IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I-1' NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.584/Del/2021
Assessment Year: 2016-17

FMI Automotive Components Pvt. Ltd., Plot No. 1, Sub-Plot -4,5,8 and 9 MSIL, Supplier Park, Phase-3A, IMT Manesar, Gurgaon, Haryana	**Vs.**	DCIT, Circle-7(1), New Delhi
PAN :AABCF1682P		
(Appellant)		**(Respondent)**

Appellant by	Sh. Himanshu S. Sinha, Adv. Sh. Bhuwan Dhoopar, Adv.
Respondent by	Sh. Surender Pal, CIT(DR)

Date of hearing	06.09.2021
Date of pronouncement	24.09.2021

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against final assessment order dated 28/03/2021 for assessment year 2016-17 passed by the National E-Assessment Centre, Delhi, pursuant to the direction dated 15/02/2021 of learned Dispute Resolution

Panel (DRP). The grounds raised by the assessee are reproduced as under:

1. *That on the facts and circumstances of the case, the impugned assessment completed vide order dated 28.03.2021 under section 143(3)/ 144C/ 143(3A)/ 143(3B) of the Income-tax Act, 1961 ('the Act'), is illegal and bad in law.*

1.1 *That the Assessing Officer erred on facts and in law in completing the impugned assessment at an income of INR 23,52,05,420 against an income of INR 11,57,69,060 declared by the appellant in the return of income for the relevant assessment year.*

2. *That the Assessing Officer/ TPO erred on facts and in law in making addition to the returned income of the appellant of INR 56,50,353 on account of alleged difference in arm's length price and actual value of the international transactions undertaken by the appellant during the relevant assessment year.*

2.1 *That the Assessing Officer/ TPO erred on facts and in law in arbitrarily rejecting the benchmarking analysis undertaken by the appellant for benchmarking its international transaction by applying Transactional Net Margin Method ('TNMM').*

2.2 *That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition without appreciating the correct FAR analysis of business of the assessee.*

2.3 *That the Assessing Officer/ TPO erred on facts and in law in not appreciating that while applying TNMM with external comparables, in order to satisfy comparability criteria provided under Rule 10B(2) of the Income-tax Rules, 1962 ('the Rules') companies engaged in providing identical business only ought to be considered as comparable.*

2.4 *That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition without appreciating that expenditure incurred by assessee towards tools exclusively purchased for a related party was required to be excluded from the benchmarking analysis.*

2.5 *That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition by including certain comparable companies without appreciating that such companies did not satisfied the comparability criteria provided under Rule 10B(2) of the Rules and had different business profile than that of the appellant.*

2.6 That the AO/ TPO erred on facts and in law in applying additional filters for selection/ rejection of comparable companies, without appreciating that selection of company ought to be on the basis of FAR analysis.

2.7 That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition by excluding certain comparable companies having business profile identical to the business of the appellant.

2.8 That the Assessing Officer/ TPO erred on facts and in law in incorrectly computing the operating profit margin of the assessee.

2.9 That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition by incurring gross errors in benchmarking analysis, which are not tenable in law.

2.10 That the Assessing Officer/ TPO erred on facts and in law in making the aforesaid addition without allowing adjustment on account of higher depreciation incurred by the appellant during the relevant assessment year on account of idle capacity.

3. That the Assessing Officer erred on facts and in law in disallowing an amount of INR 11,03,93,150 on account of expenses claimed by assessee in the profit & loss account for the relevant assessment year on an ad-hoc basis, without providing any cogent reasons for doing so.

3.1 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance on a flimsy basis without bringing on record any information/ material/ evidence to support the same.

3.2 That the Assessing Officer erred on facts and in law in makingthe aforesaid disallowance without appreciating that the same is illegal in nature and has no legs to stand at all.

3.3 That the Assessing Officer erred on facts and in law in makingthe aforesaid disallowance without specifying the legal provisions under which such disallowance is being made.

3.4 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance by merely comparing the quantum of profit/ expenditure earned/ incurred by the assessee in relevant assessment year vis a vis the preceding assessment year, which is illegal and unsustainable in nature.

3.5 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance without there being any legal mandate available with the Assessing Officer for doing so.

3.6 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance without appreciating that the books of accounts of the appellant are duly audited by the statutory auditors and tax auditors of the company without pointing out any adversity/ irregularity therein.

3.7 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance without appreciating that the expenses debited by the appellant in profit & loss account for the relevant assessment year were allowable as deduction under the provisions of section 37(1) of the Act.

4. That the assessing officererred on facts and in law in disallowing an amount of INR 33,92,861 on account of alleged non-payment of excise duty liability.

4.1 That the Assessing Officer erred on facts and in law in disallowing the aforesaid amount without appreciating that the excise duty liability under consideration was duly discharged by the appellant before filing of the return of income for the relevant assessment year vide reversal/ reduction of available CENVAT credit to that extent.

4.2 That the Assessing Officer erred on facts and in law in making the aforesaid disallowance without specifying the legal provisions under which such disallowance is being made.

5. That the Assessing Officer erred on facts and in law in charging interest under sections 234B and 234C of the Act.

The appellant craves leave to add, amend or vary the above grounds of appeal on or before the date of hearing.

2. Briefly stated facts of the case are that the assessee company has been incorporated on 01/11/2007 as a joint-venture between M/s Futaba Industrial Co. Ltd. (in short 'Futaba') and Maruti Suzuki India Ltd. (in short 'Maruti') with equity participation in the ratio of 51% and 49% respectively. The company is primarily engaged in the business of manufacturing,

selling and dealing in all kind of Automative Exhaust Systems, components and related part manufactured from its unit located in Manesar, Haryana.

3. For the year under consideration, the assessee filed return of income on 29/11/2016, declaring total income of ₹ 11,57,69,060/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In view of the international transaction carried out by the assessee, the Assessing Officer referred the matter of determination of arm's-length price of those international transactions to the learned Transfer Pricing Officer (TPO). The learned TPO in his order dated 22/10/2019 proposed adjustment of ₹56,50,353/-. In the draft assessment order dated 09/12/2019, the Assessing Officer proposed transfer pricing addition of ₹ 56,50,353/- along with other additions, i.e., addition for fall in net profit ratio (Rs.11,03,93,150/-); delayed payment of employee's contribution to PF and ESI (Rs. 21,56,680/-); non-submission of evidence of excise duty paid before due date of filing of return of income (Rs, 33,92,861/-) and disallowance out of expenses (Rs.16,87,95,310/-). The learned DRP vide order dated 15/02/2021 upheld the draft order of the Assessing Officer and rejected objection of the assessee. Pursuant to the order of the learned DRP, the Assessing Officer has passed impugned final assessment order. Aggrieved with the said order, the assessee is before the Tribunal raising the grounds as reproduced above.

4. Before us, the parties appeared through Video Conferencing facility and filed paper-book and other documents physically as well as through email.

5. The ground No. 1 (one) and 1.1 of the appeal are general in nature and, therefore, we are not required to adjudicate upon specifically.

6. The grounds No. 2 to 2.1 of the appeal relate to transfer pricing adjustment. The assessee has challenged the transfer pricing adjustment mainly on rejection of the benchmarking analysis of the assessee, not appreciating FAR (functions carried out, assets employed and risk undertaken) analysis of the business of the assessee, wrong selection of comparables by the learned TPO, while benchmarking non-exclusion of expenditure incurred towards tools exclusively purchase related party, applying additional filters for selection/rejection of the comparable and wrong rejection of certain comparables selected by assessee; not allowing ideal capacity adjustment.

6.1 The brief facts qua the issue in dispute are that the Assessing Officer observed following international transaction entered into by the assessee with its Associated Enterprises (AEs):

S. No.	***International Transaction***	***Amount (In INR)***
1.	*Availing of Technical Guidance for tools and Jigs design*	*100,21,562*
2.	*Availing of other technical services*	*133,28,299*
3.	*Purchase of Fixed Assets*	*8,06,98,142*
4.	*Import of spares, raw material, finished goods and other consumables*	*53,24,543*
5.	*Payment of Royalty*	*1,51,75,180*
6.	*Payment of Service Fee*	*1,93,22,582*
7.	*Payment of Interest*	*8,13,634*
8.	*Reimbursement of Expenses to AE*	*21,38,863*

6.2 The assessee aggregated international transaction at Sr. No. 1 to 6 of the list as the primary manufacturing activity and benchmarked them using TNMM as most appropriate method at the entity level margin of the assessee. The assessee worked out ratio of Operating Profit to Operating Revenue (Profit Level Indicator or PLI) at 5.85 percent. While computing operating profit, the assessee excluded expenses on tools for Maruti Suzuki. The assessee after applying various filters in selection of the comparables, selected three comparables, namely, Omax Autos Ltd., Munjal Auto Industries and Talbros Auto Components and submitted that in view of entity level margin of the assessee being higher than average margin of the comparables, the international transactions of the assessee were at arm's-length. The learned TPO rejected the adjustment made by the assessee for exclusion of tools for Maruti Suzuki and reworked the margin of the assessee (OP/OR) as 0.92%. The learned TPO also extended the list of comparables suitable in the case of the assessee and added 10 comparables to the list of the comparables, making final list of 13 comparables. The working capital adjusted mean margin of those comparables has been worked out to 4.81% as under:

S. No.	***Company Name***	***WC adjusted OP/OR***
1.	*Omax Autos Ltd.*	*1.18%*
2.	*Gajra Gears Pvt. Ltd.*	*1.58%*
3.	*Talbros Automotive Components Ltd.*	*4.33%*
4.	*Auto Ignition Ltd.*	*4.41%*
5.	*Minda Industries Ltd.*	*4.41%*
6.	*Munjal Auto Inds. Ltd.*	*4.63%*
7.	*Rane T R W Steering Systems Pvt. Ltd.*	*4.81%*
8.	*India Nippon Electricals Ltd.*	*6.49%*

9.	*Setco Automotive Ltd.*	*6.77%*
10.	*R A C L Geartech Ltd.*	*7.90%*
11.	*J B M Auto System Pvt Ltd. (Merged)*	*8.66%*
12.	*Sakthi Auto Components Ltd.*	*9.54%*
13.	*Indi Schottle Autoparts Pvt. Ltd.*	*12.90%*
	35th percentile	***4.41%***
	Median	***4.81%***
	65th percentile	***6.77%***

6.3 The transfer pricing adjustment of ₹ 56,50,353/- has been worked out by the learned TPO as under:

Operating Revenue of Assessee	*A*	*4,462,034,405*
Arm's Length Margin (OP/OR) (%) (As proposed by your goodself)	*B*	*4.81%*
Arm's Length Operating Profit	*C=A*B*	*214623855*
Arm's Length Operating Cost	*D=A-C*	*4,247,410,550*
Actual Operating Cost of the assessee	*E*	*4,421,042,264*
Difference	*F=E-D*	*173,631,714*
Amount of International (excluding transaction pertaining to payment of interest on external commercial borrowing and reimbursement of expense to AEs)	*G*	*143,870,308*
Proportionate cost (%)	*H=G/E*	*3.25%*
Proposed Adjustment u/s 92CA	*I=F*H*	*5,650,353*

6.4 Before the learned DRP, the assessee contested inclusion of comparables by the learned TPO, however, the learned DRP rejected objections of the assessee and retained the comparables selected by the Learned TPO.

6.5 Before us, the Learned Counsel of the assessee challenged all the 10 comparables selected by the learned TPO and submitted that:

(i) The comparable selected by the Learned TPO are functionally not comparable with the assessee, as the learned TPO has not examined functions of the comparables in the light of decision of the Tribunal in the case of **Nissin Brake India P. Ltd. Vs DCIT (2020) 116 taxmannn.com 576 (Delhi Trib.).** He has submitted that in the case of Nissin Brake (supra), the Tribunal has held that *'in automotive industry, auto components can be divided into two parts. First one core components and others are non-core components'.* According to him, The Tribunal directed to compare entities engaged in manufacturing of respective components only and products of one Category cannot be treated as being comparable in terms of market position to the other. The learned Counsel submitted that this aspect of comparability has not been examined by the learned TPO and therefore issue of transfer pricing adjustment may be restored back to the file of the Learned AO/TPO for deciding afresh.

(ii) The comparable companies selected by the Ld. TPO are engaged in research and development activity (R & D)

which own significant amount of intangibles assets, whereas, the assessee company is not engaged in any R & D activity and in fact paying royalty to its AEs for technical know-how, which it uses for manufacturing exhaust systems. He submitted that impact of research and development should also be examined by the learned TPO.

(iii) The capacity utilization and depreciation issues have also not been examined by the learned TPO. He submitted that depreciation cost of assessee company is significantly higher than comparable companies, which may have utilized their capacity in an effective manner leading to effective utilization of fixed cost.

(iv) That during the year under consideration, the assessee purchased certain tools exclusively upon the request of Maruti Suzuki India Ltd, which were capitalized and included as part of fixed assets for calculation of depreciation. The tools were used and then sold to Maruti Suzuki, the depreciation booked in respect of such tools and the profit from sale of such tools booked required adjustment to the PLI of the assessee. The assessee, accordingly, reduced profit on sale of the fixed assets from operating income and depreciation in respect of such tools from operating expenses. However, the learned TPO, while determining operating margin of the assessee, treated profit on sale of tools as non-operating and depreciation as operating in nature. The learned Counsel contended that if depreciation (

Rs. 3,13,78,409/-) is considered operating, profit on sales (Rs.4,04,14,752/-) should also be considered operating and if the profit on sales is considered non-operating, the depreciation on those tools should also be considered non-operating as well.

6.6 On the contrary, Learned DR relied on the order of the lower authorities and submitted that each and every comparables has been added by the Learned TPO after careful analysis of their FAR, which has been upheld by the learned DRP and, therefore, transfer pricing adjustment must be upheld. Regarding considering sale of tool as non-operating and depreciation as operating in nature by the learned TPO, the learned DR relied on finding of DRP and submitted that profit on sale of fixed assets is not part of revenue operations and therefore learned TPO is justified in excluding the same as non-operating items whereas the depreciation has been rightly considered as operating in view of the decision of the Hon'ble Karnataka High Court in the case of PCIT Vs Kirloskar Toyota Textile Machinery Private Limited (2019) 106 taxmann.com 309 (Karnataka) .

6.7 We have heard rival submission of the parties and perused relevant material on record. The assessee has carried out multiple international transactions, which includes, purchase of fixed assets, availing of technical guidance on tools and jigs design from Futaba, availing of technical services from YMP Press & Dies (Thailand) Co. P Ltd; import of the spares, raw material, finished goods and other consumables; payment of royalty and payment of service fee etc. The functions performed and risk undertaken

under different international transactions has been reported by the assessee in its transfer pricing study (available on page 367 to page 372 of paper-book). For ready reference, the relevant analysis is reproduced as under:

> ***"4.2 Availing of Technical guidance on Tools and Jigs Design from Futaba***
>
> *FMI has entered into a license agreement with Futaba for granting of proprietary information and availing of technical support services from Futaba in relation to the information and trademark obtained on license. The scope of services includes the following:*
>
> > *Providing instructions for the manufacture or fabrication of the products and operation method;*
> >
> > *Supervision of installation, wiring and piping of equipment or jig supplied by Futaba, provided that the expenses at the time of execution would be borne by FMI;*
> >
> > *Supervision of local tryouts and fine tuning of dies, equipment and jig provided by Futaba, provided that the expenses at the time of execution would be borne by FMI;*
> >
> > *Quality confirmation of FMI's off-tool sample;*
> >
> > *Inspection, instruction for adjustment for operation of the manufacture or fabrication of the products;*
> >
> > *Instruction for inspection and procurement of material and components;*
> >
> > *Other assistance at the request of FMI.*
>
> *For the services received, FMI remunerates Futaba in the following manner: Technical Service Fee in the form of:*
>
> > *Daily advisory fee for dispatching personnel in the amount of JPY 72,000 per day per person for those who are managers or hold other title senior to managers, and 48,000 Yen per day per person for all others;*
> >
> > *Sum of JPY 12,000 per working day per personnel for the technical training provided by Futaba to the personnel of FMI*

Reimbursement of the following costs incurred by Futaba in relation to the dispatch of the personnel on a temporary basis to FMI's plant:
business class round air fare from Japan to India;

actual inland transportation expenses within Japan and India;

boarding expenses in the amount of Japanese Yen ("JPY") 5,500 per day per person for the days on which Licensor's dispatched personnel travel from Japan to India and stay in India to give such technical advice and guidance and travel for return direct to Japan; and

actual accommodation expenses within India;

The value of the transaction is as under:

Associated Enterprise	***Amount(INR)***
Futaba Industrial Co. Ltd. (Tools & Jigs Design)	*1,00,21,562*
Futaba Industrial Co. Ltd. (Technical Services)	*1,13,95,386*
Total	*2,14,16,948*

*(*The above amount has been capitalized by FMI)*

4.2.1 Functions performed

In respect of availing of technical services, the overall scope of services is determined by FMI in consultation with Futaba, who is responsible for recruiting and training the necessary technical people who may be required to render technical services to FMI. For the purpose of executing the above mentioned technical services, personnel of Futaba may be required to make visits to India. Expenses pertaining to travel, accommodation other allowances of these personnel are borne by FMI. However, these people only make intermittent visits and continue to be employed by Futaba.

Futaba is also responsible for ensuring that the proprietary information provided to FMI is free from any defect or error. If any defect, error or mistake is found in proprietary information, the same shall be corrected by Futaba at its own cost. FMI is responsible for adhering to quality specifications and manufacturing and assembly procedures of Futaba. It is also responsible for ensuring that the products manufactured are as per quality specifications laid down by Futaba.

4.2.2 Risk Analysis

FMI bears the market/ business risk in relation to manufacture and selling of products in India for which the technical services have been availed as it may be subject to adverse market conditions. Futaba's business risk is limited to the extent of work or services provided to FMI

The payment made by FMI to Futaba is denominated in Japanese Yen. Hence, FMI is exposed to the inherent foreign exchange risk arising due to fluctuation in the exchange rates. However, since Futaba is receiving payment from its AE, it bears limited credit and collection risk vis-a-vis independent service providers.

FMI also bears the service liability risk as it is liable to litigation for any identified shortcomings in its product delivery to third parties. Futaba also bears the service liability risk to the extent of the technical services provided by it to FMI not resulting in the desired results for FMI.

4.3 Availing of technical services from YMP Press & Dies (Thailand) Co. Ltd. and Shima Trading Co.

FMI has also entered into an agreement with YMP Press & Dies (Thailand) Co. Ltd. for granting technology, technical assistance and technical knowhow for manufacture and sales of automotive parts to each other. The scope of services includes the following:

> *Technical assistance for the scope, areas and/or items that parties judges as possible from time to time during the term of this Agreement to manufacture and fabricate Products at the Site. Parties would assist by providing the necessary Technical Information for the manufacture of products and more particularly:*
>
> *Furnishing of the Technical Information in respect of the installation of the production facilities and operation thereof, and the manufacture of the Products;*
>
> *Supply of production engineering information and documents, such as method, process, and process layout for fabrication and assembly of Products and component.*
>
> *Supply of concept drawing or, design drawing for die, equipment, jig, C/F, and etc. which are required for process and assembly of Products and components by charge.*
>
> *Supply by charge of necessary assembly equipment, jig, C/F, die setting and supply of inspection standard for parts and components*

Supply of parts and components by charge

Inspection including testing of performance of products and parts by charge
Dispatch of the Technical Qualified Staff and support staff of parties in accordance with the Agreement.

Training of technical personnel of parties.

Technical assistance in solving problems in the process/ manufacture of Products from time to time.

For the services received, FMI remunerates YMP in the following manner:

A Despatch fee shall be the amount equivalent to the below amount each per day/one Technical Qualified Staff and support staff for the number of working days elapsed from (and including) the date of Arrival in India or Thailand and to (and including) the date of Departure from India or Thailand:

Japanese Staff US$ 250

Local Manager, and above Manager US$ 50

The other employee US$ 40

In event that Technical Qualified Staff or support staff of FMI or YMPPD'S supplier is dispatched, parties shall pay 105% of what parties actually paid to parties suppliers.

FMI or YMPPD shall bear below expenses for dispatch of their Technical Qualified Staff:

Hotel accommodation expenses and meal expenses in India or Thailand.

The expenses of transportation from Hotel to Site.

The expenses of mail, telephone, telegram, wire and other communication for performance of Technical assistance and commercial support

The expenses of Travelling in India or Thailand for performance of technical assistance and support.

The expenses of round air passage and luggage from India to Bangkok and back again to India complying with parties travel rule.

The expenses of Interpreter (Japanese-Thai-English) for Technical Qualified staff and support staff in India or Thailand.

Further, we have been informed by the management of FMI that FMI has availed technical services from Shima Trading Co. during the F.Y. 2015-16. We have also been informed that the terms of the agreement are similar to the terms mentioned for the above contracts (i.e. with Futaba and YMP).

The value of the identified international transaction is as follows:

Associated Enterprises	***Amount (INR)***
*YMP Press & Dies (Thailand) Co. Ltd.**	*332,934*
Shima Trading Co.	*15,99,979*
Total	*19,32,913*

('Includes Rs.2,63,360 forming part of Capital Assets)

4.3.1 Functions performed

In respect of availing of technical services, the overall scope of services is determined by FMI. For the purpose of executing the above mentioned technical services, personnel of YMP may be required to make visits to India. Expenses pertaining to travel, accommodation other allowances of these personnel are borne by FMI. However, these people only make intermittent visits and continue to be employed by YMP.

4.3.2 Risk Analysis

FMI bears the market/ business risk in relation to manufacture and selling of products in India for which the technical services have been availed as it may be subject to adverse market conditions. YMP's business risk is limited to the extent of work or services provided to FMI

The payment made by FMI to YMP is denominated in US dollars. Hence, FMI is exposed to the inherent foreign exchange risk arising due to fluctuation in the exchange rates. However, since YMP is receiving payment from its AE, it bears limited credit and collection risk vis-a-vis independent service providers.

FMI also bears the service liability risk as it is liable to litigation for any identified shortcomings in its product delivery to third parties.

YMP also bears the service liability risk to the extent of the technical services provided by it to FMI not resulting in the desired results for FMI.

4.4 Import of spares, raw materials, finished goods and other consumables

During FY 2015-16, FMI imported certain spare parts, finished goods and consumables from STC in respect of its manufacturing plant.

The value of spares and consumables imported are given below:

Associated Enterprises	***Amount(INR)***
Shimla Trading Company Ltd.	*53,24,543*

4.5 Payment of Royalty

FMI entered into an agreement with Futaba for grant of a non-exclusive license for the use of Proprietary Information for the engineering, manufacturing and sale of products and the trademark of Futaba for use on the products, packing, advertisement documents and other related documents.

The Proprietary Information and the trademark were the exclusive property of Futaba developed by it over time as part of its research and development efforts. In relation to the Proprietary Information, Futaba provides FMI with the following assistance:

The necessary Proprietary Information for the manufacture of the products, and more particularly:

Development, designing, and determination of specification of the products;

Furnishing of Proprietary Information in respect of the installation of production facilities and operation thereof, and manufacture of the products.

Supply of designs, drawings of components;

Supply by charge of necessary assembly equipment jig, checking fixture, die setting, and supply of inspection standards for parts and components;

Supply by charge of parts and components;
Inspection including testing of performance of the products and parts and components by charge; and

Technical assistance in solving problems in the process/manufacture of the products from time to time. For the use of the Proprietary Information and trademark and related services, FMI is required to pay royalty to Futaba at the rate of 2 percent of the net ex-factory sale price. Net ex-factory sale price means the basic price of the products exclusive of the cost of raw material, locally purchased parts and imported parts, excise duty, sales tax, freight, and insurance.

During FY 2015-16, FMI has paid the following amount as royalty to its AE:

Associated Enterprise	***Amount (INR)***
Futaba Industrial Co. Ltd.	*15,175,180*

4.6 Payment of Service Fee

FMI has entered into an agreement with Futaba for secondment of personnel for providing technical services, including but not limited to, managerial, technical, production, marketing, purchasing, and administrative services to FMI. The import terms and conditions of the agreement are given below:

The scope of work performed by personnel includes provision of technical inputs, advice, guidance, supervision, execution, etc, in whole or part.

The Personnel work for FMI on full time basis during their respective dispatched period. These personnel, during their stay in India, work under the supervision and control of FMI. For their services, FMI pays a service fee to Futaba on a lump sum fee per month per employee basis, which, effectively, only includes the cost of the personnel such as salary and other benefits.

During the employment with FMI, the Personnel are subject to the employment policies, rules, regulations, and code of conduct of FMI. In respect of availing of support services, the overall scope of services is determined by FMI, and Futaba is responsible for recruiting the necessary qualified people to render support services to FMI.

The payment of service fee made by FMI to Futaba is denominated in Japanese Yen. Hence, FMI is exposed to the inherent foreign exchange risk arising due to fluctuation in the exchange rates.

The value of transaction involving availing of professional services by FMI is given below:

Associated Enterprise	***Amount (INR)***
Futaba Industrial Co. Ltd.	*19,322,582*

6.8 The assessee has benchmarked its international transaction on aggregate basis under Transactional Net Margin Method (TNMM) as most appropriate method. This method has been accepted by the learned TPO. The learned TPO has also allowed working capital adjustment to the margin (PLI) sought by the assessee. The dispute is regarding selection of comparables by the learned TPO. According to the learned Counsel of the assessee, the comparables chosen by the learned TPO are engaged in manufacturing of non-core components and, therefore those companies are not functionally comparable with the assessee in view of the decision of the Tribunal in the case of Nissin Breaks India private limited (supra). For ready reference, the finding of the Tribunal in the said case is reproduced as under:

"18. The entities are examined as to their relevance and comparability.

1. Admach Auto India Ltd.: *The comparable manufactures sheet metal components against the* ***brake*** *system manufactured by the assessee company. As per Rule 10TA(b) and Rule 10TA(h) of the Income Tax Rules, 1962, a separate definitions have been laid down for core auto components and non-core auto components. As per Rule 10TA(b)(3), the core auto components means, suspension breaking parts including* ***brake*** *and* ***brake*** *assemblies,* ***brake*** *lining, shock absorbers and leaf springs and Rules 10TA(h) defines "non-core components" means auto components other than core auto components.*

Since, the business of the assessee is "core auto components", we hold that it cannot be compared with an entity which is in the

business of "non-core auto components". This comparable cannot be considered for the study.

2. ASK Automotive Pvt. Ltd.: *The turnover of the company is Rs.937 crores compare to the turnover of Rs.220 crores of the assessee company. Hence, it was argued that it cannot be a right comparable. Further, the comparable incurred expenditure on R&D activities whereas the assessee company doesn't have any R&D centre in* ***India****. We find that the* ***brake*** *shoes manufacturing which is a core auto components consists of 28.97% of the total turnover of the company which is approximately Rs.270 crores. Hence, the turnover is not an impediment for comparative study. We also find that the R&D expenditure incurred by the ASK Automotive Pvt. Ltd. is very minimal which would not alter the comparison to a considerable extent. Hence, we hold that ASKAPL may be considered as a correct comparable.*

3. Gabriel India Ltd.: *This company is primarily into manufacturing of front forks and shock absorbers. Since, they are non-core auto components owing to the difference in the products manufacturing it cannot be treated as a right comparable.*

4. Brakes India Pvt. Ltd.: *The product line is similar to that of the assessee. However, the turnover of this comparable is 16 times to that of the assessee's turnover. In general that the turnover filter is adopted to avoid selection of high-end companies with that of minnows in a similar line of business. The range cannot be fixed and how to adopt the filter depends on the facts of each case. High turnovers cannot be rejected prima facie while low turnovers are accepted when it suits to the parties without objections from either of the sides. An acceptable range would be the turnover of the taxpayer and the range of the upper limit at ten times as well as the lower limit at ten times (1/10) with a margin of variation may be considered as a right comparable. Since, in this case the turnover is 16 times which is well beyond the margins for a right comparison and eliciting correct results. Hence, we hold that BIPL may not be considered as a comparable in the instant case.*

5. Munjal Showa Ltd.: *The company is engaged in the manufacturing of shock absorbers, struts and rear cushions. Since, the product line is different the profits cannot be comparable and hence cannot be considered as a right comparable.*

6. Foundation Brake Manufacturing Pvt. Ltd.: *The company has been showing losses continuously for the last three years and doesn't cross the proposed filter, hence cannot considered as a right comparable."*

6.9 We find that the Tribunal (supra) invoking safe harbour rules for International Transaction (Rules 10TA to 10G) held functional dissimilarity of comparable companies. The term "core auto components" has been defined in Rule 10TA(b) as under:

> **"Definitions.**
>
> **10TA**. *For the purposes of this rule and rule 10TB to rule 10TG,—*
>
> *(a) ……..*
>
> *(b) "core auto components" means,—*
>
> *(i) engine and engine parts, including piston and piston rings, engine valves and parts cooling systems and parts and power train components;*
>
> *(ii) transmission and steering parts, including gears, wheels, steering systems, axles and clutches;*
>
> *(iii) suspension and braking parts, including brake and brake assemblies, brake linings, shock absorbers and leaf springs;"*

6.10 Further, non-core components has been defined under Rule 10TA(h) as under:

> ***"Definitions.***
>
> ***10TA***. *For the purposes of this rule and rule 10TB to rule 10TG,—*
>
> *(a) ……*
>
> *(b) ……*
>
> *(c) ……*
>
> *(d) ……*
>
> *(e) ……*
>
> *(f) ……*
>
> *(g) ……*
>
> *(h) "non-core auto components" mean auto components other than core auto components;*

6.11 Further, in table below Rule 10TD(2), safe harbour limit of operating profit margin for core auto components and non-core auto component has been listed at serial No. 10, 11 and 12% and

8.5% respectively. Thus, it is evident that the CBDT has identified difference in operating profit margin of the companies engaged in manufacturing of the core components vis-à-vis non-core components. In such circumstances, in principle, the companies engaged in manufacturing of core components cannot be compared on FAR analysis with companies engaged in manufacturing of non-core components. However, on perusal of order of the lower authorities, we find that few comparable companies are engaged in manufacturing of core components whereas other are engaged in manufacturing of non-core components. The assessee itself has submitted before the Learned DRP that the company "Setco Automotive Ltd" is engaged in production of 'drive transmission and steering parts', which is one of the core components. The Learned DRP has noted that assessee is also engaged in manufacturing of 'power train components' under engine parts. Regarding 'JBM Auto Systems Private Limited' the assessee has claimed before the Learned DRP that it was engaged in manufacturing of sheet metal components and tools and dies for automobiles, which falls in the nature of non-core components. The Learned DRP has accepted 'Auto Ignition Ltd' as functionally comparable on the ground that it is engaged in manufacturing and export of heavy duty auto Electric components for commercial vehicles, tractors off-road vehicles etc. The company "Rane TRW Steering Systems Private Limited" has been retained by the Learned DRP on the ground that company is engaged in manufacturing of suspension systems, Valve train components, Viction metal products, die-casting product any steering gear valve. The company "Minda Industries

Ltd." has been observed as engaging manufacturing of switches, lightning, batteries and blow moulding products for two wheelers as well as four wheelers. The company "India Nippon Electricals Ltd." has been retained as comparable on the ground that it is engaged in manufacturing of electronic ignition system for two wheelers, portable engines for three wheelers, flywheel magneto generator, capacitor discharge ignition unit etc. The company "Indo Schottle Auto Parts Private Limited" is engaged in manufacturing of collets, Mechatronic, valves, fuel system, turbocharger etc. The company "Sakthi Auto Components Ltd." is engaged in manufacturing of iron casting. The company 'Gajra Gears Private Limited' is engaged in manufacturing automotive gears. The company "RACL Geartech Ltd." mainly manufacture automotive gears and components. The company has also diversified in the field of industrial gears for electrical switchgears and circuit breaks, winches and cranes etc.

6.11 As far as issue of the selection of comparables by learned TPO is concerned, in backgrounds of above discussion, we are of the opinion that the decision of the Tribunal in the case of Nissin Brake (supra) was not available before the learned TPO and therefore he could not examine the comparability on the basis of function of manufacturing of core or non-core auto components. In the circumstances, we feel it appropriate to restore the issue of examining comparability of the assessee with other 10 companies to the file of AO/TPO with the direction to examine product manufactured by comparable companies and verify whether same falls under core component or non-core component and thereafter decide the comparability on verification of components

manufactured by the assessee. The Learned AO/TPO may also examine other objections of the assessee of research and development activities carried out by the comparable companies in accordance with law.

6.12 As far as arguments of Learned Counsel of the assessee on the issue of denial of capacity utilization/excess depreciation adjustment is concerned, we find that Learned DRP has observed as under:

> *"3.2.5 It is also argued by the assesses that during the year, the assessee had idle capacity due to which the entire fixed costs such as depreciation could not be absorbed. It is stated that depreciation cost of the assessee is significantly higher than comparable companies who may have utilized their capacity in an effective manner leading to effective utilization of fixed costs. Accordingly, it stated that the profit margins of the comparable companies needed to be adjusted on account of capacity utilization.*
>
> *3.2.5.1 The Panel has considered the submission. It is noticed that this claim has been made by the assessee merely by way of averments, without providing evidence of decline in sales on account of economic factors which forced any such underutilization of its installed capacity. There is also no evidence vis-a-vis the comparables whether such factors resulted in any such simultaneous effects on the working of the comparables. The tabular chart which has been filed in the synopsis before the Panel is merely based on presumption without any proof or documentary evidence. It is not clear as to how the assessee has worked out the tested party margins after the so-called capacity adjustments in the absence of relevant data. These adjustments are not routine and cannot be claimed on the basis of presumptions and surmises. The law in this regard was explained by the Bangalore Bench of the Hon'ble ITAT in Tavant Technologies India (P) Ltd v DCIT [2017] S3 taxmann.com 105 (Bangalore - Trib.) in the following words*
>
> > *"7. Having considered the rival submissions as well as the relevant material on record, we note that the assessee has claimed the adjustment on account of under-utilisation of capacity and particularly >n account of cost of employees and cost of rental which remained unutilized. However, the assessee has not given the proper details as well as evidences to show the level of capacity of utilization of the assessee as well as comparable companies. The learned*

Authorised Representative of the assessee has submitted that it was not feasible for the assessee to give all the details of the comparable companies regarding capacity utilization. We do not find any merit in the claim of the assessee when the assessee failed to produce the relevant details regarding the level of capacity utilization of each and every comparable company in comparison to the assessee's capacity utilization. Therefore in the absence of necessary details and evidences, this ground of the assessee's appeal is rejected."

3.2.5.2 The Panel, accordingly, finds no merit in the contention of the assessee and rejects the same."

6.13 Before us, the learned Counsel of the assessee in his submission has submitted a chart of adjustment on account of capacity utilization on the basis of that depreciation to sales ratio. We direct the learned TPO to examine the claim of the assessee of capacity utilization in view of the data submitted by the assessee. As far as issue of incorrect computation of operating margin of the assessee in view of considering profit on sale of the tools as non-operative and depreciation of all those tools as operative is concerned, the Learned DRP has adjudicated as under:

"3.2.4 The assessee has raised a contention that the TPO has excluded depreciation and profit on the sale of its assets while calculating the operating profit. It is stated that the assessee purchased certain tools exclusively for Maruti, which were included in fixed assets for calculation of depreciation. These tools were sold to Maruti by the end of the year at a profit. The profit and depreciation on such sale was reduced by the TPO while computing the assessee's profitability during the year.

3.2.4.1 The Panel has considered the submission. Since the profit on sale of its assets does not pertain to the revenue side the TPO has rightly excluded the same. Further, there is no question of allowing depreciation either on such fixed assets and the TPO has taken a consistent and legally correct view. As far as depreciation is concerned, the matter is covered against the assessee by the

judgment of the Hon'ble Karnataka High Court in PCIT Vs. Kirloskar Toyota Textile Machinery (P.) Ltd. {2019} 106 taxmnmann.com 309 (Karnataka)."

6.14 Since sale of asset is not part of regular revenue operation in the case of the assessee and, therefore, profit generated on same cannot be part of revenue operation of the assessee. In our opinion, the Learned DRP has correctly held the profit on sale of a set as non-operative item. As far as the depreciation on operative expense is concerned, the learned DRP has held to be operative in view of assets used for the purpose of the business, and thus depreciation is part of expenditure connected with business operation of the assessee. The depreciation is also justified as operating expense, because profit earned on employing the tools in the business is part of profit earned on manufacturing process which is part of operating revenue. We do not find any error in the order of the Learned DRP on the issue and accordingly, we reject this contention of the assessee to refer this matter back to the learned TPO. The grounds No. 2.4 and 2.8 of the appeal are accordingly dismissed and other grounds from 2.1 to 2.10 except ground No. 2.4 and 2.8 are allowed for statistical purposes.

7. The ground No. 3 to 3.7 of the appeal relate to disallowance made on the basis of low net profit rate of the assessee during the year under consideration as compared to preceding year.

7.1 The facts qua the issue in dispute are that Assessing Officer observed that in the year under consideration, there is a fall in net profit ratio by 2.18%, which is equivalent to ₹ 11,03,93,150/-. The assessee explained that said fall in net profit rate is due to increase in cost of the material consumed, increase in the entries

of the finished goods and work in progress and increase of employees benefit expenses due to regular hike in salary of the employees. But according to the Assessing Officer, no credible evidence of above averments were submitted before him and therefore he made addition of ₹ 11,03,93,150/-. The learned DRP upheld the disallowance observing as under:

"3.3.3 The Panel has considered the submission. The grievance of the AO is that there was no evidence furnished in respect of increased expenditure. The AO has specifically returned a finding in para 7.2 of his order that no details in respect of the following expenses were furnished by the assessee:

S. No.		***FY 2015-16***	***FY 2014-15***
i.	*Consumption of stores*	*Rs.1,55,98,131/-*	*Rs.11,88,52,947/-*
Ii	*Consumables*	*Rs.13,55,43,387/-*	*Rs.11,88,52,947/-*
iii	*Repair & Maint. (Building)*	*Rs.39,81,240/-*	*-*
iv.	*Rates & Taxes*	*Rs.14,58,979/-*	*Rs.6,19,802/-*
v.	*Selling & Distribution*	*Rs.60,30,866/-*	*Rs.52,01,414/-*
vi.	*Miscellaneous expenses*	*Rs.61,82,707/-*	*Rs.51,91,306/-*
	Total	*Rs.16,87,95,310/-*	

3.3.3.1 In that view of the matter, the Panel holds that there is no evidence in respect of expenditure or other reasons to justify a decline in NP Ratio and the AO has rightly made an addition of Rs.11,03,93,150/- on that account. Any claim of expenditure is to be supported by necessary evidence as required by the Assessing Officer in the absence of which mere entries of these expenses in the books of account and audited by a chartered accountant do not obviate tire requirement of furnishing supporting evidence in respect of such expenses; or curtail, restrict or delimit the power of the Assessing Officer to call for supporting evidence as by doing so he is not going into the question of commercial expediency of the expenditure nor is he examining whether the expenditure is wholly and exclusively incurred for the purpose of business in terms of section 37. The evidence of expenditure is required to assert in whether the expenditure has been incurred at all and if yes, what is the extent or quantum of that expenditure. The question of its being incurred wholly and exclusively for the purpose of business arises at a stage subsequent to that. That stage has not readied in this case. The Panel, therefore, is not inclined to interfere with the order of the

AO, in the absence of evidence in support of expenditure. The objection stands rejected accordingly."

7.2 Before us, the Learned Counsel of the assessee referred to page 301 of paper-book, Volume 2 (schedule of other expenses) and submitted that there is a loss on foreign currency transaction of ₹ 4,52,88,087/- which is main reason of low net profit rate in the year under consideration and this aspect has not been examined properly by the learned Assessing Officer. The Learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of PCIT Vs RG Buildwell Engineers, Reported in (2018) 99 taxman.com 284(SC) and submitted that no ad-hoc disallowance is permitted.

7.3 On the other hand, the Learned DR submitted that the assessee failed to substantiate its averments with credible evidences and, therefore, lower authorities are justified in making addition for low net profit rate. He further submitted that the assessee has come up with a new reason for low net profit, which needs to be examined by the Assessing Officer.

7.4 We have heard rival submission of the parties on the issue in dispute. The lower authorities have sustained the addition mainly due to non-furnishing of documentary evidence in support of claim of increase in cost of material and employee's benefit. But before us, the assessee has submitted one new reason of the lower not net profit rate as loss on account of foreign currency transaction, which was not incurred in immediately preceding assessment year. Both the parties agreed that issue need to be examined by the Assessing Officer, accordingly, we set aside the finding of the lower authorities and restore the issue to the file of

the Learned Assessing Officer for examination and verification of contentions raised by the assessee of foreign currency transaction loss during the year under consideration. The grounds of the appeal are accordingly allowed for statistical purposes.

8. The ground No. 4 to 4.2 of the appeal relates to non-payment of excise duty liability.

8.1 The Assessing Officer disallowed the claim of payment of the excise duty of ₹ 33,92,861/- in view of the comment of the auditor in tax audit report that it was not possible for him to give the date of payment of excise duty. The learned DRP upheld the disallowance observing as under:

> *"3.2.7.1 The assessee submits that the balance of excise duty unpaid as at the end of the previous year amounting to INR 33,92,861/- was paid subsequent to the year-end through the credit of CENVAT and no amount was paid in cash. The adjustments were made on different dates subsequent to the year-end but before the due date of filing of the tax return under Section 139 of the Act and accordingly a particular date of payment could not be ascertained Reference should also be made to the Tax Audit report wherein the tax auditor has reported NIL outstanding balance but has not provided any certain date of payment. It is further stated that as per section 43B of the Act, any tax duty, cess or fee, by whatever name called, under any aw for the time being in force, is allowable as deduction if the same is 'actually paid" on or before the due date as specified in section 139 of the Act. Accordingly, any tax which is actually paid on/before the due date of furnishing the tax return as specified u/s 139 of the Act shall be allowable as deduction. Further as per the provisions of excise laws, the liability of excise duty may be discharged by payment in cash well as through adjustments from the input credits available and permissible under law. The term "Actual payment" shall also include the adjustment of ex.ise duty from the input credit balances available. Reliance is placed on Eichier Motors Ltd. v Union of India [1999] 106 ELT 3 (SC) and ITAT Delhi Bench decision in the case of CIT v Kaiser Industries Ltd. Accordingly, it is submitted that the AO be directed to consider the amount of excise duty as paid and delete the disallowance as stated in para 6.1 & 6.2 of the draft assessment order.*

3.2.7.2 The Panel has considered the submission In the case, there is no evidence of payment of excise duty or any evidence of credit of CENVAT and related reconciliation in this regard The Supreme Court decision in Etcher Motors Ltd, followed in Kaiser Industries Ltd by the ITAT, merely says that setting of MODVET credit is as good as duty paid. However, it does not remove the requirement of giving evidence in respect o; such credit and requisite reconciliation to draw an inference of actual setting of the credit towards the payment of excise duty. Accordingly in the absence of evidence in this regard, the Panel is not inclined accept the objection of the assessee or interfere with the action of the AO. The objection is, accordingly, rejected."

8.2 Before us, the learned Counsel of the assessee referred to page 83 of the paper-book and submitted a reconciliation of Cenvat credit taken and utilized. The Learned Counsel of the assessee submitted that issue may be restored to the file of the Assessing Officer for deciding in the light of decision of the Hon'ble Supreme Court in the case of **Eichers Motors Ltd** (supra), wherein it is held that payment of excise duty by way of adjustment against Modvat/Canvat credit is valid. On the contrary, the Learned DR did not object for restoring the issue for verification to the file of the Assessing Officer of the reconciliation of Cenvat credit taken and utilised by the assessee.

8.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The issue in dispute regarding payment of excise duty arose due to absence of evidence on record of the lower authorities. Now, before us, the assessee has submitted that actual payment of excise liability under section 43B of the Act also include adjustment of excise duty from the input credit balance available. The learned Counsel submitted that such adjustment was made before the due date of

filing of return under section 139(1) of the Act and, therefore, assessee is entitled to deduction under section 43B of the Act. The assessee has submitted a reconciliation chart of Cenvat Credit taken and utilized to support that excise duty was paid in terms of provision of section 43B of the Act and claimed that deduction is justified. In view of the facts and circumstances of the case and interest of substantial justice, we restore this issue back to the file of the Assessing Officer for deciding afresh after verification of reconciliation chart of Cenvat credit taken and utilized along with supporting documentary evidence in the light of the decision of the Hon'ble Supreme Court in the case of Eichers Motors Ltd (supra). The grounds of the appeal of the assessee are accordingly allowed for statistical purposes.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 24th September, 2021

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 24th September, 2021.
RK/-(DTDC)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi