ITAT: Holds, finding fault with TPO doesn't absolve CIT(A) from responsibility to determine ALP u/s 92C

Mar 03, 2023

Gea Procees Engineering (I) Pvt Ltd [TS-131-ITAT-2023(Mum)-TP]

Conclusion

Mumbai ITAT sets aside CIT(A)'s deletion of TP adjustments qua purchase of components and spares, payment of design and engineering fees and receipt of commission in case of assessee (engaged in engineering, procurement and construction of food, dairy, chemical and Pharma plants) for AY 2005-06, 2009-10, 2010-11; W.r.t deletion of TP adjustment qua purchase of components and spares, terms CIT(A)'s order 'sketchy and vague', remits issue to TPO following assessee's own case for AY 2008-09; Notes that assessee imputed sales value of each of the purchase transaction despite itself stating that determination of gross margin is not feasible for every component because components are imported to the specific requirement of each project and spare and components are either charged separately or are recovered as part of overall project revenue; States that it is not known how the assessee arrived at sales value w.r.t each invoice of AEs, since in EPC contract, there is no separate value of sales of each component as stated in TP study report; Also fails to understand how CIT(A) upheld assessee's RPM over Revenue's Cost plus method; However, also disagrees with with TPO's methodology of adjusting the international transaction by 25% in making an adjustment; Observes that assessee did not furnish timely information before TPO, and CIT(A) also did not mention what documents which have been furnished by assessee based on which he is completely satisfied that international transactions are at ALP; Opines, *"If the appellate authorities are not satisfied with the determination of ALP determined by either the assessee or by the TPO, they are bound to follow the same procedure for determination of the arm's-length price which an assessee or TPO are required to do. Finding fault with ld TPO does not absolve the responsibility of the ld CIT (A). Such is the mandate of the provisions of section 92C(3)";* Separately, w.r.t CIT(A)'s decision deleting TP adjustment qua payment of design and engineering fees, ITAT remits the issue back to TPO for similar reasons as above; Lastly, w.r.t TP adjustment qua receipt of commission, ITAT notes that CIT(A) confirmed assessee's segmental benchmarking adopting TNMM as MAM by stating that TPO did not bring on record specifically as to why benchmarking methodology adopted by assessee is not reliable; Relying on assessee's own case for AY 2008-09, ITAT remits issue back to TPO, clarifies that assessee is to benchmark international transactions according to Sec.92C(3) since primary onus lies on assessee to show that its transactions are at ALP.:ITAT Mum

Decision Summary

The ruling was delivered by ITAT bench comprising of Shri Prashant Maharishi and Ms Kavitha Rajagopal.

Mr. Sunil Moti Lala, Advocate argued on behalf of the assessee while Revenue was represented by Ms. Samruddhi Dhananjay Hande, SR AR.

Ruling Relied Upon

- ITAT: Remits ALP-determination with direction to group commission income and supervisory income for EPC-service provider
- TS-366-ITAT-2022(Mum)-TP

Case Law Information

Taxpayer Name

- Gea Procees Engineering (I) Pvt Ltd

Judicial Level & Location

- Income tax Appellate Tribunal Mumbai

Appeal Number

- ITA No 1213/MUM/2017

Date of Ruling

- 2023-02-24

Ruling in favour of

- Both, Partially

Section Reference Number

- 92B
- 92C
- 92C(3)

Nature of Issue

- ALP computation
- Entity level v. transaction level
- Segmental results
- TNMM
- Remand for fresh consideration

Judges

- Shri Prashant Maharishi
- Kavitha Rajagopal, Judicial Member

Counsel for Tax Payer

- Mr Sunil Moti Lala

Counsel for Department

- Samruddhi Dhananjay Hande

Industry

- EPC

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS KAVITHA RAJAGOPAL, JM

ITA No. 1213/MUM/2017
(Assessment Year 2005-06)

ACIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020 **(Appellant)**	Vs.	M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740 **(Respondent)**

CO No. 216/MUM/2017
Arising Out of ITA No. 1213/MUM/2017
(Assessment Year 2005-06)

M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740 **(Appellant)**	Vs.	ACIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020 **(Respondent)**

ITA No. 6494/MUM/2016
(Assessment Year 2009-10)

DCIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020 **(Appellant)**	Vs.	M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740 **(Respondent)**

CO No. 127/MUM/2017
Arising Out of ITA No. 6494/MUM/2016
(Assessment Year 2009-10)

M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740	Vs.	DCIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020

(Appellant) **(Respondent)**

ITA No. 6495/MUM/2016

(Assessment Year 2010-11)

DCIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020	Vs.	M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740
(Appellant)		**(Respondent)**

CO No. 128/MUM/2017
Arising Out of ITA No. 6495/MUM/2016

(Assessment Year 2010-11)

M/s. Gea Procees Engineering (I) Pvt.Ltd. Savali Road, P.O. Dumad Baroda, Gujarat-391 740	Vs.	DCIT CIR 2(2)(1) R.No. 545, Aayakar Bhavan, M.K.Road, Mumbai-400 020
(Appellant)		**(Respondent)**

PAN No. AAACK0566H

Assessee by	:	Mr. Sunil MotiLala, Adv
Revenue by	:	Ms. Samruddhi Dhananjay Hande, SR AR

Date of hearing: 30.11.2022
Date of pronouncement : 24.02.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This is the bunch of six cross appeals in case of M/s Gea Processing Engineering India Private Limited (the appellant/assessee) for three years i.e. assessment year 2005 – 06, 2009 – 10 and 2010 – 11 involving similar

issues. Both the parties argued them together. Therefore, these appeals are disposed of by this common order.

02. First we take up the appeals for assessment year 2005 – 06. Facts shows that the ITA number 1213/M/2017 is filed by the learned Assistant Commissioner Of Income Tax, Circle – 2 (2) (1), Mumbai (The Learned AO) against appellate order passed by The Commissioner Of Income Tax (Appeals) – 56, Mumbai (The Learned CIT – A) wherein the appeal filed by the assessee against the assessment order dated 28/11/2008 passed by the learned Deputy Commissioner Of Income Tax – 2 (2), Mumbai (The Assessing officer) under section 143 (3) of The Income Tax Act, 1961 (The Act). The assessee is also aggrieved and has filed cross objection number 216/M/2017.

03. The learned AO in ITA No. 1213/MUM/2017 for Assessment Year 2005-06 has raised following grounds of appeal: –

> "1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment to ₹ 2,37,93,786/- without appreciating the fact that the segmental account and the net segmental margins filed by the assessee are not reliable as the same is based in proportionate allocation of indirect expenses with the sales.
>
> 2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP

adjustment amounting to ₹ 2,37,93,786/- and holding that the benchmarking at entity level using TNMM by the TPO is not correct without appreciating the fact that all transactions are closely linked.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment amounting to ₹ 2,37,93,786/- without appreciating the fact that different international transactions with the AE are closely linked and overlooked various judicial pronouncement."

04. In Cross objection CO No. 216/MUM/2017 assessee has raised following grounds: –

"1. The learned CIT (A) has erred in not adjudicating the ground preferred by the Respondent/Cross-Objector, in relation to the arbitrary and irrational upward adjustment of 25% to the receipts and 25% downward adjustment to the payments, as it is incorrect and illegal both on facts and law, for the reason that no specific adjudication on this ground was warranted pursuant to the decision rendered by the learned CIT(A)."

05. Brief facts of the case shows that

i. Assessee is a company engaged in the business of engineering, procurement and construction of food, dairy, chemical and Pharma plants.

ii. Assessee filed its return of income on 26/10/2005 at the total income of ₹ 58,775,840/–.

iii. Return was picked up for the scrutiny.

iv. As the assessee has entered into international transaction, the reference was made under section 92CA (1) of the act on 7/9/2007 to The Transfer Pricing Officer – II (2), Mumbai (the learned TPO) to determine the arm's-length price of the international transaction where the assessee entered into 12 different international transactions.

v. The learned TPO issued various notices to the assessees, which were not complied. Subsequently on 23 October 2008 the assessee submitted form number 3CEB, annual accounts, computation of income, acknowledgement of return and summary of transfer pricing study report without certificate from the auditor.

vi. Again, on 24 October 2008, assessee made an application to furnish additional details and documents to substantiate the arm's-length price in relation to the international transaction and further time was sought for.

vii. The learned transfer-pricing officer found it not feasible to grant further time to the assessee.

viii. He computed the margins of the assessee as per the financials submitted.

ix. The learned transfer-pricing officer referred to 3 different international transactions entered into by the assessee.

x. With respect to the international transaction of purchase of components and space of ₹ 7.62 crores, the learned TPO noted that assessee has purchased components and spares from its associated enterprises. The assessee has used cost plus method as the most appropriate method to justify the arm's-length price. The assessee receives EPC orders, which require various types of components and equipment designing in the specific manner by the AE. Assessee also imports such equipments for its project business as well as for equipment sales. The assessee has used cost plus method to benchmark the above transaction but the workings of the cost etc have not been furnished. Further, the prices have not been compared with any uncontrolled transaction.

xi. With respect to the payment of design and engineering fees of Rs. 1.13 crores, the learned transfer pricing officer noted that for rendering the technical services and execute various EPC projects in India the assessee has made the above payment to its associated enterprises. The assessee has adopted the cost plus method to justify the arm's-length price. Assessee informed that usually it is paid at the rate of 5% on net tax works order value is

reduced by the items applied by the associated enterprises plus actual cost like taxes, duties, freight, insurance etc. The assessee also stated that though these fees are not separately identifiable in project invoicing however, it is part of the project cost. Assessee did not furnish any other detail and therefore according to the TPO it was difficult to accept the transaction being at arm's length.

xii. With respect to the receipt of commission of ₹ 7,714,756 being commission received from the associated enterprises amounting to ₹ 0.13 crores arm's-length price of which has been determined at ₹ 7,714,756 from the associated enterprises for extending the marketing as well as administrative support in India. The assessee has adopted the profit Split Method for justifying the said transaction. It was further stated that commission is received on the orders directly booked by the associated enterprises in India and commission slabs are based on the amount of the order. It was further stated that sometimes customers prefer to place orders directly on associated enterprises instead of the assessee company. Assessee extends marketing as well as administrative support in such cases and receives commission based on market condition and mutual negotiation. It was the claim of the assessee that it is sharing of profit from the associated enterprises from the business generated in India and therefore it had followed the profit split method as

the most appropriate method. Apart from the submission, nothing was produced before the learned transfer-pricing officer.

xiii. Based on the above submission, the learned transfer-pricing officer held that assessee has merely submitted raw details without any supporting evidences and therefore the arm's-length price of the international transactions cannot be determined. Accordingly he made an adjustment of 25% in all the above three International Transactions on ad hoc basis and computed the arm's-length adjustment of ₹ 23,793,786/– by passing an order under section 92CA (3) of the act on 31/10/2008.

xiv. Accordingly the assessment order under section 143 (3) of the act was passed by the learned AO on 28/11/2008 wherein the only adjustment was the transfer pricing adjustment of ₹ 23,793,786/– determining the total income of the assessee at ₹ 82,569,626/– against the returned income of ₹ 58,775,840/–.

06. The assessee aggrieved with assessment order preferred an appeal before the learned CIT – A. The learned CIT appeal deleted

i. 25% adjustment to the arm's-length price of the import of spares and components and payment of design and engineering services international transaction holding that the

transaction for import of spares and components and payment of design and services are forming part of the overall contract. He further held that it can be seen from the invoices submitted by the appellant company that one to one correlation made to third-party customers in India of such procurement is possible. He further referred to the FAR in assessee submitted by the assessee company holding that FAR of each of the international transactions are completely different from each other. He further noted that in assessment year 2009 – 10 in assessment year 2010 – 11 for which the assessee was also in appeal before him, vide order dated 29/7/2016 the benchmarking methodology adopted by the assessee with respect to procurement of goods and payment for design and engineering services was found to be appropriate. Therefore he held that the benchmarking carried out by the assessee in its transfer pricing study report was appropriate. Accordingly he deleted the adjustment.

ii. With respect to the rejection of transactional net margin method adopted by the assessee to benchmarked its international transaction of receipt of commission, the learned CIT – A deleted the addition holding that the learned

transfer pricing officer has wrongly rejected the transactional net margin method as most appropriate method without bringing on record specifically as to why the benchmarking methodology adopted by the appellant company for the subject transaction is not reliable is incorrect. He further relied on his own order for assessment year 2009 – 10 and 2010 – 11 in case of the assessee. Accordingly the transfer pricing adjustment made by the learned TPO was deleted.

iii. Even otherwise he held that the methodology adopted by the appellant company was to be rejected the TPO ought to have followed the benchmarking methodology prescribed under section 92C(3) of the act in any way the adjustment proposed of margin at the rate of 25% is liable to be set-aside even on this count.

iv. Accordingly the appeal of the assessee was partly allowed.

v. The learned assessing officer is aggrieved with the same and is in appeal before us.

07. Assessee has filed cross objections which are also on TP issues supporting order of ld CIT (A).

08. The learned departmental representative vehemently supported the order of the learned transfer pricing officer

and submitted that the learned CIT – A has failed to appreciate that assessee has not submitted any details before the learned transfer pricing officer and therefore there is no fault in the order of the learned TPO in making 25% adjustment. Even otherwise the learned CIT – A has not benchmarked the individual transactions to arrive at that whether these transactions are at arm's-length price or not.

09. The learned authorized representative submitted that the learned transfer pricing officer has made an arbitrary adjustment of 25% of all the international transaction whereas the learned CIT – A has deleted the addition following his own order for assessment year 2009 – 10. He referred to the order of the learned CIT – A for assessment year 2009 – 10. His main arguments were as under:-

i. entity level transactional net margin method applied by the learned transfer pricing officer is not in accordance with the law and therefore has rightly been rejected by the learned CIT – A.

ii. Applicability of resale price method is the most appropriate method over transactional net margin method for import of transactions.

iii. The segmental transactional net margin method drawn up using allocation of indirect cost in proportion of turnover is accepted.

010. It was therefore submitted that the learned CIT – A has correctly deleted the addition/adjustment made by the learned transfer-pricing officer. He otherwise submitted that ad hoc addition of 25% made by the learned TPO is not according to the prescribed method.

011. Ld AR referred to several judicial precedets on each of the issue.

012. In the rejoinder, the learned departmental representative submitted that identical issue arose in the case of the assessee for assessment year 2008- 2009 on transfer pricing Grounds wherein the matter has been remanded back to the file of the learned transfer pricing officer. There is no change in the facts and circumstances of the case and therefore this matter should be sent back to the file of the learned transfer-pricing officer. It was further claimed that assessee has failed to provide any information before the learned TPO as well as before the learned CIT – A.

013. As assessee has not filed any paper book before us, assessee was directed to submit at least the transfer pricing study report , financial statements and remand report for the impugned assessment year. Vide letter dated 9 December 2022 assessee submitted the details for assessment year 2005- 2006. The details submitted by the assessee is the 13th annual report 2004 – 05 of the assessee as well as the transfer pricing study report prepared by MZS and Associates in October 2005.

014. Ld AR vehemently opposed the plea of ld DR to set aside the issue back to the file of the ld AO.

015. We have carefully considered the rival contention and perused the orders of the learned CIT – A for assessment year 2005 – 06 as well as the appellate order passed by him in assessee's own case for assessment year 2009 – 10 and 2010 – 11. We have also gone through the transfer pricing study report submitted before us for the impugned assessment year. We have also perused the objection of the assessee on proposal to set aside the issue back to the file of ld AO and also various judicial precedents.

016. On careful study of TPSR, At paragraph number 5.1 the international transaction of imported components from its associated enterprises are referred to. The assessee was selected as a tested party for this international transaction. The most appropriate method is discussed in paragraph number 5.5.6 of the PSR. It was submitted that since the components and spares are sold without any significant processing**, resale price method** as MAM may be used to determine the arm's-length character of the international transaction. It was stated that the components and spares are imported to specific requirements of each project such spares and components either are charged separately or are covered as a part of overall project revenue. Accordingly, the determination of gross margin is not feasible for every component. Therefore, arm's-length price has been determined for all the purchase transactions from the AE taken together. For

the purpose of determining the ALP, normal gross margin earned by comparable companies was determined. Companies engaged in engineering procurement and commissioning business or dealing in similar products were selected as a population for arriving at the normal gross margin by using prowess database. Assessee selected 11 comparables as per appendix 7B and gross margin was computed of this comparable deriving the AM mean of 18.13%. The assessee applied this margin to the purchases from associated enterprises. The assessee derived that the arm's-length purchase price of this material is Rs. 9,78,39,303 whereas the international transaction is only of ₹ 8,33,24,837 and accordingly this international transaction is at arm's-length. By looking at the appendix 8 assessee has imputed the sales value of each of the purchase transaction. However the assessee itself in paragraph number 5.7 has stated that determination of gross margin is not feasible for every component because the components are imported to the specific requirement of each project and the spare and components are either charged separately or are recovered as part of overall project revenue. Therefore, it is not known that how the assessee has arrived at sales value with respect to each of the invoices of associated enterprises. Because in EPC contract there is no separate value of sales of each component as stated in TPSR. This is also contrary to the last paragraph of the order of the learned CIT – A at page number six of 13 wherein it is stated that in most cases the customer is charged

individually for the said component and spares. We also failed to understand that in this situation [EPC Contracts] how the learned CIT – A has given a finding that one-to-one identification for purchase and sales is possible and therefore the resale price method adopted by the assessee is most appropriate method is correct. The method mentioned by ld AO in TP order is Cost plus method, there is no finding of dl CIT (A) that how now the most appropriate method is RPM.

017. We are also not in agreement with the methodology adopted by the learned transfer pricing officer of adjusting the international transaction by 25% in making an adjustment.

018. In case of the assessee the identical issue arose in assessment year 2008 – 09 in ITA number 4155/M/2015 for assessment and cross objection number 148/M/2015 wherein paragraph number 19, coordinate bench has held that the order passed by the learned CIT – A is cryptic in nature and fails to lead to the specific conclusion as to why the TP adjustment made by the TPO are being deleted. The observation made by the learned CIT – A are generic observation without going into the functionality of the particular segment/international transaction transfer pricing adjustment cannot be deleted. Therefore, the coordinate bench has restored the issue of the transfer pricing adjustment to the file of the learned transfer pricing officer.

019. The facts in this case are not only similar but order of the ld CIT (A) is more sketchy and vague. In this case, the assessee has not furnished timely the information before the learned transfer-pricing officer. Even the learned CIT – A has not referred that what are those documents which have been furnished by the assessee before him based on which he is completely satisfied that the international transactions entered into by the assessee are at arm's-length. It is stated that remand report is obtained by ld CIT (A), however it is not discussed at all. Ld CIT (A) has not made any whisper that on issues what is the opinion of the ld AO. Neither the Assessee nor the ld DR brought it on record. If the appellate authorities are not satisfied with the determination of ALP determined by either the assessee or by the TPO, they are bound to follow the same procedure for determination of the arm's-length price which an assessee or TPO are required to do. Finding fault with ld TPO does not absolve the responsibility of the ld CIT (A). Such is the mandate of the provisions of section 92C (3) of the act. Adequate details are also not submitted before us, neither Assessee nor ld AO has filed any paper book. At the instances of the bench, only some documents were filed, therefore we are also not in a position to determine ALP Of International Transaction at this stage.

020. Therefore, as in assessment year 2008 – 09, the issue of determination of arm's-length price is set-aside to the file of the learned transfer pricing officer. We do not have any

hesitation in following the decision of the coordinate bench.

021. The second international transaction is with respect to payment for design and engineering fees amounting to ₹ 11,265,972/–. Assessee submitted that project by the assessee ranges from standard applications to that requiring complex engineering and specific designing. The group has over the period built up a pool of technical expertise in specific fields. Such expertise is made available to other group companies on the basis of the requirements. As per the group policy such services are recovered at 5% on net ex works cost reduced by the item supplied by the AE's actual cost like taxes, duties, freights, insurance etc. As per the terms of contract with the customer such designing and engineering services are either recovered separately or as a part of overall project billing. Assessee selected itself as the tested party and adopted the resale price method as the most appropriate method. It selected two comparable companies considering normal gross margin at 18% determine the arm's-length price at ₹ 5,976,510 of an international transaction of ₹ 3,558,775 and stated to be at arm's-length. Further in case where the designing and engineering fees are not recovered separately assessee also computed the normal gross margin at the rate of 18% and held that international transaction of ₹ 7,707,188 has the arm's-length price of ₹ 9,413,934/– and therefore there is no adjustment required. The learned TPO, in absence of any further details, adjusted the arm's-length

price by 25%. The learned CIT – A deleted addition giving the same logic, which was given for import of spares and components. For the reason given by us in setting aside the issue back to the file of the learned transfer pricing officer for that service, the same reason also applies to these services.

022. In case of receipt of commission of ₹ 7,714,756 assessee adopted transactional net margin method as the most appropriate method taking itself as a tested party and adopting profit level indicator of operating margin ratio. The PLI of the assessee was computed at 1262.87 percentage. It selected 17 comparable companies whose average PLI was computed at 32.15% and it was stated in the transfer pricing study report that the international transaction is at arm's-length. The learned transfer pricing officer, in absence of any detail, made an upward adjustment of 25%. The TPO also held that the segmental margins of the assessee company cannot be derived accurately, rejected the TP methodology adopted by the assessee. The learned CIT – A held that TPO has not brought on record specifically as to why the benchmarking methodology adopted by the appellant company is not reliable and is incorrect. According to the learned CIT – A segmental benchmarking carried out by the assessee was found to be appropriate based on his order for assessment year 2009 – 10 and 2010 – 11. As per page number 18 of 29 of the order of the learned CIT appeal for assessment year 2009 – 10, he relied on his order for assessment year 2007 – 08 and assessment year 2008 – 09. The

coordinate bench for assessment year 2008 – 09 at apara number 19 has categorically held that the order of the learned CIT – A is not sustainable. We do not have any hesitation in reiterating the above finding of the coordinate bench in assessee's own case for assessment year 2008 – 09. Such statement by us is further fortified by the margin computed by the assessee i.e. 1262% and compared with the margin of the comparable company of merely 32%.

023. Accordingly we set-aside the appeal of the learned assessing officer as well as the cross objection filed by the assessee which are on the same issue to the file of the learned transfer pricing officer. It is the duty of the assessee to benchmark the international transactions according to the provisions of section 92C (3) of the act. The primary onus lies on the assessee to show that its international transactions are at arm's-length. The learned TPO, may examine the same, after giving adequate opportunity to the assessee, decide the issue in accordance with the law.

024. In the result appeal filed by the learned AO and cross objection filed by the assessee are allowed for statistical purposes for assessment year 2005 – 06.

025. Now we come to the appeal of the learned assessing officer in ITA number 6494/M/2017 for assessment year 2009 – 10 and cross objection filed by the assessee in CO number 127/M/2017.

026. Learned AO has raised following grounds of appeal

ITA No. 6494/MUM/2016

(Assessment Year 2009-10)

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the segmental information and holding that the benchmarking at entity level using TNMM by the AO and adjustment of ₹ 60,24,437/- is not correct, without appreciating the fact that all transactions are closely linked.

2. On the fact and in circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the Resale Price Method applied by AO and holding that the benchmarking at entity level using TNMM by the AO is not correct without appreciating the fact that all transactions are closely linked.

3. On the fact and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the depreciation on goodwill amounting to ₹ 4,92,20,000/- without appreciating the fact that goodwill is the integral part of business and depreciation on goodwill cannot be ignored while determining PLI.

4.On the fact and in circumstances of the case and in law, the Ld. CIT(A) erred in deleting the depreciation on goodwill amounting to ₹ 05,19,11,719/- without appreciating the fact that in the schedule of fixed assets, goodwill was shown as intangible asset in the

balance sheet and no other intangible assets were claimed during the year.

5. On the fact and in circumstances of the case and in law, the Ld. CIT(A) erred in deleting the deleting provision for warranty and liquidated damages amounting to ₹ 4,43,71,772/- without appreciating the provision of Rule 46A of the I.T. Rules and without giving opportunity of additional evidence by AO.

6. On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the disallowance under Sec. 36(1)(va) of the Act without appreciating that the employees contribution to EPF is deemed to be income u/s. 2(24)(x) and deduction is allowable under sec. 36(1)(va) of Act only if the payment is made on or before the due date for payment ignoring the decision of Gujarat High Court in the case of Gujarat State Road Transport Corporation, reported in 366 ITR 170."

027. The assessee has raised following grounds in its cross objection

CO No. 127/MUM/2017
Arising Out of ITA No. 6494/MUM/2016
(Assessment Year 2009-10)

"1. On the facts and circumstances of the case, the learned CIT(A) has erred in holding that the order of the learned AO is not bad in law even thought the learned AO had failed to make a reference to the TPO in accordance with instruction No. 3 of 2003, since

the aggregate value of the international transactions entered into by the Respondent/ Cross-Objector during the subject year exceeded INR 5 crores. The learned CIT(A) has also failed to appreciate the fact that where a reference would have been made to the TPO, the learned AO would have been required to pass a draft order under section 144C(1) of the Income-tax Act, 1961 ('Act'), whereas the impugned assessment order has been passed by the learned AO under section 143(3) of the Act.

2. Without prejudice to any other ground/ cross-objection, on the facts and circumstances of the case, the learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent, Cross-Objector that in case the learned AO were to apply Transactional Net Margin Method at entity level for the purpose of benchmarking various international transactions entered into by the Respondent/ Cross-Objector during the year, 'Depreciation on Goodwill' amounting to INR 4,92,20,000/- ought to be excluded while doing so. The learned CIT(A) held that the subject ground/cross-objector became academic in nature pursuant to the decision rendered by him on the earlier grounds.

3. Without prejudice to any other ground/cross-objection, on the facts and circumstances of the case, the learned AO has failed to appreciate that although the financial and tax statements of the Respondent/ Cross-Objector depicted the entire amount of INR 49,22,00,0000 as Goodwill, the same comprised of

various intangible assets as such non-compete agreement, trade name, customer replacement cost etc on which, depreciation is to be allowed as per Section 32(1)(ii) of the Act. "

028. Coming to the appeal of the learned assessing officer, ground number 1 – 3 of the appeal are with respect to the transfer pricing adjustment. Ground number one of the cross objection is also with respect to the transfer pricing adjustment.

029. There is no change in the facts and circumstances of the case with respect to the transfer pricing adjustment as compared to assessment year 2008 – 09 and 2005 – 06. By these orders, the issue has been set-aside to the file of the learned assessing officer/transfer pricing officer. For similar reasons, these grounds of appeal of the learned AO and CO of the assessee are restored back to the file of the learned TPO for fresh examination.

030. Ground number 4 of the appeal of the AO is with respect to the depreciation on goodwill, it was submitted that this issue is squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 2007 – 08 and assessment year 2008 – 09. The learned CIT – A has decided this issue at paragraph number 9. This issue is squarely covered by the decision of the coordinate bench. For this year the depreciation if it is allowable , is on opening WDV of Good will. Therefore, respectfully following the decision of the coordinate bench for earlier years in the assessee's own case, we direct the learned

assessing officer to grant depreciation to the assessee. Accordingly, ground number 4 of the appeal of the AO is dismissed.

031. Ground number 5 of the appeal is with respect to deleting the provision for warranty and liquidated damages amounting to ₹ 44,371,772/–. The learned assessing officer disallowed these expenses contending that the appellant company has failed to establish as to how the provision for the warranty has been calculated by the appellant company and whether the same is based on any scientific method as per the nature of the business, sales, product manufactured and sold and historical trend. The learned CIT – A has noted that assessee has already disallowed the above sum in the computation of total income. Therefore, this amounts to double disallowance. We do not find any infirmity in the direction of the learned CIT – A that when assessee itself has disallowed the same in its computation of total income, disallowance once again made by the learned AO will result into double disallowance. It was not shown to us by the learned departmental representative that the finding of the learned CIT – A are incorrect. Accordingly, ground number 5 of the appeal of the AO is dismissed.

032. Ground number 6 of the appeal of the AO, with respect to the disallowance of employees' contribution to provident fund deposited beyond the due dates of the respective act. The learned CIT – A has deleted the disallowance for the reason that assessee has deposited the dues of the

employees' contribution to the provident fund within the grace period allowed under the respective act itself. Payment of Employees' contribution within the grace period is within the due dates of respective act. No infirmity is pointed out. Accordingly we confirm the order of the learned CIT – A deleting the above disallowance. Thus ground number 6 of the appeal of the AO is dismissed.

033. Accordingly, for assessment year 2009 – 10 appeal of the learned assessing officer is partly allowed and the cross objection of the assessee are allowed for statistical purposes.

034. For assessment year 2010 – 11, the learned AO has raised following grounds

ITA No. 6495/MUM/2016

(Assessment Year 2010-11)

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment to ₹ 2,31,25,984/- without appreciating the fact that the segmental account and the net segmental margins filed by the assessee are not reliable as the same is based in proportionate allocation of indirect expenses with the sales.

2. On the facts and circumstances of the case and in law, Ld. CIT(A) erred in deleting the Alp adjustment amounting to ₹ 2,31,25,984/- and holding that the benchmarking at entity level using TNMM by the TPO

is not correct without appreciating the fact that all transactions are closely linked.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment amounting to ₹ 2,31,25,984/- without appreciating the fact that different international transactions with the AE are closely linked and overlooked various judicial pronouncement.

4. On the facts and circumstances of the case and in law, the Ld. CIT has erred in directing the Assessing Officer to restrict the disallowance u/s. 14A r.w. Rule 8D(2)(iii) by excluding the long term investments which are in the nature of strategic investments relying on the decision of ITAT in case of Garware Wall Ropes Ltd (65 SOT 86), without appreciation the fact that the decision of the ITAT has not been accepted by the department and appeal has been admitted by the Hon'ble High Court."

035. The assessee has raised cross objection for assessment year 2010 – 11 as under

CO No. 128/MUM/2017
Arising Out of ITA No. 6495/MUM/2016
(Assessment Year 2010-11)

"1. On the facts and circumstances of the case, the learned CIT(A) has erred in not adjudicating the ground preferred by the Respondent/ Cross-Objector that in case the learned AO were to apply Transactional Net Margin Method at entity level for the purpose of benchmarking various International

transactions entered into by the Respondent/Cross-Objector during the year, 'Depreciation on Goodwill' amounting to INR 4,92,20,000/- ought to be excluded while doing so. The learned CIT(A) held that the subject ground/cross-objection became academic in nature pursuant to the decision rendered by him on the earlier grounds.

2.. On the facts and circumstances of the case, the learned CIT(A) has failed to adjudicate that even in a case where disallowance is to be made under section 14A of the Income-tax Act, 1861 (the Act) read with Rule 8D of the Income-tax Rules, 1962, the disallowance has to be computed on the average value of investments, as appearing in the balance sheet of the Respondent/ Cross-Objector, on the first day and last day of the previous year, as against the action of the learned AO in considering the entire value of strategic investment for the purpose of computing disallowance thereinunder.

036. We find that ground number 1 – 3 of the appeal of the AO relates to the transfer pricing adjustment and ground number 1 of the cross objection of the assessee is also with respect to the same issue. There is no change in the facts and circumstances of the case as compared to the facts in earlier years. The similar issue in the earlier years has been set-aside by the coordinate bench to the file of the learned assessing officer/TPO for fresh examination. For the reasons given by us for assessment year 2005 – 06 and 2009 – 10, we restore the matter back to the file of the learned TPO with similar directions.

037. Ground number 4 of the appeal of the AO and ground number 2 of cross objection of assessee relates to disallowance under section 14 A of the act. The fact shows that assessee has made investment of ₹ 31.07 crores and therefore the learned AO invoked the provisions of section 14 A read with rule 8D and made the disallowance of ₹ 1,553,621. The assessing officer has categorically noted that assessee has not earned any exempt income during the year. The learned CIT – A deleted the disallowance on the basis that assessee has made investment in its subsidiary which is a strategic investment. However for the reason that assessee has not earned any tax free income during the year, no disallowance under section 14 A is warranted, we direct the learned assessing officer to delete the disallowance made under section 14 A of the act. Accordingly, ground number 4 of the appeal of the AO is dismissed. The consequential ground in the CO of the assessee becomes infructuous.

038. In the result appeal of the learned assessing officer for assessment year 2010 – 11 is partly allowed and CO of the assessee allowed for statistical purposes.

039. In the order,

Order pronounced in the open court on 24.02.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 24.02.2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai