

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", 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.1468/PUN/2010

निर्धारण वर्ष / Assessment Year : 2006-07

Mercedes-Benz India Pvt. Ltd.,
E-3, MIDC Chakan, Phase – III,
Chakan Industrial Area,
Kuruli & Nighoje, Tal. Khed,
Pune – 410501
PAN: AABCM1789L

.... अपीलार्थी/Appellant

Vs.

The Asst. Commissioner of Income Tax,
Circle – 9, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.10/PUN/2012

निर्धारण वर्ष / Assessment Year : 2007-08

Mercedes-Benz India Pvt. Ltd.,
E-3, MIDC Chakan, Phase – III,
Chakan Industrial Area,
Kuruli & Nighoje, Tal. Khed,
Pune – 410501
PAN: AABCM1789L

.... अपीलार्थी/Appellant

Vs.

The Asst. Commissioner of Income Tax,
Circle – 9, Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.298/PUN/2013

निर्धारण वर्ष / Assessment Year : 2008-09

Mercedes-Benz India Pvt. Ltd.,
E-3, MIDC Chakan, Phase – III,
Chakan Industrial Area,
Kuruli & Nighoje, Tal. Khed,
Pune – 410501
PAN: AABCM1789L

.... अपीलार्थी/Appellant

Vs.

The Asst. Commissioner of Income Tax,
Circle – 9, Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Achuthan
 Revenue by : Ms. Nandita Kanchan

सुनवाई की तारीख / Date of Hearing : 12.02.2019	घोषणा की तारीख / Date of Pronouncement: 30.04.2019
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of appeals filed by the assessee are against separate orders of ACIT, Circle-9, Pune, dated 28.10.2010, 19.10.2011 and 30.11.2012 relating to assessment years 2006-07, 2007-08 and 2008-09 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. These three appeals relating to same assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. First, we shall take up the appeal in assessment year 2006-07.

4. The learned Authorized Representative for the assessee at the outset pointed out that the issues raised in the present appeal are squarely covered by the order of Tribunal in earlier year.

5. The learned Departmental Representative for the Revenue on the other hand placed reliance on the orders of Assessing Officer / DRP / TPO.

6. The assessee in ITA No.1468/PUN/2010, relating to assessment year 2006-07 has raised the following grounds of appeal:-

1. *The learned Assessing Officer erred in making an addition to the total income of the Appellant in AY 2006-07 of Rs.12,36,57,880 on account of transfer pricing adjustments and not considering the comparability analysis as documented in the transfer pricing study report of AY 2006-07 provided by the Appellant.*

The Appellant prays that comparability analysis as documented in the transfer pricing study report of AY 2006-07 provided by the Appellant be accepted and the addition made to the total income of the Appellant in AY 2006-07 on account of transfer pricing adjustments be deleted.

2. *The learned Assessing Officer erred in rejecting the combined transaction approach followed by the Appellant in AY 2006-07 including use of Transactional Net Margin Method ("TNMM") at the company level for benchmarking various international transactions of AY 2006-07.*

The Appellant prays that the combined transaction approach followed by the Appellant for AY 2006-07 be accepted including use of TNMM at the company level for benchmarking various international transactions of AY 2006-07.

3. *The learned Assessing Officer erred in rejecting certain companies identified by the Appellant in the transfer pricing study report of AY 2006-07 as comparable companies.*

The Appellant prays that all companies identified by the Appellant in the transfer pricing study report of AY 2006-07 be accepted as comparable companies.

4. *The learned Assessing Officer erred in incorrectly applying Resale Price Method ('RPM') for benchmarking of the international transaction of import of Completely Built Unit cars ('CBUs') in AY 2006-07.*

The Appellant prays that the approach of applying RPM for benchmarking of the international transaction of import of CBUs in AY 2006-07 be rejected.

5. *The learned Assessing Officer erred in rejecting the separate TNMM search provided by the Appellant for benchmarking of the international transaction of import of CBUs in AY 2006-07 as if the said activity is an independent activity.*

The Appellant prays that the separate TNMM search provided by the Appellant for benchmarking of the international transaction of import of CBUs in AY 2006-07 as if the said activity is an independent activity be accepted.

6. *The learned Assessing Officer erred in incorrectly applying Comparable Uncontrolled Price Method ('CUP') for benchmarking of the international transaction of payment of Royalty in AY 2006-07.*

The Appellant prays that the approach of applying CUP for benchmarking of the international transaction of payment of Royalty in AY 2006-07 be rejected.

7. *The learned Assessing Officer erred in not giving benefit of the +/- 5 per cent range as available under the proviso to section 92C(2) of the Income-tax Act, 1961 while carrying out transfer pricing adjustments in AY 2006-07.*

The Appellant prays that benefit of the +/- 5 per cent range as available under the proviso to section 92C(2) of the Income-tax Act, 1961 be allowed to the Appellant while carrying out transfer pricing adjustments in AY 2006-07.

8. *The learned Assessing Officer erred in including the expenditure disallowed during the assessment proceedings of AY 2006-07 while computing the operating margin of the Appellant for AY 2006-07 for application of TNMM.*

The Appellant prays that expenditure disallowed during the assessment proceedings of AY 2006-07 be excluded while computing the operating margin of the Appellant for AY 2006-07 for application of TNMM.

9. *The learned Assessing Officer erred in disallowing the balance Royalty of Rs 3,93,88,379 as capital expenditure in AY 2006-07 (over and above the disallowance of Royalty expenditure of Rs.2,62,58,920 as a Transfer Pricing adjustment which is also appealed against in Ground No 7).*

The Appellant prays that the entire Royalty of Rs.6,56,47,299 be allowed as revenue expenditure in AY 2006-07.

10. *The learned Assessing Officer erred in disallowing the Project Assistance Technical fees (technical service charges) of Rs.6,66,65,710 as capital expenditure in AY 2006-07.*

The Appellant prays that the above expenditure be allowed as revenue expenditure in AY 2006-07.

11. *The learned Assessing Officer erred in disallowing the payment for Star Diagnostic of Rs.27,06,247 as capital expenditure in AY 2006-07.*

The Appellant prays that the above expenditure be allowed as revenue expenditure in AY 2006-07.

12. *The learned Assessing Officer erred in taxing the prior period transactions relating to the Third Party Account in AY 2006-07.*

The Appellant prays that the above prior period transactions not be taxed in AY 2006-07.

7. The assessee has also raised additional grounds of appeal which read as under:-

13. *the learned Assessing Officer has erred on the facts and in law in computing the transfer pricing adjustment on the entire cost of sales of CBU Unit of the Appellant instead of limiting it to the international transaction with Associated Enterprise in respect of purchase cost of CBUs.*
14. *The Transfer Pricing adjustments/additions/variatioins made by the learned Assessing Officer should be deleted as being bad in law and illegal since they are based on an invalid and illegal Transfer Pricing Order which is passed without authority of law and jurisdiction.*

The Transfer Pricing order passed under section 92CA(3) (dated 1/10/2009) should be quashed as being bad in law or illegal or non-est or void ab initio or passed without legal authority and jurisdiction or in excess of jurisdiction.

8. Briefly, in the facts of the case, the assessee was engaged in the manufacture of automobiles. For the year under consideration, the assessee had furnished return of income declaring total income of ₹ 25,14,19,400/- under regular provisions of the Income Tax Act and taxable income of ₹ 66,65,50,598/- under the provisions of section 115JB of the Act. The assessee was engaged in the manufacture and sale of Mercedes Benz cars, automobile parts, components and consumables. Besides its own manufacturing of Mercedes Benz cars, the assessee also imported Completely Built Units (CBUs) from the parent company M/s. Dailmer Chrysler AG, Germany. The sale of cars was normally done through various dealers. The spare parts were also imported / purchased locally and were sold to the dealers for their after sales activity. During the year under consideration the assessee in addition to manufacture and sale of cars, had also imported 107 CBUs. During the year under consideration, total of 1867 vehicles were sold. The Assessing Officer had made reference to the Transfer Pricing Officer (TPO) under section 92CA(1) of the Act. The TPO in its order passed under section 92CA(3) of the Act proposed an adjustment of ₹ 9,73,98,960/- towards international transaction of purchase of CBUs and ₹ 2,62,58,920/- on account

of excess royalty paid by the assessee company. The TPO was of the view that the assessee company had made excess payment for purchase of CBUs. The TPO was also of the view that the assessee had made excess payment of royalty and hence, proposed addition. The Assessing Officer in the draft assessment order notes that claim of royalty payment was disallowed in earlier assessment year also and it was held that entire payment of ₹ 6.56 crores was required to be disallowed in the hands of assessee. The Assessing Officer in this regard show caused the assessee who explained the nature of payment and why the same should be allowed in the hands of assessee. The Assessing Officer observed that the submissions made by assessee were same as before the TPO and hence, the order of TPO was not disturbed and adjustment of ₹ 9.73 crores was made towards international transaction of purchase of CBUs and ₹ 2.62 crores on account of excess royalty paid by the assessee.

9. The Assessing Officer further noted that the assessee had debited sum of ₹ 6.56 crores towards royalty payment @ 5%. He further noted that royalty payment was one of the issues for which case was referred to Transfer Pricing Authority. The TPO had adopted the arm's length royalty rate @ 3% as against 5% paid by the assessee and accordingly, suggested disallowance of ₹ 2.62 crores. The Assessing Officer noted that in earlier years, even the balance royalty was disallowed as capital expenditure. So, the assessee was show caused in this regard, against which the assessee filed submissions which are reproduced in the draft assessment order. However, the Assessing Officer was of the view that there was no justification for any payment to DCAG other than return of investments done by it. He further observed that entire exercise was

just an arrangement between the assessee and its parent company, to reduce the Indian tax liability. He further was of the view on without prejudice basis that where the assessee company had acquired certain exclusive and non transferable rights with respect to manufacturing licensed vehicles, then such agreements and royalty payments were to be treated as capital expenditure. Therefore, the Assessing Officer held that technical fees paid by assessee company to its parent company was purely in the nature of capital expenditure having an enduring benefit to the assessee spread out for long period of time. The Assessing Officer further carried out the exercise to determine the nature of expenditure and was of the view that the said expenditure was an unjustified claim of deduction and at best be treated as capital expenditure in the hands of assessee, in view of the Department's stand in earlier years. Consequently, the entire royalty payment of ₹ 6.56 crores was disallowed in the hands of assessee. However, the assessee was held to be eligible for depreciation under section 32 of the Act on the said amount as well as WDV of the disallowance made in earlier assessment years.

10. The Assessing Officer also noted the corporate issue of Third Party Account (TPA adjustment). In the computation, the assessee had added sum of ₹ 12,42,59,727/- under the head 'Prior period expenses' and had claimed identical deduction in its computation. The assessee was asked to explain prior period transactions. The assessee filed explanation which is reproduced in the draft assessment order. The Assessing Officer noted that the receipts & payments pertained to assessment years 1995-96 to 2002-03 and hence, were prior period transactions, since the receipts and payments (credits and debits)

were equal and hence, tax was neutral. The assessee had contended that in the original return of income for the assessment years 2002-03 and 2003-04, the assessee had offered income out of TP account. The assessee further pleaded that credits pertained to assessment years 1995-96 to 1999-2000 which were not offered to tax and were now recorded in the books of account and hence, referred as prior period income but the same could not be taxed during the year. The Assessing Officer analyzed the submissions and entries and noted that the assessee came into existence during assessment year 1995-96 as Joint Venture between Tata Engineering Locomotive Company Ltd. (TELCO) and Daimler Chrysler AG and from that year onwards the foreign partner of Indian JV was keeping with itself some income of Indian JV, without knowledge of JV partner and the Indian Govt. The Assessing Officer has then analyzed the transaction at pages 13 and 14 of the draft assessment order and was of the view that these were undisclosed financial transactions between assessee and its parent company and were not even known to the other JV partner TELCO. The Assessing Officer further observed that the assessee had disclosed cost of TPA transaction and paid taxes in 2006, but major part of the income was not offered to tax on the belief that the time limit laid down in the Act to offer the income had elapsed. Since the TPA transactions pertained to earlier years i.e. assessment years 1995-96 to 2002-03 were recorded in the books of account during the year, the Assessing Officer was of the view that some were to be brought to tax during the year under consideration. Since the assessee had failed to discharge the onus of proving that the transactions were pertained to respective years, the Assessing Officer was of the view that out of total receipts of ₹ 12.42 crores in the TPA accounts, sum of ₹ 8.13 crores is to

be taxed in the hands of assessee. The Assessing Officer proposed the said draft assessment order to the assessee, against which it filed objections before the Dispute Resolution Panel (DRP). The DRP had rejected all the objections raised by assessee company except the set off of brought forward losses. The Assessing Officer then passed final assessment order under section 143(3) r.w.s. 144C(13) of the Act, against which the assessee is in appeal and we proceed to decide the issues raised in the present appeal vide different grounds of appeal raised by assessee.

11. First, we take up appeal of assessee in assessment year 2006-07. The grounds of appeal No.1 to 8 along with additional grounds of appeal No.13 and 14 were argued by assessee in the first instance. The learned Authorized Representative for the assessee pointed out that in the final assessment order at page 22, the Assessing Officer had made TP adjustment on account of CBUs at ₹ 9.73 crores and on account of royalty at ₹ 2.60 crores. The Assessing Officer has disallowed balance royalty payment of ₹ 3.93 crores separately. He further pointed out that the assessee had selected TNMM method as most appropriate method, wherein the margins of assessee were 8.58%. The assessee had selected 12 concerns as comparables whose mean margins worked out to 4.92%. He then referred to the order of TPO at page 238 of Paper Book and pointed out that the assessee was carrying on manufacture and sale of luxury cars; and was also importing CBUs and were selling the same models as such in order to test the market and also to cater the demands of customers; and the third transaction was sale of spares which were bought from associated enterprises in order to not only sell the spares,

but also to fulfill warranty conditions. The learned Authorized Representative for the assessee stated that all these transactions were aggregated under TNMM method and were benchmarked by the assessee. He then referred to the order of Tribunal in assessee's own case in assessment year 2005-06 with special reference to paras, 24, 32 and 33, wherein the facts of case were noted and to paras 42 and 43, the directions of the Tribunal to apply TNMM method on aggregate basis; then the Tribunal goes on to hold that where there is no analysis by the TPO on comparables, the matter needs to be adjudicated. However, in the present case, the TPO at pages 241 to 243 looks at the selection of 12 comparables by the assessee and rejects 6 comparables. The mean margins of balance comparables were 6.28% as against margins of assessee at 8.58%. The TPO however, rejects aggregation of all the transactions and finally makes the addition on account of RPM method applied and comparison of margins of CBUs with the margins of trading in spare parts. The second point which needs to be seen is the payment of royalty, which also needs to be benchmarked after aggregation with all the other transactions while applying TNMM method. He pointed out that ground of appeal No.1 raised by assessee is general and same does not need any adjudication. In respect of ground of appeal No.2, the issue raised is rejection of combined TNMM method which has been allowed by the Tribunal in assessee's favour vide paras 32 and 33 of the decision. Then, he referred to grounds of appeal No.4 and 5, wherein RPM method was held to be most appropriate method by the TPO/Assessing Officer and the gross margins of CBUs were compared with the margins of spares. He referred to the order of Tribunal that the said approach of TPO was rejected in assessment year 2005-06 and the issue was decided in assessee's

favour. The learned Authorized Representative for the assessee pointed out that in case grounds of appeal No.2, 4 and 5 are decided in favour of assessee following earlier years order, then grounds of appeal No.3, 8 and additional grounds of appeal No.13 and 14 would become academic in nature. Referring to ground of appeal No.6, the learned Authorized Representative for the assessee pointed out that the TPO had applied CUP method to benchmark payment of royalty by using rate of Maruti Udyog Ltd. and the said issue has been decided by earlier orders of Tribunal including the order of Tribunal in assessment year 2005-06, wherein the Revenue had raised this issue vide grounds of appeal No.2 and 3, which were dismissed. The issue in ground of appeal No.8 raised by assessee is the benefit of +/-5% range.

12. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

13. We have heard the rival contentions and perused the record. The first issue which is transfer pricing issue raised vide different grounds of appeal by assessee is similar to the issue raised in the case of assessee in assessment year 2005-06. The Tribunal in ITA No.1083/PUN/2013, cross appeal in ITA No.1110/PUN/2013 along with CO No.60/PUN/2014, relating to assessment year 2005-06, vide order dated 25.10.2018 had considered the factual aspects of the case first. The assessee was engaged in manufacture of luxury passenger cars and in order to sell the same, it was engaged in the manufacture of certain models of said cars and it also imported CBUs of some models for re-sale in the Indian market. In addition, the assessee had also

imported spares in order to comply with the conditions of warranty and also for their re-sale in the domestic market. The aggregated international transactions of assessee with its associated enterprises totaled to ₹ 239.85 crores. The assessee had applied TNMM method after aggregating all the transactions and its PLI was 8.58%. It had selected 12 concerns as comparables in its TP study report, whose mean margins was 4.92% and held that the transactions were at arm's length price.

14. The case of Revenue on the other hand, was not accepting aggregation report in the first instance and also in applying RPM method for benchmarking international transactions by comparing margins of CBUs sold, with the margins of spares; the TPO had rejected aggregation approach applied by assessee. Though in his order, he has commented upon the selection of 12 concerns by the assessee and rejection of 6 concerns by him. The assessee thus, pleads that in the instant assessment year, the TPO had looked at comparability analysis and in the final analysis, selected 6 concerns as comparables whose mean margin worked out to 6.28%. The issue of application of aggregation approach in respect of import of raw materials, purchase of spare parts and import of CBUs and the method to be applied by TPO, wherein he had applied RPM method and compared the gross margins of transactions with another controlled transaction of the assessee and proposed an upward adjustment in the hands of assessee, arose before the Tribunal in assessment year 2005-06. The Tribunal vide paras 24 to 27 noted the facts of case and then vide paras 32 and 33 came to a finding that the transactions of import of CBUs and import of spare parts were closely interlinked to the manufacture of passenger cars by

assessee and the said activity had to be benchmarked on aggregate basis along with other transactions under the umbrella of manufacturing activity. In this regard, we are referring to the said decision of Tribunal in paras 32 and 33 and the same read as under:-

“32. Now, coming to the facts of present case, where the assessee was engaged in the activities of manufacture of passenger cars worldwide many models of Mercedes Benz were available. However, in the year under consideration the assessee was engaged only in manufacturing activity of C and E class brands of passenger cars. But in order to make available other brands available worldwide, to its customers in India and in the absence of manufacturing facility developed for such models, the assessee imports CBUs and resells the same to customers. The assessee has placed on record some models which were imported in the year under consideration are being manufactured by the assessee in later years, since the demand for such models had increased. In order to efficiently run its business, the assessee had adopted a methodology, under which the most popular models were being manufactured in India and in order to widen its customer base at par the requirement of customers or otherwise, the assessee was importing other models from its associated enterprises. Such import of CBUs and its resale was closely and interlinked to its basic activity of manufacture of passenger cars. Hence, the same has to be aggregated with import of raw materials and cannot be benchmarked independently.

33. The third segment was import of spare parts which were being imported from associated enterprises in order to fulfill warranty commitments of passenger cars sold by assessee i.e. both manufactured and imported CBUs and also in order to meet other requirements of customers. Undoubtedly, warranty commitments were being fulfilled by dealers but under a dealership agreement, wherein the dealer was to use only spare parts which were made available by assessee. Such imports were being made of spare parts in order to keep the standard of products sold and also to maintain efficiency of passenger cars. The assessee had fairly admitted that it was covering cost of such spares, which were to be provided free of cost to customers under warranty commitments, from the cost of cars sold by it. In such scenario, the import of spare parts was an activity which was also closely connected with sale of manufactured and imported passenger cars and the same could not be benchmarked independently. Accordingly, we hold that transactions of import of CBUs and import of spare parts were closely and interlinked to the manufacture of passenger cars by assessee and the said activity was to be benchmarked on an aggregate basis along with other transactions under the umbrella of ‘manufacturing activity’.”

15. Then, the next issue which was decided by the Tribunal in assessment year 2005-06 was the most appropriate method to be applied. The said

deliberations are in paras 34 to 41 of the order and findings of Tribunal are in paras 42 and 43 which read as under:-

“42. Following the above said principles, we hold that approach adopted by TPO in comparing margins of controlled transaction i.e. import of spare parts and import of CBUs from associated enterprises and proposing adjustment on account of arm's length price of international transactions does not stand and the same is cancelled. Hence, the TPO had erred in applying RPM method. In any case, under the garb of RPM method, TPO has compared sale of spares with sale of passenger cars. Further, it may be pointed out that TPO compared margins of fully developed vehicles with margins of spare parts, but the two items cannot be said to be functionally comparable and hence, there is no merit in the stand of Assessing Officer / TPO in this regard.

43 The next step is the application of most appropriate method in order to benchmark international transactions undertaken by assessee. In this regard, we find that assessee had applied TNMM method by selecting certain concerns as comparables. Though the TPO in show cause notice had proposed to reject five companies out of total 12 companies identified by assessee in its TP study report, but there are no final observations of TPO / TO in this regard. The same also was not necessitated because the TPO had applied RPM method. In such scenario, where the TPO has failed to look into the comparability aspect of margins of assessee with mean margins of comparables, we remit this issue back to the file of Assessing Officer / TPO to consider submissions of assessee in this regard and after applying aggregation approach, compute the margins of assessee company and compare it with mean margins of concerns which are functionally comparable to the assessee. The assessee shall cooperate and furnish the details and Assessing Officer shall decide the limited issue after affording reasonable opportunity of hearing to the assessee. The Assessing Officer shall pass consequent order applying transfer pricing provisions and determine arm's length price of international transactions undertaken by assessee. Consequently, grounds of appeal No.3 to 6 raised by assessee are thus, allowed as indicated above.”

16. The Tribunal thus, held that TNMM method is to be applied on aggregated basis. Since no analysis was done by TPO in respect of companies selected in initial year, the TPO was directed to look into this aspect and determine the arm's length price of international transactions undertaken by the assessee.

17. Now, coming to the facts of present case, which are identical to the facts in assessment year 2005-06 and the Revenue has not pointed out any difference in the facts when compared to earlier year. Hence, we hold that

proposition laid down by the Tribunal in assessment year 2005-06 (supra) is squarely applicable to the issue raised in the present appeal. The assessee was engaged in carrying out all the activities i.e. import of raw materials, import of CBUs and also import of spare parts from its associated enterprises and other transactions. All these transactions are to be benchmarked under the umbrella of manufacturing activity on an aggregate basis and after applying TNMM method, margins shown by assessee needs to be compared with the mean margins of finally selected concerns. In this regard, the learned Authorized Representative for the assessee stressed that in the instant year, the factual aspects to this extent were different as the TPO had taken note of selection of comparables by assessee and rejected 6 of them. The said deliberations are in part (vii) at pages 241 to 243 of Paper Book. The mean margins of balance comparables worked out to 6.28%. However, in all fairness, since the TPO in the final analysis applied RPM method and not TNMM method, we direct the TPO / Assessing Officer to verify the stand of assessee in this regard and where the said 6 concerns, which were finally selected by him are comparable, may be adopted for benchmarking the transactions under TNMM method. The margins shown by assessee on an aggregate basis were 8.58% and if on verification, the mean margins of comparables are at 6.28%, then no addition is to be made in the hands of assessee on this count. Hence, grounds of appeal No.2, 4 and 5 as pressed by assessee are allowed. The grounds of appeal No.3, 8 and additional grounds of appeal No.13 and 14 would become academic and hence, the same are dismissed. The issue in ground of appeal No.7 i.e. benefit of +/-5% range is

consequential and hence, the same is also dismissed. The ground of appeal No.1 is general and does not need any adjudication.

18. Now, that leave us ground of appeal No.6 i.e. adjustment made on account of royalty payment, wherein the TPO had applied CUP method by comparing with unit rate of Maruti Udyog Ltd.

19. The Tribunal in assessment year 2005-06 has also decided the said issue, which was raised by Revenue vide grounds of appeal No.2 and 3. The Tribunal in paras 55 to 60 at pages 39 to 41 have found no merit in the orders of TPO/Assessing Officer in applying CUP method and comparing the rate of royalty paid by assessee with the rate of royalty paid by Maruti Udyog Ltd. to Suzuki Motors Corporation, which was a controlled transaction. The Tribunal however, held that payment of royalty is to be benchmarked along with other transactions by applying TNMM method under the umbrella of manufacturing activity and the Assessing Officer was directed to include the said payment while applying transfer pricing provisions. The issue raised in the present appeal vide ground of appeal No.6 is identical and following the same parity of reasoning, we accordingly direct the Assessing Officer / TPO to include payment of royalty and aggregate the same along with other international transactions undertaken by assessee.

20. Now, let us take up the corporate issues raised. The first issue vide ground of appeal No.9 is the disallowance of balance royalty by the Assessing Officer as capital expenditure. This issue also stands covered by the order of

Tribunal in assessment year 2005-06. However, in that year, the Revenue was in appeal since the CIT(A) had allowed balance royalty payment of ₹ 3.30 crores as revenue expenditure. The Tribunal noted that the issue stands covered by earlier orders of Tribunal in assessment years 2002-03 to 2004-05 and following the same parity of reasoning, it was held that the said balance royalty payment of ₹ 3.30 crores is to be allowed as revenue expenditure in the hands of assessee. Following the same parity of reasoning as in paras 61 and 62 of order of Tribunal relating to assessment year 2005-06, we allow this ground of appeal in favour of assessee.

21. Now, coming to the next issue raised vide ground of appeal No.10 i.e. Project Assistance Technical Fees were disallowed as capital expenditure. This issue has also arisen before the Tribunal in assessment years 2002-03 to 2004-05 and also in the appeal of Revenue in assessment year 2005-06. The Tribunal following the same parity of reasoning as in earlier years, has upheld the order of CIT(A) in assessment year 2005-06 in directing the Assessing Officer to allow Project Assistance Technical Fees as deductible expenditure under section 37(1) of the Act. The relevant findings are in paras 63 and 64 and following the same parity of reasoning, we direct the Assessing Officer to allow the claim of assessee as expenditure.

22. Now, coming to the last issue raised vide ground of appeal No.11 i.e. payment of Star Diagnostic, which was disallowed being capital expenditure.

23. Brief facts relating to the issue are that the assessee had incurred expenditure of ₹ 27,06,247/- on System Updatons – After sales, which was booked under the head ‘Commission, Incentives and Subsidy to the dealers’. The assessee claims that the said expenditure was for usage of hardware and software updates of the Star Diagnostic tool for in-factory testing and after sales services by dealers (hereinafter referred to as ‘Star Diagnostic’). The said updation was used for testing and locating any faults in the cars, without which it was impossible to locate any faults / problems in the cars. Star Diagnostic was owned by the parent company of assessee i.e. Daimler AG and was provided to assessee for in-factory testing and for further providing it to dealers for after sales services. For this purpose, the assessee paid certain periodical rental charges to Daimler AG. The assessee recovered charges for usage of Star Diagnostic from its dealer and hence, net expenditure of ₹ 27,06,247/- was booked. The Assessing Officer disallowed the said expenditure as capital expenditure rejecting the plea of assessee that it was only allowed to use the said Star Diagnostic and no new capital asset had come into existence. The Assessing Officer was of the view that where the benefit of expenditure was available for longer period and life of tool was also long, then the same was to be capitalized. The DRP upheld the order of Assessing Officer, against which the Assessing Officer passed final assessment order.

24. The assessee is in appeal against aforesaid disallowance in its hands.

25. The learned Authorized Representative for the assessee pointed out that similar expenditure was incurred in earlier years and the disallowance was

made being capital expenditure. He referred to the order of Tribunal dated 31.03.2009 relating to assessment year 1999-2000 in ITA No.936/PN/2003, wherein after hearing the parties, the matter was restored back to the file of Assessing Officer for fresh adjudication. The learned Authorized Representative for the assessee points out that in the order passed under section 143(3) r.w.s. 254 of the Act, dated 15.12.2010, the said issue was decided against assessee. The CIT(A) allowed the claim of assessee observing that Star Diagnostic was a tool which was utilized for servicing car on the basis of software installed in the same. The CIT(A) also noted that where Star Diagnostic was owned by the parent company i.e. Daimler AG and not by assessee and rental charges were being paid and since no new asset had been acquired by assessee, the expenditure could not be held to be capital expenditure. Similar issue was also decided by the CIT(A) in assessment years 2004-05 and 2005-06. The learned Authorized Representative for the assessee pointed out that no appeal has been filed by Revenue before the Tribunal against orders of CIT(A) relating to assessment years 1999-2000, 2004-05 and 2005-06. He further pointed out that in assessment year 2007-08, the DRP directed the Assessing Officer to delete addition. Further, the Assessing Officer had not made any disallowance in assessment year 2008-09 onwards. The learned Authorized Representative for the assessee also pointed out that payment made to Star Diagnostic is towards its usage for a year and neither Star Diagnostic becomes the property of assessee nor does the assessee get any enduring benefit from the payment of these usage charges.

26. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

27. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against disallowance made on the expenditure incurred by assessee for Star Diagnostic, which is payment towards its usage for a year. The said Star Diagnostic was the property of Daimler AG and payment of usage charges was to be made only when the same was used by assessee and on its usage, no new capital asset comes into existence. In the entirety of the said facts and circumstances, the said expenditure merits to be allowed as revenue expenditure in the hands of assessee. We further find that similar expenditure has been claimed by assessee starting from assessment year 1999-2000 onwards. The expenditure has been allowed in the hands of assessee either by CIT(A) or DRP in earlier years and from assessment year 2008-09, no disallowance on this account has been made by Assessing Officer in the hands of assessee. In view thereof, following the consistency approach, we find no merit in the disallowance made in the hands of assessee.

28. Now, coming to assessment years 2007-08 and 2008-09, the learned Authorized Representative for the assessee pointed out that limited issue raised in two years is on account of transfer pricing adjustment made on account of sale of CBU units and sale of spare parts and by comparing the margins of CBU units with margins of spare parts. He fairly pointed out that no

transfer pricing adjustment was made on account of royalty. However, royalty was held to be capital expenditure.

29. We have already decided the issue of transfer pricing adjustment in the hands of assessee and has directed the Assessing Officer/TPO to apply aggregate approach in benchmarking all the transactions undertaken by assessee i.e. import of raw material, import of CBU units and import of spare parts together and benchmark the same by applying TNMM method as most appropriate method. In respect of royalty, we have also held the same to be aggregated with other international transactions as the same is linked. Accordingly, we direct the Assessing Officer to follow our directions in assessment year 2005-06 and compute the arm's length price of international transactions by comparing the margins of assessee with margins of finally selected comparables.

30. Now, coming to the corporate issue of payment of royalty. The same has also been allowed in favour of assessee in assessment year 2005-06 and we have followed the same parity of reasoning for allowing the claim in the hands of assessee in assessment year 2006-07. Accordingly, this ground of appeal is also stands decided in favour of assessee. The grounds of appeal raised by assessee are thus, partly allowed.

31. The ground of appeal No.12 in assessment year 2007-08 is not pressed and hence, the same is dismissed.

32. The additional grounds of appeal No.12 / 14 in respective years are academic, hence dismissed.

33. In the result, all the appeals of assessee are allowed.

Order pronounced on this 30th day of April, 2019.

Sd/-
(ANIL CHATURVEDI)
 लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
 न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 30th April, 2019.

GCVSR

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

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The CIT/DIT, Pune;
5. The DR 'B', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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