

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD
BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

IT(TP)A No.1294/Ahd/2015
Assessment Year : 2007-08

General Motors India P.Ltd. Chandrapura Industrial estate District Panch Mahal Halol 389 351 PAN : AAACG 8371 P		ACIT, Godhra.
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(Applicant)		(Responent)
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Assessee by :	Shri SN Soparkar, Sr.Advocate and Shri Parin Shah, AR
Revenue by :	Shri Alok Kumar, CIT-DR

सुनवाई की तारीख/Date of Hearing : 25/08/2022

घोषणा की तारीख /Date of Pronouncement: 23/11/2022

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present appeal has been filed by the assessee against order passed by the Addl. Commissioner of Income-Tax (Transfer Pricing Officer)-1, Ahmedabad [hereinafter referred to as "TPO"] dated 20.10.2010 passed under section 92CA(3) of the Income Tax Act, 1961 [hereinafter referred to as "the Act" for short] for the Asst.Year 2007-08.

2. At the outset itself, the ld.counsel for the assessee pointed out that the present appeal has come before us in the 3rd round. It was pointed out that the assessee had filed a Miscellaneous Application seeking rectification in the order passed by the ITAT in second round

on account of the issue of adjustment made to the income of the assessee by the Transfer Pricing Officer (TPO for short) ,on account of determination of arm's length price ("ALP" for short) of the international transactions of royalty paid by the assessee to its AE, GM Daewoo Auto & Technology Company ("GMDAT" for short)), having been adjudicated by the ITAT noting incorrect facts to the effect that the assessee had nothing to say to the comparables selected by the TPO for arriving at the ALP of the impugned transaction. The ld.counsel for the assessee pointed out that the ITAT accepted the assessee's plea noting that the assessee had made arguments countering the comparable selected by the TPO in the first round of litigation ,which were not considered by the ITAT in the second round of litigation, and therefore, there was an apparent mistake in the order of the ITAT, while adjudicating this issue. He pointed out that accordingly, this issue was directed to be adjudicated afresh and in pursuance to the same, the hearing before us today.

The ld.counsel for the assessee, therefore, contended that the solitary issue to be adjudicated was with regard to the adjustment made by the TPO to the international transaction of royalty paid by the assessee i.e. General Motors India Pvt. Ltd. (GMIPL for short) to the associate enterprise, GMDAT during the year, as raised by the assessee vide ground no.4 of the appeal in second round of litigation before the ITAT, and the same reads as under:

4. Adjustment to transaction pertaining to payment of royalty

4.1. The AO/ TPO erred in law and on facts in rejecting the internal comparable transaction identified by the appellant to determine the arm's length price of the impugned transaction of payment of royalty

4.2. *The AO/ TPO erred in law and on facts in applying Comparable Uncontrolled Price Method ("CUP Method") by using transactions which are not comparable to the impugned transaction of the appellant.*

4.3. *The AO/ TPO erred in law and on facts in making adjustment to the royalty transaction without providing corresponding effect for determination of arm's length price of other transaction which have been analysed using Transactional Net Margin Method."*

3. Drawing our attention to the chronology of events leading to the present appeal, the ld.counsel for the assessee pointed out that initially , during assessment proceedings ,on a reference made under section 92CA(1) of the Act for the computation of ALP in relation to the international transactions carried out by the assessee, the TPO had dealt with international transaction of royalty paid by the assessee to its AE, GMDAT. The TPO had noted the fact of the royalty having been paid as per the technology licence agreement with GMDAT at the rate of 5%, amounting in all to Rs.12,24,01,259/-. He further noted that the assessee had justified the transaction to be at arm's length, benchmarking it with internal CUP available , being similar agreement of the assessee with third party i.e. Isuzu Motors Ltd., Japan to obtain certain technical information and assistance in relation to manufacturing of "Tavera" in India, pointing out that vide this agreement also, the royalty charged by Isuzu was at the rate of 5% of the net selling price to the assessee. The assessee had pointed out that net royalty payment was approximately 0.54% of the gross selling price. The TPO however undertook an independent search of ADGAR online database for royalty agreement for independent parties and found two agreements; one of which related to GMDAT's M-150 and M-200 projects itself i.e. project for which the assessee had paid royalty to GMDAT. The TPO found that royalty rates mentioned in this independent party agreement was 3%, and finding these royalty agreement to be exactly comparable to the assessee's royalty

agreement relating to similar technology of GMDAT for which the assessee has paid royalty, he treated the comparables selected by him to be the correct comparables and rejected the internal CUP of the assessee. Accordingly, the ALP of royalty payment was determined at the rate of 3% as against 5% made by the assessee resulting in upward adjustment of royalty payment amounting to Rs.4,89,60,504/-. The assessee objected to this upward adjustment to the DRP who dismissed the objection of the assessee upholding order of the TPO in this regard. The matter thereafter travelled upto the ITAT, and the ITAT vide their order dated 2.8.2013 in ITA No.3308/Ahd/2011, noted that the DRP had not analysed the contention put forth by the assessee and had not considered the relevant terms and conditions of the agreement relied upon by both the assessee and the TPO of the respective comparables selected by them while deciding the issue. The ITAT therefore was of the view that the matter needed to be considered afresh and accordingly restored the issue back to the file of the TPO for detailed examination and verification of the assessee's contentions. Thereafter, the TPO in the second round before it noted that the assessee had raised similar objections which were already dealt with by the TPO in his original order and accordingly upheld the adjustment made in the first round. The matter travelled upto the ITAT for a second time who dismissed the plea of the assessee noting that the assessee did not have much to say on the external comparable given by the TPO. That ITAT's order passed in the second round is dated 11.8.2016. Thereafter, the assessee filed MA pointing out that detailed submissions had been made in the first round against comparables selected by the TPO which had not been considered by the ITAT, and therefore, the order of the ITAT was in error in observing that the assessee did not have much to say on the

external comparable given by the TPO. The ITAT found merit in the contentions of the assessee and allowed MA filed by the assessee, recalling its order on the issue of adjustment made to the income of the assessee on account of determination of ALP of royalty payment made to GMDAT as raised vide ground no.4 of the appeal. Copies of all the orders of the TPO ,DRP and ITAT referred to were placed before us in a Condensed Paper Book comprising 166 pages.

4. Having stated the background of the present appeal; and having stated the chronology of events as above, the ld.counsel for the assessee pointed out that sole issue to be adjudicated is, whether comparables selected by the assessee for benchmarking ALP of its transaction was correct, as opposed to comparables selected by the TPO. In this regard, he clarified again that the assessee had selected an internal comparable relating to a licence agreement entered into by the very same party, GMDAT with Isuzu an independent unrelated party for payment of royalty for specific technology for assembling vehicle "Tavera" in the said case. Agreement provided payment of royalty at the rate of 5% of the net selling price. In the case of the assessee, the ld.counsel for the assessee pointed out that the agreement for payment of royalty was of entire vehicle "Optra" and the royalty was agreed to be of 5% of the net assessable value. The ld.counsel therefore contended that the terms and conditions of the agreement of the assessee with GMDAT was identical with that between Isuzu and GMDAT, **being payment of royalty for transfer of technology for assembling entire vehicle (emphasis supplied by us)**, Optra in the case of the assessee and Tavera in the case of Isuzu. He pointed out that comparables selected by the TPO on the other hand were Delphi-Jinzhou agreement and Namyang Henglong agreement. The

ld.counsel for the assessee pointed out that both these agreement for payment of royalty was for **providing technology for manufacturing of single component** and not for assembling of entire vehicles, and therefore, could not be said to be comparable with the royalty agreement of the assessee with GMAT which was paid for transfer of technology for assembling of entire vehicle. Further, he pointed out that comparables selected by the TPO besides having variable components for the royalty payment at the rate of 3% of net selling price, also had fixed component of USD 80,000 in the case of comparable no.1 i.e. Delphi-Zinzhou agreement, and USD of 1,00,000 in the case of comparable no.2 i.e. Namyang-Henglong, which had been considered by the TPO. He drew our attention to the copies of agreement of the comparables chosen both by the TPO; place before us at PB Page No. 152-166 and also that chosen by the assessee as internal comparable at PB Page No.124-151 of the Condensed Paper Book. The ld.counsel for the assessee stated that internal CUP chosen by the TPO therefore was not correct comparable.

5. The ld.DR, on the other hand, relied on the order of the TPO in the second round reiterating that comparables selected by the TPO was correct being for transfer of technology for M-150 and M-200 projects for which projects the assessee also had paid royalty for transfer of technology . He drew our attention to the finding of the TPO in the second round and placed before us in PB at Page No.67-68 as under:

During the course of TP proceedings for giving appeal effect to the order of ITAT, a notice u/s 92CA was issued to submit the reply on the point of royalty adjustment to enable to give effect of the directions of ITAT. Accordingly the assessee has submitted the reply on 07/10/2014 wherein it is stated that payment of royalty was accepted as at arm's length during financial year 2005-06, hence a consistent approach should be adopted to benchmark the payment of royalty. The assessee has relied on the decision of Hon'ble Supreme court of India in the case of Radhasoami Satsang Vs. CIT (193 ITR 321) and claimed that " Hon'ble Supreme Court has clearly laid down that though strictly speaking, the principle of res judicata does not apply to the income tax proceedings, but where a fundamental aspect permeating through the different assessment years have been found as a fact one way or the other and the parties have allowed the position to be sustained by not challenging the order, it is not allowed change the position in any subsequent year." However, it noticed from the original TP order for AY 2007-08 that during original TP proceedings, the search of ADGAR online database (which is based on SEC filings) was carried out to search for royalty agreement for independent parties related to assemblies for automobiles, and accordingly two agreements were found and one of these agreements were related to GMDAT's, M-150 and M-200 project itself i.e. the project for which assessee has paid royalty to M/s. GMDAT. This agreement was exactly the same on account of product royalty with the assessee's product royalty agreement. Accordingly a show cause notice issued to the assessee proposing to use the above agreement as CUP to benchmark the ALP of royalty payment. In its reply dated 30.9.2010 assessee had stated that it has benchmarked its transactions with internal CUP available on similar agreement with the third party i.e. Isuzu Motors Limited, Japan to obtain certain technical information and assistance in relation to manufacturing of Tavera in India and as per this agreement, Isuzu charged royalty at the rate of 5% of net selling price to the assessee for providing technical information and assistance in this regard. The assessee further had stated that net royalty payment was approximately 0.54% of the gross selling price and hence same was below 3% and should be accepted as benchmark rate for royalty transaction. However, the contention of the assessee was not accepted by the TPO stating that Isuzu's agreement and this agreement is not exactly comparable with assessee's agreement for royalty for M-200 project; whereas agreement between Korea Delphy Automotive Systems Corporation, Korea and Jingzhou Henglong Automotive Parts Company

Limited, China is exactly comparable in respect of all technical specification and for same project of GMDAT'M- 200. This agreement clearly specifies that technology is of GMDAT only. Under the circumstances, this agreement can be said as exact comparable for assessee's royalty agreement in this regard; whereas Isuzu's agreement is only for some certain specific technologies and not of this specific GMDAT's technology for assembly of car, hence, cannot be treated as exact comparable. The assessee had further stated that royalty payment is only 0.54% of gross selling price which is not correct way of comparing prices. Therefore the TPO had made adjustment of Rs.4,89,60,504/- restricting the payment @ 3% as against 5% claimed by the assessee.

In view of above, it is clear that though the royalty payment was treated at ALP in earlier year, during this year, due to detection of valid internal CUP, adjustment was made. Therefore the adjustment of Rs.4,89,60,504/- is retained as it is.

6. We have heard the rival contentions. The solitary issue to be adjudicated is determination of ALP of the international transaction of the royalty paid by the assessee to its AE, GMDAT. The facts of the case are that the assessee had paid royalty at the rate of 5% to GMDAT amounting to Rs.12,24,01,259/- in the impugned year. The assessee has justified and benchmarked this transaction by internal CUP referring to transaction of an independent party i.e. Isuzu carried out with the same entity GMDAT for transfer of technology for assembling of vehicle and agreeing to pay royalty at the rate of 5% of the net selling price. The contention of the assessee being that this internal CUP is completely comparable with the case of the assessee as both the agreement related to royalty being paid for transfer of technology for assembling entire vehicles. The Revenue on the other hand has identified two comparable instances of the royalty payment being Delphi-Zinzhou & Namyang-Henglong and held them to be true comparable since they are in relation to

transfer of same technology as was agreed to be transferred by GMDAT to the assessee in the present case. The assessee has countered by saying that comparable selected by the Revenue are not correct since they related to transfer of technology vis-à-vis only part of the vehicle while in the assessee's case, the transfer of technology is for entire vehicles and the comparable selected by the assessee is in relation to identical transfer of technology for assembling entire vehicle. This, we have noted, has been the consistent stand of the assessee through all the rounds of litigation. In the first round, the ITAT had noted that this specific contention of the assessee, that the comparables selected by the TPO were not correct comparables, had not been considered by the DRP while upholding the order of the TPO. Accordingly, the issue has been restored to the TPO who in the second round upheld the order passed by him in the first round noting that the assessee had nothing new to say.

7. We have considered the contentions of both the parties and have also gone through copies of the agreement of all the comparable cases selected by both the assessee and the TPO, and we find merit in the contentions of the ld.counsel for the assessee. It is a fact on record and has not been denied by the Revenue, that the assessee's agreement for payment of royalty was for transfer of technology for assembling of entire vehicle and similarly also in the case of comparable selected by the assessee royalty was paid for transfer of technology for assembling of entire vehicles. The comparable selected by the Revenue on the other hand, are for transfer of technology for manufacturing of particular part of the vehicles.

Surely technology for assembling vehicles and that for manufacturing a particular part cannot be the same. Merely because the technology for assembling cars and manufacture of parts relate to the same project does not mean that the technology transferred is the same. Apparently technology for assembling cars and that for manufacturing parts of car are different. At least this is what any layman would understand. The Revenue has given no technical input as to how the two technologies are the same in the circumstance that they relate to the same project of vehicle manufactured/assembled.

It is abundantly clear therefore that the comparable selected by the assessee is the correct comparable being payment of royalty for technology acquired for identical activity as availed by the assessee, while that of the TPO are for totally different activity. Therefore, we uphold the benchmarking done by the assessee by adopting internal CUP and delete the adjustment made to the ALP of royalty transaction amounting to Rs.4,89,60,504/-. The ground no.4 raised by the assessee is allowed.

8. This order forms part of the order passed by the Tribunal dated 11.8.2016 to the extent of Ground no.4, which now stands reversed by this order.

9. In view of the above, appeal of the assessee is allowed.

Order pronounced in the Court on 23rd November, 2022 at Ahmedabad.

**Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER**

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

Ahmedabad, dated 23/11/2022