737 as approved by Bombay High Court in revenue's appeal 394 ITR 73]

Respectfully following the same, we find no infirmity in the stand of Ld. CIT(A) in granting the benefit of proportionate adjustment to the assessee by holding that entity level *TNMM* could not be applied to all the transactions / cost base on gross basis as a whole and the same was to be applied on proportionate basis to international transactions which were subjected to determination of *ALP.*

8.6 Proceeding further, upon perusal of impugned order, we find that Ld. first appellate authority while granting proportionate adjustment arrived at *TP* adjustment of Rs.25.63 Lacs, being 2.54% *of TP* adjustment of Rs.10.49 Crores as computed by Ld. AO. However, the said adjustment has been found to be within range of *safe harbor* of ±5% as provided u/s 92C(2) as calculated with reference to aggregate international transactions of Rs.11.28 Crores and therefore, deleted in full. We find no infirmity in the same since the benefit as envisaged by the statutory provisions could not be denied to the assessee. Therefore, the same being in accordance with law, require no interference on our part.

8.7 Resultantly, this ground stand dismissed. The revenue's appeal stand partly allowed for statistical purposes.

Conclusion

9. The assessee's appeal stand partly allowed whereas the revenue's appeal stand partly allowed for statistical purposes.

Order pronounced in the open court on 03rd October, 2018.

Sd/-	Sd/-
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated :03.10.2018
Sr.PS:-Thirumalesh

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**