

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'C', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 747/Del/2017 : Asstt. Year : 2007-08**

DCIT, Circle-11(1), New Delhi	Vs	M/s Honda Trading Corporation India Pvt. Ltd., Sigma Centre, A- 27, Infocity, Sector-34, Gurgaon-122001
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCH5556J</b>		

**CO No. 101/Del/2017 : Asstt. Year : 2007-08**

M/s Honda Trading Corporation India Pvt. Ltd., Sigma Centre, A-27, Infocity, Sector-34, Gurgaon-122001	Vs	DCIT, Circle-11(1), New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>
<b>PAN No. AABCH5556J</b>		

**Assessee by : None**

**Revenue by : Sh. Rajesh Kumar Kedia, CIT DR**

<b>Date of Hearing: 10.02.2020</b>	<b>Date of Pronouncement: 20.02.2020</b>
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**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeal has been filed by the revenue and Cross Objection by the assessee against the order of the Id. CIT(A)-19, New Delhi dated 21.11.2016.

2. Following grounds have been raised by the assessee:

*"1. Whether on the facts & the circumstances of the case, Id. CIT (A) was correct in deleting the penalty of Rs.86,09,925/- u/s 271(1)(c) made on the addition*

*on account of transfer pricing adjustment of Rs.2,55,40,101/- made by the AO?"*

3. The facts have been primarily taken from the record of Id. CIT (A) with the assistance of the Id. CIT DR.

4. A Transfer Pricing Adjustment was made by the TPO in respect of transactions of Rs.68,65,61,835/- with its Associated Enterprise and adjusted amount of Rs.8,64,78,406/- has been added to the total income.

5. The assessee went in appeal before the Id. DRP which reduced the transfer pricing adjustment to Rs.4,30,47,427/-. Thereafter, the assessee went in appeal before the ITAT which restored the matter to the Assessing Officer for considering the foreign exchange fluctuation arising on account of abnormal movement of Thai Bhat against the Indian National Rupee, while determining the Arms Length Price. The Assessing Officer while giving effect to the order of Income Tax Appellate Tribunal, retained the adjustment to the tune of Rs.2,55,40,101/-. The AO, thereafter, proceeded to impose the penalty amounting to Rs.86,09,925/-.

6. With regard to the penalty levied before the Id. CIT (A) the assessee emphasized on the fact that Assessing Officer had failed to appreciate the observations of the ITAT and the order giving effect to the directions of Income Tax Appellate Tribunal was erroneous. It was also emphasized that assessee did not go in appeal against this order only to save itself from further litigation in the matter. It has been argued before the Id. CIT (A) that assessee has neither concealed any income nor filed

any inaccurate particulars of income. For this proposition, the assessee has relied on the following judicial decisions:

- *K.C Builders Vs ACIT (265ITR 562) (SC)*
- *CIT Vs Indian Metals and Ferro Alloys Ltd. (1995) 211 ITR 35 (Orissa HC)*
- *Hindustan Steel Ltd Vs State of Orissa (1972) 83 ITR 26 (SC)*
- *Commissioner of Income-tax Vs Santhosh Financiers (2001) 247 ITR 742 (Kerala)*

7. In connection with the penalty levied, we have perused the observation of the ITAT with regard to the foreign exchange fluctuation, which is as under:

*"21. From the above submissions and careful perusal of citations and all other relevant judgments we observe that Rule 10B(1)(e) of the Act on the one side and other sub-rules in the context of TNMM need to be analyzed for eliminating the difference, if any, in the comparable uncontrolled transaction which materially affect the profit margin of the assessee. Having noticed the differences, the revenue has to quantify the difference, if any, and then revenue authorities must decide if that difference constitutes 'materially affect' the price in open market. As per these provisions, if the answer of the above question is in the affirmative, then the identified difference has to be removed and the margin has to be adjusted for arriving at the credible comparable. It is a well-accepted accounting principle that net margins can be influenced by some of same factors which can influence price or gross margins. It is the expectations and requirements of the rules/provisions that any difference which is likely to materially affect the net profit margin (NPM) in the open market has to be eliminated. The revenue authorities and TPO are duty bound to know that the TNMM visualizes the undertaking of a thorough comparability analysis and elimination of the differences through the requisite adjustments.*

22. *In the case in hand, admittedly, the average exchange rate of Thai Bhat during October, 2005 to March 2006 was 100 Thai Bhat equivalent to INR 110 and after consideration of said average exchange rate, price of sale of goods had to be agreed upon with the customers. The DR has not disputed the point that during April, 2006 to September, 2006 at the time of purchase, the exchange rate of Thai Bhat was substantially increased and the average exchange rate of Thai Bhat was increased to 100 Thai Bhat - INR 119. Accordingly, we cannot rule out and ignore this factual matrix emerged from the fluctuation of foreign exchange rates that while prices of purchases and import made by the appellant have increased, the sale price of exported goods remained on the lower side which is an important element to materially affect the price in the open market. In this situation, we are inclined to hold that the authorities below should have considered the said difference due to foreign exchange rate fluctuation in favour of Thai Bhat and against the INR and the said difference has to be removed and the margin thereon has to be adjusted for arriving at the credible comparable through the requisite adjustments.*

23. *During the course of arguments, the DR submitted that the issue of fluctuation in foreign exchange price was considered by the authorities below but from perusal of the impugned order, inter alia, order of the DRP, we observe that the authorities below have not considered the element of abnormal and huge fluctuation in the foreign exchange fluctuation in favour of Thai Bhat and against the INR and the said difference has to be removed and the margin thereon has to be adjusted for arriving at the credible comparable through the requisite adjustments.*

24. *Accordingly, in view of the observations made hereinabove, ground of appeal No. 2.7 and 2.8 are allowed with a direction to the Assessing Officer that necessary adjustments pertaining to the huge and abnormal fluctuation in the foreign exchange may be allowed to the assessee in determining the ALP of the*

*international transaction undertaken by the appellant."*

8. Post the order of the ITAT, the assessee re-worked the foreign exchange fluctuation and OP/sales has been worked out at 10.04%. The working of the assessee is as under:

<b>Particulars</b>		<b>Amount in Rs.</b>
Sales (trading segment)		<b>80,86,24,823/-</b>
Other operating income		<b>3,74,22,103/-</b>
Purchase price	<b>81,41,44,911/-</b>	<b>70,51,31,638/-</b>
Less: Adjustment on account of exchange fluctuations <b>(62,13,64,728 - 51,23,81,455)</b>	<b>10,88,83,273/-</b>	
Operating expenses		<b>5,96,65,854/-</b>
Net profit		<b>8,12,49,434/-</b>
OP/Sales		<b>10.04%</b>

9. The Assessing Officer did not agree with the arguments of the assessee and held as under:

*"Along with this reply, the assessee Company also filed a chart for calculation of fluctuations of loss of Rs.10,89,83,273/- perusal thereof reveals that the assessee Company has calculated this loss on hypothetical basis by reducing actual purchase price by quotations rates and on this basis the assessee Company calculated quotation price of purchases of Rs.62,12,64,728/- at Rs.51,23,81,455/-. The quotation price of Rs.51,23,81,455/- has no basis. The assessee Company may have quoted any price but the actual purchases is for Rs.62,13,64,728/- and the fluctuation loss on account of this purchase only has to be considered while calculating operative cost while determining ALP. In other words, the assessee Company purchased material and payment thereof was made on the later dates and on those dates the rate of Bhat was different from the purchase rate and on that account the assessee Company is required to pay extra amount than the purchase price and that payment has already been made or considered while finalizing balance sheet as*

*on 31.03.2007 by making adjustment of creditors on the basis of rates of Bhat on that date. Accordingly the assessee Company incurred fluctuation loss of Rs.1,13,13,274/- and i.e. appearing as debited in the Profit & Loss Account as fluctuation loss expenses. Actually, this amount has to be considered while calculating operating cost while determining ALP and accordingly the operating cost of the assessee Company is calculated as under:-*

<b>Sales</b>		<b>80,86,24,823/-</b>
Other of income		3,74,22,103/-
<b>Total</b>		<b>84,60,46,926/-</b>
Less: Purchase Price		81,41,14,911/-
Operating expenses	5,96,65,854/-	
Less: exchange fluctuations	1,13,13,274/-	
		4,83,52,580/-
		86,24,67,491/-
	Less: (OP)	1,64,20,565/-
	OP/Sales	(-) 1.94%
	Comparable	1.78%
		3.72%

*Thereby the Assessing Officer/TPO retained an adjustment of Rs.2,55,40,101/-."*

10. The main arguments taken up before the Tribunal during the quantum proceedings was that there was an abnormal exchange fluctuation in the rate of Thai Bhat and India National Rupee during the year under consideration. Accordingly, when the orders were booked for purchases, 100 Thai Bhat were equivalent to Rs. 110/-, while when the payment was made, 100 Thai Bhat was equal to Rs. 119/-, thereby price of purchases went up while the sales were already committed at the old settled price. The Income Tax Appellate Tribunal appreciated the fact that similar fluctuations were not borne by the comparable entities that were selected by the TPO for benchmarking the activities of the assessee since they were having

negligible import components. The ITAT, therefore, directed that for proper comparability under 10B(1)(e), such abnormal differences should be reduced and the results accordingly adjusted.

11. Thereafter, the assessee before the Assessing Officer worked out an adjustment of Rs. 10,89,83,273/- by eliminating the effect of fluctuations in respect of actual purchases & sales made by it. The Assessing Officer, however, only allowed the benefit of exchange fluctuations as appearing in the Profit & Loss Account. The amount of exchange fluctuations appearing in the Profit & Loss Account are as per the Accounting Standards, in relation to translation of foreign exchange assets into rupee terms at the close of the year. It generally does not take into account the exchange fluctuations arising on account of purchase & sale of goods which are included in the purchase price & sale price. The assessee has furnished detailed list of purchases & sales showing the effect of exchange fluctuations. The assessee has claimed the fluctuations effect only in respect of high sea sales which were made to M/s. Lumax Industries Ltd. It is further seen that after giving effect to the exchange fluctuations arising on account of sale & purchase of goods is given, the PLI of the assessee would be much higher than the PLI of the comparables and no addition would be sustainable. Therefore, it is pleaded before the Id. CIT (A) that on merits itself, since no addition on account of transfer pricing is sustainable no penalty would be leviable.

12. Against these facts available on record, the Id. DR argued that penalty u/s 271(1)(c) is leviable even if the income is estimated and since

the Transfer Pricing adjustment is much more than the estimation of income the penalty levied is ought to have been confirmed. He argued that even when addition is based on estimate, concealment penalty can be levied. He argued that omission on the part of the assessee to maintain accounts and correct TP study cannot be regarded in law as a ground for exonerating the liability of the assessee from culpability u/s 271(1)(c). Regarding the question of whether the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. Ld. DR argued that once an assessment has been done, whether it is best judgment or otherwise, the figure assessed represents the income of the assessee hence there is a failure to furnish the correct TP study which shows the intention of assessee to conceal income. Ld. DR argued that in every case falling within the mischief of Expl. 1 to Section 271(1)(c) and Explanation 7 to section 271(1)(c), a presumption of deliberate concealment has to be raised.

13. He also relied on the following case laws:

- *Addl. CIT Vs Chandrakantha and Another (MP) 205 ITR 607*
- *CIT Vs Md. Warasat Hussain (Patna) 171 ITR 405*
- *A.M. Shah & Co. Vs CIT (Guj.) 238 ITR 415*
- *CIT Vs Krishnaswamy and Sons (Mad.) 219 ITR 157*

14. Heard the arguments of both the parties and perused the material available on record.

15. We have gone through the Explanation 7 to section 271(1)(c) deals with penalty in respect of adjustment on account of transfer pricing. The provisions of the section read as under:

*"[Explanation 7.—Where in the case of an assessee who has entered into an international transaction [or specified domestic transaction] defined in section 92B, any amount*

*is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) [or the [Principal Commissioner or] Commissioner] that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.]”*

16. Having gone through the record and the arguments, we are totally in agreement with the observation of the Ld.CIT (A) who held that on perusal of the provisions of Explanation 7 to Section 271(1)(c) shows that penalty would be leviable unless the assessee proves that transactions were reported as per the provisions contained in section 92C in good faith and with due diligence. It is an undoubted fact that assessee had reported the transactions of purchase & sale at the actual price at which the transaction was undertaken. The assessee had bonafide belief that lower margin obtained by it was on account of adverse fluctuations which were of an abnormal character and after eliminating the effect thereof, its transactions would reflect an arm's length price. In fact, the discussion above & after considering the directions of ITAT, it is observed that transactions were indeed at an arm's length and no addition on account of any transfer pricing adjustments, are required to be retained. The case of the assessee, therefore, does not fall within Explanation 7 to section 271(1)(c). Even otherwise, the assessee had not concealed any income or filed any inaccurate

particulars of income. The addition arose only on account of difference of opinion between the Assessing Officer and the assessee regarding the comparables and also the PLI of the assessee. Just because the assessee has not filed an appeal against the appeal effect order of the Assessing Officer, it does not tantamount to agreeing with the adjustment made by the TPO and furthermore to entail any penalty under section 271(1)(c). Therefore, we hereby direct that the penalty levied on account of transfer pricing adjustment be deleted and hereby confirm the well reasoned order of the Id. CIT(A).

17. In the result, the appeal of the revenue is dismissed and Cross Objection of the assessee is treated as infructuous owing to the adjudication on merits of the case.

Order Pronounced in the Open Court on 20/02/2020.

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**Dated: 20/02/2020**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**