आयकर अपीलीय अधिकरण, **'डी' न्यायपीठ,** चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री महावीर सिंह**,** उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल**,** लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.867/Chny/2016**
निर्धारण वर्ष /**Assessment Year: 2011-12**

M/s. HSI Automotive Pvt. Ltd., Survey No.73, A Block, #100, Thandalam Post, Mevalurkuppam, Sriperumbudur Taluk, Kancheepuram – 602 105. **[PAN: AAACH-2804-E]**	**Vs.**	**The Dy. Commissioner of Income Tax**, Corporate Circle-2(2), Chennai.
(अपीलार्थी/**Appellant)**		**(**प्रत्यर्थी/**Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri V. Veeraraghavan, & Shri K. Senguttuvan, Advocates
प्रत्यर्थी की ओर से /Respondent by	:	Dr. S. Palanikumar, CIT
सुनवाई की तारीख/Date of Hearing	:	07.06.2023
घोषणा की तारीख /Date of Pronouncement	:	09.08.2023

आदेश / **O R D E R**

Per Mahavir Singh, Vice President :

This appeal by the assessee is directed against the assessment order passed by DCIT, Corporate Circle-2(2), Chennai u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter the 'Act') in pursuance to directions of Dispute Resolution Panel-2, Bengaluru in DRP File No.258/DRP-2-BNG/2015-16, dated 15.12.2015 for the assessment year 2011-12.

2. The first issue in this appeal of assessee is as regards to the order of the Assessing Officer (hereinafter "A.O") passed in view of the directions of Dispute Resolution Panel (hereinafter "DRP") against the objections raised by the assessee on the order of TPO in regard to the comparables included by Revenue i.e., Precisions Pipes and Profiles Company Ltd.

3. The brief facts of the case are that the assessee, HSI Automotive Pvt. Ltd., was established in the year 1997 and it is having its manufacturing facility at Sriperumbudur and producing major products such as low pressure hose, rubber profile, car roof sealing layout parts, power steering parts, fuel hose, brake hose, intercooler hose, water hose, radiator hose, weather strips and aircon hose. The company caters to most of the needs of original equipment manufacturer such as Hyundai Motors India Ltd., Ford India and General Motors India etc. The assessee for benchmarking the international transactions adopted TNMM method as the most appropriate method, for following international transactions:

Name of Associate Enterprise	*Nature of Transaction*	*Amount (Rs)*	*Method Adopted*
Hwaseung R&A Co., Ltd. Korea	*Import of Rubber Components*	*79,09,65,387*	*TNMM*
Hwaseung Networks Co., Ltd. Korea	*Import of Trading Goods*	*61,70,17,222*	
Hwaseung Exwill Co., Ltd., Korea	*Import of Machinery, Mould, Dies & Spares*	*4,39,35,884*	

3.1 The A.O referred the matter to Transfer Pricing Officer (hereinafter "TPO") u/s. 92CA of the Act and the TPO after taking objections from the assessee and confronting the comparable Precisions Pipes and Profiles Company Ltd., retained the same for benchmarking by adopting most appropriate method i.e., TNMM, wherein only functional similarity is the foundation and not product identity. According to TPO, the process of manufacturing the products and minor differences in the products manufactured like PVC are not relevant. The TPO noted that the assessee listed out in the international transactions report, the following three major products manufactured by the assessee:

I. Low Pressure Hose
II. Rubber profiles
III. PVC Profiles

3.2 This was a disclosure made by the assessee in its financial and from financial he noted that PVC profile account for sale of Rs.81 Crore out of total turnover of the assessee at Rs.354 Crores. Therefore, he retained the Precisions Pipes and Profiles Company Ltd. as comparable. Aggrieved against retention of this comparable by the TPO, the assessee moved to DRP and raised objections.

3.3 The DRP confirmed the action of TPO and directed the A.O accordingly by observing as under:

> *"As regards the comparables this panel finds that the TPO has found that certain Comparables identified by the assessee were not sufficient. The TPO has given reasons for selecting additional comparables suggested by the assessee. Therefore, the action of the TPO suggests that the reason for rejection of ALP determined by the assessee has been use of data by the assessee which is not reliable are correct. Considering the above discussion, we consider that the action of the TPO is justified and the claim of the assessee company is not acceptable."*

Aggrieved now, the assessee is in appeal before the Tribunal.

4. The Ld. counsel for the assessee argued that the comparables taken by the TPO and confirmed by DRP has not considered the objections raised by the assessee in a proper prospective. He argued that the Precisions Pipes and Profiles Company Ltd. uses raw-material as PVC, whereas the assessee uses carbon, carbon master batch, rubber profile and EPDM as the raw-material and even the wastages or the rejections out of raw-material are again re-used by recycling, whereas the comparables do not do so. It was explained that the process used by the assessee for manufacture is extrusion, whereas the comparables used moulding process and thus, resulted in additional wastage at 22% as against which is 3% in the case of comparable. He explained that the assessee mainly caters to original equipment manufacturers and its ancillary units, whereas comparables caters to multiple OEM / two wheeler / three wheeler / fridge / electrical

/ diversified class or property. It was explained that only 50% of final property of the comparable are similar to that of the assessee's business. He stated that the financials verified by the TPO and DRP is not correct, whereas the order that of the TPO states that PVC profile accounts for a sale of Rs. 81 Crores out of the total turnover Rs. 354 Crores, whereas actually the same pertains to Financial Year 2009-10 and actual PVC profile sales for the relevant Financial Year 2010-11 relevant to Assessment Year 2011-12 is at Rs. 72,72,48,372/- and this amounts for about 17.28 % of the total sale of Rs. 420 Crores. It was also explained that the comparable company came out with IPO during Financial Year 2007-08 relevant to A.Y 2008-09 and hence, it is not maintained or increased its profit margin to manage market risk. He explained that this is evident from the operating margin profit of comparable at 15.6% attained by it during the year under review. But, it is not the case with the assessee-company as it is a closely held company. The ld. counsel for the assessee argued that none of the above was considered by either TPO or DRP and this can be seen from the above reproduced orders.

5. When this was confronted to Ld. CIT-DR, he has not raised any objection against remitting the matter back to the file of A.O and TPO to re-consider the above objections.

6. After going through the rival contentions and going through the facts and circumstances of the case, we noted that the above objections raised by the assessee before us, were very much available before DRP as well as TPO as he has noticed the facts from the orders of the authorities below. We feel that all these issues factually need to be verified at the level of the A.O. The A.O will refer the matter back to the TPO to consider all these objections raised by assessee. In term of the above, we remit the matter back to the A.O/TPO and this issue of the assessee's appeal is allowed for statistical purposes.

7. The next common issues raised by the assessee by way of Grounds No.1 to 5 are as regards to the following:

I. Adjustment towards power cost;
II. Adjustment towards basic custom duty;
III. Risk adjustment;
IV. Requesting to treat FOREX gain as part of operating income and
V. Standard deduction.

8. At the outset, the Ld. counsel for the assessee relied on the decision of Co-ordinate Bench of this Tribunal in assessee's own case in ITA Nos.276 & 3011/Chny/2017 dated 03.08.2022, wherein the Tribunal has remitted back these above five issues vide para 8 as under:

> *"8. We considered the issues and relied on the documents available on record. All the issues together are remanded back to the learned Assessing Officer for de novo adjudication. The learned Assessing Officer should consider afresh on the basis of the above mentioned discussion. The learned Counsel of the Assessee pointed out that the foreign exchange loss is a genuine loss which is not at all a notional loss. The Assessee was also directed to submit all relevant documents before the learned Assessing Officer to substantiate its claim. Nonetheless, a reasonable opportunity should be allowed to the Assessee for redressal of its grievances."*

9. The Ld. counsel for the assessee stated that the facts and circumstances are exactly identical in this assessment year from A.Y 2012-13 before Co-ordinate Bench. The Ld. counsel for the assessee stated that the issue can be remitted back to the file of A.O/TPO to allow the benefit on power cost assessment, payment of basic custom duty, risk adjustment in arriving the PLI, Forex gain be treated as operating income and standard deduction be taken into account.

10. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee is seeking adjustment towards abnormal expenses being additional cost incurred on account of active generation of power using diesel while comparable companies did not have such abnormal expenses and it was contended that the adjustment towards usage of diesel be replaced in place of electricity supplied by Tamil Nadu Electricity Board. It was also claimed that the adjustment towards payment of basic custom duty, the nature of raw-material being compared to the

other raw-material available in India in extraordinary situation and the raw-material to be compared to the other raw-materials. Even, the Forex gain be treated as part of operating income while the Forex commission arose from operating income/expenses. In term of the above, we are of the view that the matter needs re-consideration at the level of the A.O/TPO while computing the PLI of the assessee. In term of the above, these issues also remit back to the file of A.O/TPO and hence, this issue of assessee's appeal is allowed for statistical purposes.

11. The Ld. counsel for the assessee drew our attention to the petition dated 08.10.2016 raising additional ground in regard to adjustment towards extraordinary foreign Forex loss and removal of deferred revenue expenses from the operating expenses while calculating the appropriate profit level indicators (PLI). The ld. counsel for the assessee stated that it is fully entitled to invoke the ground at the stage of Appellate Tribunal for the first time for the reason that the facts and other necessary details pertaining to the above ground are already available on the records of the assessment proceedings. The Ld. counsel for the assessee relied on the decision of Hon'ble Madras High Court in the case of *Ramco Cements Ltd. v. DCIT [2015] 373 ITR*

146 (Mad). He referred to the following para of decision of Hon'ble Madras High Court as under:

> *"A reading of the above decision makes it clear that if there are bonafide and good reasons in not preferring the additional grounds, the first Appellate Authority should exercise discretion in permitting the assessee to raise additional grounds. We find that the proceedings before the Commissioner of Income Tax (Appeals) and before the Tribunal on the issue of raising additional grounds appears to be analogous. The Supreme Court has clearly viewed that the proceedings before the Tribunal should not be confined only to the issues arising out of the order by the Commissioner of Income Tax (Appeals), as it would amount to taking a narrow view as to the powers of the Tribunal. If there are facts, which are on record from the assessment proceedings, there is no bar in allowing the additional grounds to be raised for the purpose of correctly assessing the tax liability of the assessee. The Supreme Court in the above-stated decision answered the question of law in the following manner:*
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> *The reframed question, therefore, is answered in the affirmative, i. e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."*
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> *16. In effect, the bottom line in such a proceedings before the Commissioner of Income Tax (Appeals) or before the Tribunal is that any question that is raised even after the appeal filed, if the same has a bearing on the tax liability of the assessee, can be considered subject to the provisions of Section 250(5) of the Income Tax Act. "*

12. Further, the Ld. counsel for the assessee also relied on the decision of Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC)*. The Ld. counsel for the assessee also relied on the decision of Hon'ble Madras High Court in the case of *CIT v. Indian Express (Madura)(P.) Ltd. [1983] 140 ITR 705 (Mad)*.

13. When a query was put to Ld. Counsel for the assessee what are the basic details and what are the necessary evidences available on the assessment records. The Ld. counsel for the assessee now filed a copy of basic purchase agreement which is dated 21.01.2002, whereas the relevant assessment involved is 2011-12. The Ld. counsel for the assessee also drew our attention to renewal of basic purchase agreement which is enclosed in assessee's paper book page No.63. The Ld. counsel for the assessee stated that the forex gain is part of the operating income and the TPO has rejected the ground to include forex gain in the operating income on the ground that they are notional and not part of the operating income. Now, the Ld. counsel for the assessee for the first time before us filed the details of extraordinary forex loss as demonstrated for the first time before Tribunal that in A.Y 2011-12 there is a loss of 15.59 Crores. This is filed in chart enclosed at page No.43 of assessee's paper book.

14. On other hand, the Ld. CIT-DR filed detailed written submissions on additional ground and argued that the additional ground raised on extraordinary forex loss was never raised before A.O or CIT(A) and it is never claimed in the return of income by the assessee. He also brought out the fact that this forex loss was not part of their own TP study. Even he argued that for raising additional ground, the assessee

did not file any factual evidence even now. Hence, he argued as it was purely a factual ground without any substance and the adjustment shortfall in additional ground was opposed in toto. The Ld. CIT-DR relied on page Nos.45-52 of assessee's paper book, wherein a cryptic detail in regard to facts relating to this additional ground was narrated. He argued that the assessee claimed to have as supply the raw-material to Hyundai with the same price agreed in Indian Rupee (INR) with the vendor as in Financial Year 2007-08 irrespective of forex fluctuation. The prevailing US Dollar (USD) in Financial Year 2007-08 was Rs. 45.08 per USD, whereas Dollar rate in Financial Year 2010-11 was Rs. 45.08 per USD. This is merely a claim by citing Dollar rate. He stated that this was never factored by the assessee in their own TP study and he stated that the basic price agreement between Hyundai Motors and assessee-company enclosed in assessee's paper book was executed way back on 21.01.2002. He argued that when this agreement was executed 10 years back, how the assessee can claim this additional ground after conclusion of TP proceedings. The Ld. CIT-DR argued another important fact that was found from the paper book given for A.Y 2011-12 is a Certificate dt. 14.3.2022 of Chartered Accountant placed at Page No.65-66. On the basis of the certificate, the assessee-company tried to claim substantial amount of adjustment for A.Ys 2011-12, 2012-13 and 2013-14. He further argued that this

certificate was sought by the assessee to demonstrate the claim before the Tribunal and as per the request of the assessee, it was issued on 14.03.2022. The Tribunal while deciding the appeal for the A.Ys 2012-13 and 2013-14, did not have an occasion to examine these documents placed in paper book for the A.Y. 2011-12. The C.A certificate dated 14-3-2022 mentioned the period from 2007-08 to 2013-14. It appears that to defeat the appeal proceedings such self-serving certificate was obtained and placed before the Tribunal. As per Basic Purchase Agreement dated 21-01-2002, it was to be renewed every year. No evidence available for renewal after 2002. Page Nos.63-64 of their paper book contains addendum to Basic Purchase Agreement. However, it was an unsigned document without any date on it. These were the documents only given by the assessee in support of their additional grounds of appeal before the Tribunal.

15. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee before us filed the basic purchase agreement dated 21.01.2002, which is applicable initially for 12 months from the date of execution of this basic price agreement, but the assessee as well as Hyundai Motors India Ltd. has not came out of this agreement and they are very much engaged in supply of the articles and it is renewed mutually on year to

year basis as contended by Ld. counsel for the assessee. It is submitted by the Ld. counsel for the assessee that purchase price from holding company of the assessee is consisting in term of rate per unit and the currency of import. The selling price from unit of assessee to Hyundai Motors India Ltd. is also consistent, remain unaltered, despite the price of raw-materials going up due to inflation and recession of Indian rupee. However, due to vulnerability of the rupee in the international market, the value of rupee weaken drastically. Therefore, the assessee had to pay more Indian rupee against each dollar to its holding company in Korea for supply of single unit. Whereas, there was no commensurate increase in price per unit for selling of their good to Hyundai Motors India Ltd. Therefore, the extraordinary foreign fluctuation contemplated above is outside the scope of negotiation even in view of basic purchase agreement. The assessee now plead that the extraordinary Forex loss should be considered for the purpose of computing PLI of the assessee and for this, the matter can be restored back to the file of the A.O. We noted that the facts are available and the facts are also available on record of the assessment, hence this issue needs re-consideration at the level of A.O/TPO. We admit this ground and remit the matter back to the file of A.O/TPO for adjudication.

16. The next issue in this appeal of assessee is as regards to the order of A.O and DRP in confirming the action of the A.O disallowing Employees Contribution towards Provident fund amounting to Rs.80,31,530/-.

17. Admittedly these payments are made by the assessee beyond the due dates as per respective statutes and now also the assessee before us admitted this fact. Once, the payments are made beyond the due date or prescribed statute i.e., Provident Fund Act, the matter is covered by the decision of Hon'ble Supreme Court in the case of *Checkmate Services P. Ltd. v. CIT in Civil Appeal No.2833/2016 dated 12.10.2022.* Since, this issue is covered by the decision of Hon'ble Supreme Court, supra, we dismiss this ground of assessee's appeal.

18. The next issue in this appeal of assessee is as regards the order of A.O/DRP in confirming the addition of disallowance of expenses relatable to exempt income of Rs. 39,05,478/- by invoking the provisions of Section 14A of the Act r/w Rule 8D(2)(II) at Rs. 29,79,978/- under Rule 8D(2)(III) of the Act at Rs. 9,25,500/-.

19. We have heard the rival contentions and gone through the facts and circumstances of the case. At the outset, it is noticed that the assessee has made investment in subsidiary company and admitted in

its grounds itself that the investment is made by the assessee in its subsidiary company only from funds received towards increase in share capital. We find that this issue is also covered against the assessee by the decision of Hon'ble Supreme Court in the case of *Maxopp Investment Ltd. v. CIT reported in [2018] 402 ITR 640 (SC),* wherein it is held that the investment made in subsidiary will fall under the disallowance of provision of Rule 8D(2)(ii) & (iii). Since, this issue is covered by the decision of Hon'ble Supreme Court, supra, we dismiss this ground of assessee's appeal.

20. The next issue in this appeal of assessee is as regards to the claim of deduction of TDS on royalty, guarantee fee and professional charges disallowed in aggregating to Rs. 40,42,954/- for non deduction of TDS u/s. 40(a)(ia) of the Act.

21. The Ld. counsel for the assessee only made submission that the disallowance made in this year for non deduction of TDS, a direction can be issued that it should be allowed as and when the assessee deducts TDS on these payments. We noted that these payments admittedly are made without deduction of TDS and hence, the A.O has rightly invoked the provisions of Section 40(a)(ia) of the Act and hence, we confirm the action of the A.O. As regards to seeking of direction from Tribunal, the assessee can *suo-moto* move appropriate

application for claim of the expenses. In term of the above, we dismiss this ground of assessee's appeal.

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

Order pronounced on 09th August, 2023.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	**(महावीर सिंह)**
(Manoj Kumar Aggarwal)	**(Mahavir Singh)**
लेखा सदस्य /Accountant Member	**उपाध्यक्ष / Vice President**

चेन्नई/Chennai, दिनांक/Dated: 09th August, 2023.
EDN/-

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**
1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त/CIT 4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF