

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : I. T. A. No. 345 of 2015

Reserved On : October 05, 2016

Pronounced On : December 23, 2016

Honda Motorcycle & Scooters India Pvt. Ltd. Appellant

vs.

Asistant Commissioner of Income Tax,
Circle-2, Gurgaon

.... Respondent

CORAM : HON'BLE MR. JUSTICE S. J. VAZIFDAR, CHIEF JUSTICE.

HON'BLE MR. JUSTICE DEEPAK SIBAL.

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Present : Mr. Deepak Chopra, Advocate and
Mr. Deepak Agrawal, Advocate
for the appellant.

Mr. Tajender K. Joshi, Advocate
for the respondent.

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DEEPAK SIBAL, J. :

In the main appeal, the appellant-assessee had sought to raise the following substantial questions of law :-

- “1. Whether the Tribunal erred in law in remanding the issue relating to transfer pricing adjustment by holding that the TPO had not given any reasons for rejection of the CUP method which finding is perverse and contrary to the record ?*
- 2. Whether the Tribunal erred in not allowing the adjustment of abnormal operating expenses while determining the net operating margins of the Appellant while*

- applying the TNMM method ?*
3. *Whether the Tribunal erred in considering Bajaj Auto Ltd. As perfect comparable ?*
 4. *Whether the Tribunal erred in not allowing the claim of depreciation on moulds ?*
 5. *Whether the Tribunal erred in not allowing the claim of sales tool expenses ?”*

Through our order dated 26.08.2016, the appeal was ordered to be dismissed. Thereafter, an application seeking review of the said order with regard to the opinion expressed by us qua the second question was filed. Correction in the order qua the answer given by us to question no.5 was also sought to the extent that the assessment proceedings, on remand, be ordered to be done by the Assessing Officer instead of the Transfer Pricing Officer (TPO).

On 24.09.2016, we had re-called our order dated 26.08.2016 to the limited extent that the second question of law would be decided by us afresh. The correction in the order dated 26.08.2016 qua question no. 5 was made that on remand, the issue which was the subject matter of question no. 5 would be determined by the Assessing Officer and not the TPO.

We now proceed to answer the second question raised in the appeal.

Before the TPO, the appellant-assessee had claimed an adjustment in the operating margin of the assessee on account of a strike in the assessee Company. It was submitted that the strike adversely effected the production/sales of the assessee but the fixed costs continued to be the

same. Therefore, abnormal fixed cost incurred during the strike was sought

to be excluded from the operating costs for computing profit margin.

The TPO was of the view that during the relevant year, the assessee had made sales of ₹ 1952 crores as against sales of ₹ 1697 crores in the immediate preceding year. This data, according to him, proved that there was no effect of the strike on the manufacturing turn over of the assessee and as a matter of fact, in the relevant year, the sales had increased by ₹ 255 crores. It was further found by the TPO that as per the risk profile submitted by the assessee, it was the assessee, which was to bear the risk of manpower and according to him, the loss, if any, from the strike, was one such risk. In view of the above, the TPO rejected the claim.

A draft assessment order was passed by the Assessing Officer on the basis of the order by the TPO, which was challenged by the assessee before the Dispute Resolution Panel (DRP). Such challenge having been rejected by the DRP, the assessee filed an appeal before the Tribunal, which also rejected the assessee's claim.

On the second question, which we are dealing with, the Tribunal was of the view that there was no occasion to reduce the operating costs from the total operating costs for the strike period as on account of the strike, there would have been some corresponding reduction of cost as well. The Tribunal further found that the assessee had not demonstrated that the operating expenses during the months preceding and succeeding the strike period were at any higher level and that as per the production chart submitted by the assessee, there was production even during the strike period.

The Tribunal further held that on the happening of any abnormal event like a strike, it would be the net operating profit margin of the comparable companies, which would need adjustment to bring both the international transactions and comparable costs at the same pedestal and that such adjustment was not to be made in the net operating profit margin of the assessee. Since the assessee had failed to bring on record any material to the effect that profit of any of the comparable entities was affected due to any strike in their premises, the claim of the assessee was negatived.

Rule 10B(1)(e)(ii) and (iii) of the Income Tax Rules, 1962, which are relevant, read as under :-

“Determination of arm's length price under Section 92C.

Rule 10B. (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :-

- (a) xx xx xx
- (b) xx xx xx
- (c) xx xx xx
- (d) xx xx xx
- (e) transactional net margin method, by which
- (i) xx xx xx
- (ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number

of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (i) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market.”

As per the above quoted Rules, the net profit margin of the comparable company is required to be adjusted to bring the international transaction by the assessee Company and that of the comparable company at the same pedestal.

According to us, the Tribunal, after rightly observing that the adjustments in the net operating profit margin on account of any strike etc. was to be made in the profit margin of the comparable company, erred in rejecting the case of the assessee Company on the ground that the assessee had failed to bring on record any material to show that the profit of the comparable companies had been hit by a strike. The profit margin of the comparable company was required to be adjusted after taking into account a strike like situation as had taken place in the assessee company.

Our order dated 26.08.2016 would show that qua question no. 1, we have upheld the order of the Tribunal remitting the matter to the TPO

for fresh assessment in accordance with law. Questions no. 4 and 5 are also

to be decided afresh. While deciding question no. 1, the second question would also be considered and decided by the TPO on making appropriate adjustments in the profit margin of the comparable company after taking into account a strike like situation in the comparable company as had taken place in the assessee Company.

(S. J. VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

December 23, 2016
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<i>Whether speaking/reasoned ?</i>	<i>Yes/No.</i>
<i>Whether reportable ?</i>	<i>Yes/No.</i>