

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI**

**BEFORE
SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 3889/Del/2017
Asstt. Year : 2008-09

Escorts Limited. Corporation Taxation, 15/5, Mathura Road, Faridabad Haryana, Pin 121003 PAN AAACE0074B	Vs.	DCIT, Circle-11(1) New Delhi
(Appellant)		(Respondent)

ITA No. 5558/Del/2018
Asstt. Year : 2012-13

Addl. CIT, Special Range-3, New Delhi.	Vs.	Escorts Limited. Corporation Taxation, 15/5, Mathura Road, Faridabad Haryana, Pin 121003 PAN AAACE0074B
(Appellant)		(Respondent)

Assessee by:	Shri R.M. Mehta, Advocate
Department by :	Shri Mrinal Kumar Das, Sr. DR
Date of Hearing	09.03.2022
Date of pronouncement	05.05.2022

ORDER

PER ASTHA CHANDRA, JM

The aforesaid two appeals have been filed by the assessee and the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-44, New Delhi ("**CIT(A)**") dated 26.07.2017 and 30.05.2018 pertaining to assessment year ("**AY**") 2008-09 and 2012-13.

2. Since these involve similar issues, they were heard together and are being disposed off by this combined order.

3. The assessee, Escorts Ltd. is engaged in the business of manufacturing of agricultural tractors, engine for agricultural tractors, round and flat tubes, heating elements double acting hydraulic shock absorbers for railway coaches, enter butter couplers, automobile shock absorbers, telescopic front fork & McPherson struts, brake blocks internal combination engine and all types of brakes used by Railways. The assessee exports tractors/ spare parts to its AE's.

ITA No. 3889/Del/2017 - AY 2008-09

4. We first take up the appeal of the assessee relating to AY 2008-09. The main grievance of the assessee is the exclusion of two comparable companies by the Ld. TPO, namely (i) Mahindra Gujrat Tractor Ltd. and (ii) HMT Ltd. which has been confirmed by the Ld. CIT(A) thereby resulting in an upward transfer pricing adjustment of Rs. 4,62,79,292/- to the value of international transactions with its Associated Enterprises ("**AEs**"). All the grounds raised by the assessee relate thereto.

4.1 During the AY 2008-09, the assessee reported the following international transactions with its AEs:-

Associated Enterprise	Nature of Transaction	Value of Transaction
Farmtrac North America, USA	Sale of Agricultural Tractor and spare parts	Rs. 29,09,29,149
Farmtrac Tractors Europe, Poland	Sale of Agricultural Tractor and spare parts	Rs. 34,88,13,918
Total		Rs. 63,97,43,067

4.2 The assessee applied the Resale Price Method ("**RPM**") as the most appropriate method to demonstrate that the international transaction of sale of agricultural tractors and spare parts to its AEs is at arm's length price

(“ALP”). Accordingly, margins were computed by taking ‘Gross Profit & Operating Profit to Net Sales’ as the Profit Level Indicator (“PLI”) and comparing the same with the average margins of 6 comparable companies as indicated in the table below.

A)	Comparables	Gross Margin to Net Sales (%)	Operating Margin to Sales (%)
	Eicher Motors	24.15	4.70
	Force Motors	17.61	-5.11
	HMT Ltd.	24.12	11.75
	Punjab Tractors Ltd.	27.15	10.16
	Mahindra Gujarat Tractors	18.96	0.50
	Tractors & Farm Equipment	22.95	12.99
	Average	23.24	6.77
B)	Escorts Limited	24.44	2.52

4.3 This way the assessee demonstrated that the international transaction of AEs segment was at ALP required under the transfer pricing regulations under the Act. The assessee’s case was referred by the Ld. Assessing Officer (“AO”) to the Ld. Transfer Pricing Officer (“TPO”) for the determination of the ALP.

4.4 During the transfer pricing proceedings, the Ld. TPO applied Transactional Net Margin Method (“TNMM”) as against RPM applied by the assessee which is undisputed.

4.5 The Ld. TPO after considering the reply of the assessee in response to the queries raised by him concluded that TNMM is the most appropriate method to be applied in the case of the assessee and rejected three comparables, namely Mahindra Gujrat Tractor Ltd., Force Motors Ltd., and HMT Ltd. The Ld. TPO finally selected three comparables with their average PLI (OP/TC) at 10.01% as depicted in the table below:-

S. No.	Name	OP/OC (%) F.Y. 2007-08
1.	Eicher Motors Ltd.	4.74
2.	Punjab Tractors Ltd.	11.03
3.	Tractors & Farms Ltd.	14.25
Average		10.01

4.6 This resulted into the transfer pricing adjustment of Rs. 4,62,79,292/- on transaction of export sales to AEs, for which equal amount of addition was made by the Ld. AO in his final order under section 143(3) read with section 144C of the Act.

5. Aggrieved, the assessee filed appeal before the Ld. CIT(A). After considering the orders of the Ld. AO/ TPO, additional evidence, written submissions, remand report and the oral arguments of the Ld. AR, the Ld. CIT(A) approved OP/ OC as PLI and the application of TNMM as the most appropriate method. On comparables finalised by the Ld. AO/ TPO which the assessee challenged before the Ld. CIT(A), the Ld. CIT(A) confirmed the exclusion of - (i) Mahindra Gujrat Tractor Ltd. on the ground that this company has a negative net worth and (ii) HMT Ltd. on the ground that there is declining revenue and profit margin trend in this company.

6. This has brought the assessee before us challenging the exclusion of the aforesaid two companies by the Ld. CIT(A) from the list of comparable companies. We will now proceed to examine each of these comparable companies.

(i) Mahindra Gujrat Tractor Ltd.

6.1 The Ld. TPO has rejected this company on the ground of having negative net worth relying upon the decision of the Hon'ble ITAT in the case of DCIT vs. Quark Systems Pvt. Ltd. [2010-TIOL-31-ITAT-CHD-SB] and Sony India (P) Ltd. vs. DCIT [114 ITD 448 (Del)].

6.2 The Ld. CIT(A) endorsed the Ld. TPO's finding by holding that the negative worth company will have excess liability which affects the profitability.

6.3 Before us, the Ld. AR reiterated the submissions made before the Ld. TPO/ CIT(A) and argued that this company should not be excluded as a comparable merely on the ground that it has a negative net worth. He argued that the negative net worth of this company is due to accumulated losses of Gujarat Tractors Ltd. (erstwhile state PSU) which the said company had at the time of its takeover by Mahindra Group. It was pointed out that Mahindra Gujrat Tractor Ltd. is reporting consistent profits in most of the subsequent years and that the net worth of this company has not become negative on account of its operations under Mahindra group. He submitted that this company is functionally comparable to that of the assessee as it is the manufacturer of tractors in 30-60 HP range as against the assessee which manufactures tractors in 25-75HP range. This was substantiated by submission of profile of Mahindra Gujarat Tractor Ltd. downloaded from its website [pp 18-21 of Paper Book]. In support thereof, he placed reliance on the decision of the Hon'ble Delhi Tribunal in the case of Qualcomm India Pvt. Ltd. vs. ACIT [ITA No. 5239/Del/2010] and ACIT vs. Gillete Diversified Operations Pvt. Ltd. [ITA No. 499/Del/2013]. The Ld. AR then drew our attention to the assessment proceedings of the subsequent years in assessee's own case where similar issue was involved with no change in the facts of the assessee's case. The Ld AR submitted that this company has been accepted as a comparable by the then TPO during the TP assessment for AY 2011-2012. He further submitted that for AYs 2012-13 and 2013-14 the then Ld. CIT(A) relying on the decisions of the Hon'ble Delhi Tribunal (supra) has upheld the contention of the assessee to include this company as comparable. The Ld. AR also argued that the reliance by the Ld. TPO/CIT(A) on the decisions of Quark Systems and Sony India (supra) are misplaced as these decisions are distinguishable on facts.

6.4 The Ld. DR strongly relied upon the order of the Ld. TPO / CIT(A) and emphasised that this company be excluded from the list of comparable being a negative net worth company. The Ld. DR argued that facts in AY 2008-09 under consideration and subsequent AYs are different as the assessee has been involved in both sale and purchase of tractors and thus is a trading concern and not a manufacturer. He also submitted that the Qualcomm India and Gillete cases (supra) cannot be applied as the business of assessee company (Escort Limited) is different from the business of the assessee in those cases.

7. We have heard the Ld. Representative of the parties and perused the orders of the Ld. TPO/AO/CIT(A) and the material available on records. In the light of the detailed submissions of the assessee and the judicial precedents in support of its contentions, we are unable to subscribe to the view of the Ld. TPO/ CIT(A). In our considered view, this company should not be excluded from the list of comparable companies.

7.1 The case of the assessee is supported by several decisions of the various forums. The assessee has relied upon the decisions of the Hon'ble Delhi Tribunal in the case of Qualcomm India Pvt. Ltd. and Gillete Diversified Operations Pvt. Ltd. (supra) which in our view squarely covers the case of the assessee. The relevant extract of the Hon'ble Tribunal's finding in the case of Qualcomm India Pvt. Ltd. (supra) is reproduced below:-

“33. The Ld. T.P.O. rejected R.S. Software as a comparable company on the basis that the company has negative net worth for the financial years 2003-04 to 2005-06. The Ld. A.R. submitted that for financial year 2005-06, R.S. Software (India) had reported an operating profit from computer software development services, especially maintenance activities hence is functionally similar to the assessee. The same is evident from the profit and loss account of the company made available at Page No. 95 of the paper book volume (ii). It was submitted further that negative net worth cannot be a criteria for evaluating the current profitability of the comparable as the negative net worth is on account of brought forward losses of earlier years, which are not relevant for the purpose of comparison. The adoption of negative net worth

criteria for rejection of functionally comparable companies is not acceptable as it would be unjust and uncalled for. Based on the provisions of the Income Tax Rule 1962, comparables for the Provision of Software services would have to be companies which provide same or similar services as the assessee and are comparable in terms of functions performed risk assumed and assets utilized. Hence for the purpose of determining the comparables, the assessee had considered functions performed, risk assumed and assets utilized for the international transaction and has not and cannot be considered the debit balance of profit and loss account which is on account of brought forward losses of earlier years as a criteria for rejection. He submitted further that the company having more than 99% of the total revenue from comparable activity of software development services. The Ld. DR on the contrary reiterated the observations made by the Ld. TPO about the company. We find substance in the above contentions of the Ld. AR that negative net worth cannot be a criteria for evaluating the current profitability of the comparable as the negative net worth is on account of huge brought forward losses of earlier years. On perusal of the profit and loss account of the Co. for the asstt. Year under consideration, we find that during the year the company has made exports of computer software development with Rs. 87,31,45,219/- computer software development (domestic) worth Rs. 4,11,26,112/- and from computer software maintenance and others at Rs. 14,35,833/-. Hence we find that the company has more than 99% of the total revenue from comparable activity of software development services. The Ld. A. O/TPO was thus not justified in rejecting R. S. Software as comparable. While setting aside this action of the A.O/T.P.O we direct them to consider R.S. Software as comparable for F.Y. 2005-06 to determine ALP in the case of assessee.”

7.2 The relevant finding of the coordinate bench of Tribunal in Gillette Diversified Operations Pvt. Ltd. case (supra) wherein the Hon'ble Tribunal also made an observation with regard to the decision of the Special Bench in Quark Systems Limited (supra) is reproduced as under:-

“24. ...i. The Id TPO has excluded this comparable stating that it has a negative net worth for the year 2005 hence it is not fit comparable to be taken. On appeal before the Id CIT(A) the assessee submitted that the TP regulation and OECD guidelines do not suggest that loss making company should not be taken as comparable. The Id CIT (A) has hold that this company is not simply the loss making company but is also a company having negative net worth and according to him when a company suffers from erosion of its wealth because of continuous loss, same cannot be taken as comparable. The case

laws relied upon by the appellant were also rejected as according to him those were relied upon high loss making company and not for a negative net worth comparables.

ii. Before us the Id AR submitted that merely because a company is having negative net worth it cannot be excluded as comparable if the functions performed, Assets deployed and risk assumed are comparable with the business of the company. Against this the Id AR relied on the order of the lower authorities.

25. We have carefully considered the rival contentions. According to rule 10(B)(a) of the Income Tax Rules the comparability of international transactions with an uncontrolled transaction shall be judged with respect to the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions. According to the Rule 10B(3) a uncontrolled transaction shall be comparable to an international transaction none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market. We do not find any such exception provided under the Income Tax Rules 1962. Furthermore neither the Id CIT(A) nor the Id AO had pointed out that how the negative net worth of the comparable make the price of the goods or the profitability arising from such transaction not comparable. Merely because the company is having negative net worth but when the FAR is comparable, it cannot be said to be non comparable unless it is shown that how the negative net worth of the company has impacted the profitability of the comparable company. **We have also noted the issue decided by Special bench in the case of DCIT V Quark Systems Limited in 2010-TII- 02-ITAT-CHD-SB-TP where in the negative net worth company was considered and it was held that business organization with negative net worth cannot be treated at par with a normal business organization. However while considering that issue the comparable was also functionally not comparable in that case. Therefore there was no view expressed in that decision that though comparable has similar FAR still negative net worth company is required to be excluded without showing the impact of negative net worth on the profitability of the company. In view of this we direct the inclusion of this Company i.e. Muller & Phipp India Limited as comparable for the purpose of determining arm's length price. ”**

[Special emphasis supplied]

7.3 Further, we do not find force in the argument of the Ld. DR that this company is functionally not comparable with that of the assessee. The assessee company is in the business of manufacturing and trading of tractors since past many years which is evident from the business profile of the assessee company. We also concede with the argument of the Ld. AR that the decisions in the case of Quark Systems and Sony India (supra) would not be applicable in the facts and circumstances of the present case. In Sony India's case (supra) the TPO excluded those companies which had negative net worth and huge liabilities and dwindling profits. However, in the present case scenario, this company is functionally comparable to that of the assessee and is consistent in reporting net profits with incremental growth which is evident from the Audited Financial of this company placed on record.

7.4 Moreover, we also note that this company has been included by Ld. TPO/ CIT(A) as a comparable in subsequent AYs facts remaining the same.

7.4.1 For AY 2011-12, the assessee selected this company a comparable in its transfer pricing study report (Page 236 of the Paper book). The Ld. TPO examined the transfer pricing documentation which contained the functional and economic analysis of comparables and of assessee and concluded in his order under section 92CA(3) of the Act that *"in view of the functional and economic analysis of assessee and of comparables, no adverse inference is drawn in respect of the international transactions undertaken by the assessee during the F.Y. 2010-11."* (pp 241-242 of the Paper Book).

7.4.2 For AY 2012-13, the Ld. CIT(A) directed the Ld. AO/ TPO to include this company in the final list of comparables by recording the following finding. The Department is in appeal before the Tribunal contesting the inclusion of this comparable.

"5.9 The TPO has not included Mahindra Gujarat Tractors Ltd in the final list of comparables on the ground that the company had a negative net worth even though it had a positive OP/OC margin of 5.58%. The appellant has relied

upon the order of the Hon'ble ITAT New Delhi in the case of Qualcomm India Private Limited versus ACIT in ITA No. 5239/DL/2010 where it has been held that if the comparable entity is profit-making but having a negative net worth the same cannot be rejected as long as it is in the same line of business. In accordance with the principle of consistency and doctrine of judicial discipline, the AO/TPO is directed to include Mahindra Gujarat Tractors Ltd. in the final list of comparables."

7.4.3 For AY 2013-14, the Ld. CIT(A) followed the order of his predecessor and directed the Ld. AO/ TPO to include this company in the final list of comparables by applying the rule of consistency and doctrine of judicial discipline. The relevant finding of the Ld. CIT(A) order is reproduced below:-

"6.7 The issue regarding comparability of Mahindra Gujarat Tractors has been decided by the CIT(A)-44, New Delhi in Appeal No. 129/2017-18 for AY 2012-13 dated 30.05.2018 where it has been held as follows:-

"5.9 The TPO has not included Mahindra Gujarat Tractors Ltd in the final list of comparables on the ground that the company had a negative net worth even though it had a positive OP/OC margin of 5.58%. The appellant has relied upon the order of the Hon'ble ITAT New Delhi in the case of Qualcomm India Private Limited versus ACIT in ITA No. 5239/DL/2010 where it has been held that if the comparable entity is profit-making but having a negative net worth the same cannot be rejected as long as it is in the same line of business. In accordance with the principle of consistency and doctrine of judicial discipline, the AO/TPO is directed to include Mahindra Gujarat Tractors Ltd in the final list of comparables. "

6.8 The material facts of the case at the same in the instant year also. In accordance with the principle of consistency, the doctrine of judicial discipline and respectfully following the order of the CIT(A)-44, New Delhi in Appeal No. 129/2017-18 for AY 2012-13 dated 30.05.2018, the AO/TPO is directed to include Mahindra Gujarat Tractors Ltd in the final list of comparables."

7.5 Based on the above, we hold this company Mahindra Mahindra Gujrat Tractor Ltd. to be a comparable company and accordingly direct the Ld. AO/ TPO to include this company in the final list of comparables.

(ii) HMT Ltd.

8. The assessee selected this company as comparable based on the fact that it fulfilled the criteria of functional comparability.

8.1 The Ld. TPO rejected this company on the ground of declining sales of the company and the losses.

8.2 The Ld. CIT(A) observed that admittedly this company is operating at lower percentage of its installed capacity, therefore calls for adjustment for lower capacity utilization or exclusion from the list of comparable. Further relying on Ld. TPO's order and rejecting the arguments of the Ld. AR, the Ld. CIT(A) held that this company should not be included in the final list of comparables. The relevant para of the Ld. CIT(A)'s order is reproduced below:-

“3.3 (c) HMT Ltd :- Ld. AR has argued that this company is shown loss on account of operating at lower percentage of its installed capacity. He argued that at gross profit level this company has positive margin. As admittedly this company is operating at lower percentage of its installed capacity, therefore admittedly adjustment should be made for lower capacity utilization or excluded this comparable from the list. Ld. AR has not provided data for adjustment on account of lower capacity utilisation. Further Ld. AR's argument in respect of gross profit margin does not hold good as TNMM is approved as the most appropriate method with OP/OC as PLI. Ld. TPO has further held that there is declining revenue and profit margin trend in this company. Considering these facts, in my view this comparable should not be considered in the final list of comparables.”

8.3 Before us, the Ld. AR reiterated the argument he took before the Ld. CIT(A). The Ld. AR submitted that this company was selected as a comparable because it met the criteria of functional comparability. This company manufactures tractors in the range of 25-75 HP category like that of the assessee. A brief history of this company downloaded from its website was submitted (page 22 of the Paper Book) in support thereof. The Ld. AR

further submitted that this company is a pioneer in the field of tractor manufacturing since 1971. Over some past years, it incurred losses due to low capacity utilisation resulting in non-absorption of fixed costs. Such minor aberrations are seen in every comparable entity whether of positive nature or negative nature. But the main reason for including this party as comparable is its meeting the functional test. This company is wholly into tractor manufacturing and the assessee company has more than 80% of its turnover from tractors business. The negative net worth of this company is due to its accumulated losses. He also submitted that this company has been accepted as a comparable company in the subsequent AY 2012-13 by the Ld. CIT(A). The Department is in appeal before the Tribunal contesting the inclusion of this comparable.

8.4 The Ld. DR relied on the orders of the Ld TPO/ CIT(A). He also submitted that this company seems to be a government company and hence may not qualify to be a comparable of the assessee. Therefore, the Ld. TPO be directed to verify if HMT Ltd. is a government company and decide accordingly.

9. We have heard the Ld. Representative of the parties and perused the orders of the Ld. TPO/AO/CIT(A) and the material available on records. We agree with the claim of the assessee that this company is functionally similar to that of the assessee which is evident from the brief profile of this company produced before us. However, we find that this company has been excluded owing to its low capacity utilisation and persistent losses. The Ld. AR submitted that the Ld. CIT(A) has accepted this company as a comparable in AY 2012-13. Perusal of the order of the Ld. CIT(A) for AY 2012-13 reveals that the Ld. CIT (A) has directed the Ld. AO/TPO to include HMT Ltd. in the final set of comparables if the company has not incurred persistent losses in the past three years with the direction to the assessee to submit copy of the relevant annual reports to the Ld. AO/TPO. The relevant finding in para 5.8 of the Ld. CIT(A)'s order is reproduced below:-

“5.8 HMT Ltd has been excluded from the final list of comparables in the order of CIT(A) – 44 in assessment year 2009-10 in ITN No. 29/2013-14 as the company had incurred persistent losses of past 3 years which was not in line with the general industry trend. The AO/TPO is directed to include HMT Ltd. in the final set of comparables if the company has not incurred persistent losses in the past 3 years. The appellant is directed to submit copy of the relevant Annual Reports to the AO/TPO.”

10. The Ld. DR has also stated that this company may be a government company which fact needs to be verified. The Ld. AR conceded. We, therefore, decline to interfere in this regard, direct the Ld. AO/ TPO to verify the contention of the Ld. DR stated in para 8.5 above and take a final view based on the result of verification done by them.

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

ITA No. 5558/Del/2018 - AY 2012-13

12. We now proceed with the Departmental appeal in ITA No. 5558/Del/2018 pertaining to AY 2012-13.

13. Briefly stated, the facts of the case are that during the AY 2012-13, the assessee reported its business in the following four segments – (i) Tractors; (ii) Railway Equipments; (iii) Automotive Parts; and (iv) Construction Equipments. The assessee entered into international transaction in respect of its Tractors segment. It exported tractors and spare parts to its AE in Poland. TNMM was used by the assessee as the most appropriate method to determine the ALP in respect of export of sales and spare parts to its AE in Poland.

13.1 The case of the assessee was referred to the Ld. TPO. The Ld. TPO made an addition of Rs. 3,61,00,000/- to the income of the assessee on account of transfer pricing adjustment to the ALP declared by the assessee.

The equal amount of addition was made by the Ld. AO in his final assessment order under section 143(3) read with section 144C of the Act.

13.2 In the transfer pricing study, segment information of the Tractor division has been considered as the international transactions with AE related to sale of tractors and its spare parts. However, the Ld. TPO rejected the segment results of the Tractor division used by the assessee for entity level.

13.3 The Ld. TPO rejected two comparable companies selected by the assessee and included two comparable companies on his own to the final list of comparable companies. The position of comparables selected by the assessee and the Ld. TPO and their net profit margin is shown below:-

S. No	Name	Net Profit/Margins (%)	
		As per Assessee	As per TPO
1.	Tractors & Farm Equipment Ltd.	14.67	14.67
2.	International Tractors Ltd.	19.26	19.26
3.	TAFE Motors & Tractors Ltd.	12.09	12.09
4.	Mahindra Gujarat Ltd.	5.58	Rejected
5.	HMT Ltd.	-16.33	Rejected
6.	Mahindra & Mahindra Ltd	-	18.83
7.	VST Tillers Tractors Ltd.	-	13.18
	Arithmetic Mean	7.05	15.06

13.4 Aggrieved by the action of the Ld. AO/ TPO, the assessee appealed before the Ld. CIT(A). The Ld. CIT(A) after considering the detailed submissions of the assessee directed the Ld. AO/ TPO - (i) to include Mahindra Gujrat Tractors Ltd. in the final list of comparable; (ii) to include HMT Ltd. in the final set of comparables if the company has not incurred

persistent losses in the past 3 years and copy of the relevant annual reports are submitted by the assessee to the Ld. AO/TPO; and (iii) to exclude Mahindra & Mahindra Ltd. and VST Tillers Tractors Ltd. (which were selected by the Ld. TPO) from the final list of comparable companies.

14. This has brought the Revenue before us challenging the exclusion of- (i) Mahindra & Mahindra Ltd. from the final list of comparables by the Ld. CIT(A) which was included in the final list of comparables by the Ld. TPO; (ii) inclusion of Mahindra Gujarat Tractors Ltd. in the final list of comparables; and (iii) inclusion of HMT Ltd. in the final list of comparables subject to the condition stated therein. We will now proceed to deal with each of the comparable companies in dispute.

(i) Mahindra & Mahindra Ltd.

14.1 During the TP proceedings, the assessee objected to the inclusion of this comparable by the Ld. TPO on the ground that it is functionally not comparable. The Ld. TPO rejected the claim of the assessee by holding that this company is engaged in manufacture of tractors, multipurpose vehicles and other four vehicles goods. The assessee company is also engaged in manufacture of tractors and hence this company is accepted as the comparable.

14.2 Before the Ld. CIT (A), the assessee submitted as under (para 4, pages 10-11 of CIT(A)'s order):-

“This party is in the business of manufacturing of automobiles i.e. passenger vehicles, utility vehicles (UV) Multi-purpose vehicles (MPV) and cars and three-wheelers. Besides this, the company also manufactures agricultural tractors Inverters and UPS Systems. The tractor sales of this company constitute about 30% of the total sales thus making it primarily a company in the automotive vehicles space. This company does not meet the criteria to be selected as a comparable on the following grounds:-

- i) *The company is a multi-product company with a low volume of around 30% of its total sales pertaining to tractors (copy of their P & L A/c & Schedule 21 are enclosed (page 114 to 115 of paper book)*
- ii) *Segment information of its tractor division is not available and is also not published in its standalone annual results. Its net profit as per the published annual report is 10.18% of turnover for all the businesses taken together. Usually, the profitability in the automotive division is generally higher due to higher margin products whereas the margin on tractor business is generally lower than their average margins because of limited market with limited growth prospects.*
- iii) *The learned TPO adopted its net profit margin at 18.83% for which no working details have been shown. It has not been specified whether the net margins have been computed on the segmental result of its tractor division. The Ld. TPO was requested to requisition the segment information from this party but he failed to do so.*
- iv) *Without prejudice, the size of its tractor sales is about four times that of the assessee company. It has sold 236666 nos. of tractors during the year as compared to 60452 tractors sold by the assessee. In terms of the tractor business, this party has much wider geographical reach than its competitors including Escorts Ltd. This party should not have been considered on account of its sheer scale of operations and operating leverages.”*

14.3 The Ld. CIT(A) concurred with the contention of the assessee and recorded the following findings:-

“5.6 The main objection of the appellant regarding Mahindra & Mahindra Ltd is that the tractor business of the said company hardly constitutes 30 percent of its total sales. It is also stated that segment information of its tractor division is not available in the public domain. It has further been submitted that the net profit margin as per the published Annual Report is 10.18% whereas the TPO has adopted a net profit margin of 18.83% for which working details have not been shown. It has further been stated that the size of the sales of tractor is 4 times as that of the appellant and that the above-mentioned company has a much wider geographical reach than the appellant.

The contention of the appellant is accepted in view of the fact that the tractor division constitutes only 10% of the turnover of the company and that segment till information was not available in the public domain. The contention of the appellant is upheld. The AO/TPO is directed to exclude Mahindra & Mahindra Ltd from the final list of comparables.”

14.4 Aggrieved, the Revenue is in appeal before us. The Ld. DR relied upon the order of the Ld. TPO. He submitted that the comparable can be selected at entity level in the absence of segmental information and that the assessee has not objected to the filters applied by the Ld. TPO.

14.5 The Ld. AR reiterated the submissions made before the Ld. CIT(A). He submitted that this company has not been selected as a comparable in the transfer pricing study report and that the assessee company objects to the inclusion of this company as a comparable for the reasons stated before the Ld. CIT(A) which has been reiterated before us.

14.6 On consideration of the rival submissions of the parties and the material available on record, we find force in the argument of the Ld. AR that this company is functionally non-comparable to that of the assessee owing to low volume of only around 30% of its total sales pertaining to tractors as compared to that of the assessee. We, therefore, uphold the finding of the Ld. CIT(A) and reject the appeal of the Revenue. Accordingly, the Ld. AO/TPO is directed to exclude Mahindra & Mahindra Ltd. from the final list of comparables.

(ii) Mahindra Gujrat Tractor Ltd.

15. The Ld. TPO/ AO excluded this company on account of its negative net worth which contention has been reversed by the Ld. CIT(A).

15.1 The Ld. CIT (A) in para 5.9 of the appellate order has recorded the following finding:

“5.9 The TPO has not included Mahindra Gujarat Tractors Ltd. in the final list of comparables on the ground that the company had a negative net worth even though it had a positive OP/OC margin of 5.58%. The appellant has relied upon the order of the Hon’ble ITAT New Delhi in the case of Qualcomm India Private Limited vs. ACIT in ITA No. 5239/DL/2010 where it has been held that if the comparable entity is profit-making but having a negative net worth the same cannot be rejected as long as it is in the same line of business. In accordance with the principle of consistency and doctrine of judicial discipline, the AO/TPO is directed to include Mahindra Gujarat Tractors Ltd. in the final list of comparables.

15.2 Before us, the Ld. DR and Ld. AR presented the same arguments in respect of this comparable stated above in para 6.2 and 6.3 respectively in AY 2008-09.

15.3 We have already considered the rival submissions of the parties and recorded our findings on this comparable in para 7 of this order in the assessee’s appeal for AY 2008-09. The facts of the case remain the same in the AY 2012-13 as they were in AY 2008-09. Accordingly, we hold this company Mahindra Mahindra Gujrat Tractor Ltd. to be a comparable company and therefore direct the Ld. AO/ TPO to include this company in the final list of comparables.

(iii) HMT Ltd.

16. The Ld. AO/ TPO excluded this company for the reason that this company does not fulfil the net worth filter applied by the Ld. TPO.

16.1 The Ld. CIT (A) in para 5.3 of the appellate order has recorded the following finding:”

“5.3 The material facts of the case are the same in the instant year also. In accordance with the principle of consistency and respectfully following the order of the CIT(A) in AY 2008-09 and of the appellant by using OP/OC as the

PLI and the TNMM as the most appropriate method using the same methodology as in AY 2008-09 & 2009-10.”

16.2 Before us, the Ld. DR and Ld. AR presented the same arguments in respect of this comparable stated above in para 8.3 and 8.4 respectively in AY 2008-09.

16.3 We have already considered the rival submissions of the parties and recorded our findings on this comparable in para 9 and 10 of this order in the assessee’s appeal for AY 2008-09. The facts of the case remain the same in the AY 2012-13 as they were in AY 2008-09. Accordingly, we restore this comparable to the file of the Ld. AO/ TPO for verification of the required facts and take a final view based on the result of verification done by them.

17. In the result, the Revenue’s appeal is partly allowed for statistical purposes.

Order pronounced in the open court on 5th May, 2022.

sd/-

(R.K. PANDA)

ACCOUNTANT MEMBER

sd/-

(ASTHA CHANDRA)

JUDICIAL MEMBER

Dated: 05/05/2022

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	

Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	