IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.10.2017

Date of Reserving the Order	*Date of Pronouncing the Order*
09.10.2017	**20.10.2017**

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.2088 of 2017 &
W.M.P.No.2058 of 2017

M/s.Hyundai Motor India Limited,
Rep., by its Authorised Signatory,
Mr.T.Saravanan
Plot No.H-1, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur Taluk,
Kanchipuram – 602 117. ... Petitioner

Vs.

1.The Secretary,
Income Tax Department,
Dispute Resolution Panel-2,
7th Floor, Income tax office,
BMTC Building, 80 feet road,
Koramangala, Bangalore.

2.Joint Commissioner of Income-tax,
Transfer pricing officer 2(i/c),
Room No.320, III floor, Main Building,
No.121, M.G.Road, Nungambakkam,
Chennai – 600 034.

3.Deputy Commissioner of Income-tax,
Large Taxpayer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extn.,
Chennai – 600 101. ... Respondents

Prayer in all W.Ps: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records comprised in the impugned order bearing File No.116/DRP-2/BLR/2016-17, dated December 13, 2016, made under Section 144C(5) of the Income Tax Act, 1961 for the Assessment Year 2012-13, on the file of the first respondent, quash the same.

For Petitioner : Mr.N.Venkatraman Senior counsel for Mr.K.Magesh

For Respondent : Mrs.Hema Muralikrishnan

ORDER

The petitioner has challenged the order passed by the Dispute Resolution Panel-II, Bangalore (DRP), dated 13.12.2016, by which directions have been issued under Section 144C(5) of the Income Tax Act, 1961 (Act).

2. The petitioner is a wholly owned subsidiary of Hyundai

Motor Company, South Korea, and is a manufacturer and exporter of cars. The Transfer Pricing Officer had made adjustment to the value of international transactions and the Assessing Officer had disallowed various expenses that has resulted in the assessee filing objections before the DRP. The gist of the objections are as follows:-

(i) The Assessing Officer erred in disallowing a sum of Rs.93,44,170/- under Section 14A of the Income Tax Act, by applying the provisions of the Rule 8D of the Income Tax Rules 1962,(Rules);

(ii) The Assessing Officer erred in reducing the subsidy granted by SIPCOT from the cost of the asset and consequently disallowing depreciation amount of Rs.2,38,665/-;

(iii) The Assessing Officer erred in treating the export incentives on account of Focus Market Scheme and Focus Product Scheme amounting to Rs.90,57,29,308/- as income for the previous year relevant to the assessment year 2012-13;

(iv) The Assessing Officer erred in disallowing additional depreciation amounting to Rs.17,87,956/- in respect of assets used in factories/workstations;

(v) The Assessing Officer erred in disallowing an amount of Rs.2,26,17,00,000/-, debited in the profit & loss account towards provisions for warranty;

(vi) The Assessing Officer erred in restricting the claim of depreciation on UPS, Scanners and Printers at 15% as against the claim of 60% the difference amounting to Rs.24,54,729/-;

(vii) The Assessing Officer erred in disallowing guarantee charges amounting to Rs.1,40,40,660/- paid to the assessee's parent company, Hyundai Motor Company, Korea by treating the same as capital expenditure. Without prejudice, if the payment of guarantee charges is treated as capital expenditure, the same should be added to cost of the asset and proportionate depreciation should be allowed;

(viii) The Assessing Officer erred in disallowing "performance reward" amounting to Rs.13,08,30,410/- under Section 43B of the Act.

(ix) The Assessing Officer erred in ignoring the fact that the petitioner inadvertently added Rs.35,92,42,476/- to its total income for the subject assessment year and tax has been paid on the escalated total income. The Assessing Officer erred in granting credit to TDS for an amount of Rs.22,10,89,496/- as against a total TDS of Rs.22,85,85,356/-, claimed by the petitioner in its return of income;

(x) The Assessing Officer erred in levying excess interest under Section 234C of the Act;

(xi) Initiation of penalty proceedings under Section 271(1)(c) of the Act is not sustainable;

(xii) The Transfer Pricing Officer erred in rejecting the transfer pricing study carried out by the assessee without cogent reasons and erred in analyzing domestic segment on a standalone basis. The

Transfer Pricing Officer has erred in benchmarking the international transactions entered into by the assessee with its Aes on the basis of the segment wise profitability details obtained during the assessment proceedings, without appreciating that the international transactions entered into by Assessee are closely linked and integrated and cannot be viewed in terms of separate segments for Transfer Pricing benchmarking;

(xiii) The Transfer Pricing Officer erred in not considering the royalty income received by the Assessee in consideration for the license of the trademarks and know-how transferred to Mobis in relation to the distribution of after sales products, as operating while computing the operating margins of the tested party. The Transfer Pricing Officer erred in not considering the incentives received from the Government of Tamil Nadu for its Phase II investments under Ultra Mega Integrated Automobile Projects within Tamilnadu, as operating while computing the operating margins of the tested party. The Transfer Pricing Officer erred in not considering the discounts from suppliers towards early payment for purchases and also the commission received towards car finance referrals and car insurance referrals as operating while computing the operating margins of the tested party. The Transfer Pricing Officer erred in considering provision for doubtful advances/deposits and contingencies as operating while computing the operating margins of the tested party;

(xiv) The Transfer Pricing Officer has considered the economic analysis submitted by the assessee, where the assessee had used single year margins in determining the operating margins of the comparable companies. Without prejudice to the same, the assesee requests the Panel to consider multiple year data on determining the operating margins of the comparable companies;

(xv) The Transfer Pricing Officer have exceeded his jurisdiction and erred in making the adjustment towards a fees for a purported brand development service alleged to be provided by the assessee to its AE, without first establishing that there was any international transaction in this regard between the assessee and its AE, which can be subject to section 92 of the Act.

3. In this Writ Petition, the petitioner challenges the impugned order only with regard to the transfer pricing adjustment by contending that can be limited only to an international cross border transaction and in the petitioner's case, the imports were made from the Associate Enterprises(AE). It is submitted that to make any Arm's Length Adjustment (ALA) in any other area or category, which is not an international transaction, namely, imports from non-AE's, domestic sourcing and various other administrative costs is incorrect and not sustainable. It is submitted elementary principle is well grounded vide

Rule 10B(e) of the Rules, that adjustment can be confined only to international transaction. It is submitted that the petitioner is under transfer pricing adjustment, since the assessment year 2002-03, and never in the past, there has been even a remote attempt to make transfer pricing adjustments on other than international transactions. When an attempt was made for the assessment year 2011-12, trying to segregate domestic and export segment, it was reversed in favour of the petitioner by the DRP vide its order dated 28.12.2015. The second respondent, the Transfer Pricing Officer, while taking up the transfer pricing adjustment for the assessment year 2012-13, rightly restricted the transfer pricing adjustment to the international transaction from AE's only. However, the DRP under the guise of exercising powers under Section 144C(8) of the Act, has sought to enhance the adjustment by traveling beyond international transaction and making adjustments on non-international transaction including domestic procurement and administrative costs in blatant violation of the law and all binding judicial precedents. The petitioner in no uncertain terms, have stated that they are not challenging the merits of the order passed by the DPO as confirmed by the DRP and will prosecute appropriate appellate remedy. In other words, the Writ Petition is confined only to the aspect of the enhancement sought to be made by the first respondent, which according to the petitioner is without jurisdiction and contrary to binding judgments and thus violative of Article 14 & 19(1)(g) of the Constitution.

4. Mr.N.Venkatraman, learned Senior counsel appearing for the petitioner did not venture into the factual scenario, but strictly confined his arguments by contending that the order of enhancement passed by the DRP is in blatant violation of the settled legal principle of the Bombay and the Delhi High Courts as well as the Chennai, Mumbai, Delhi and Pune Benchs of the ITAT. In support of such a stand, the following decisions were referred to.

(a) M/s.Mobis India Ltd., vs. The Deputy Commissioner of Income Tax in I.T.A.No.2112/Mds/2011, dated 14.08.2013

(b) The Commissioner of Income Tax-1, Mumbai vs. ALSTOM Projects India Ltd., Income Tax Appeal No.362 of 2014, dated 14.09.2016;

(c) CIT vs. M/s.Hindustan Unilever Ltd., in ITA No.1873 of 2013, dated 26.07.2016;

(d) CIT vs. M/s.Tara Jewels Exports Pvt., Ltd., in ITA No.1814 of 2013, dated 05.10.2015;

(e) CIT vs. Petro Araldite Pvt., Ltd., in ITA No.1804 of 2013, dated 24.11.2015;

(f) CIT vs. M/s.Thyssen Krupp Industries India Pvt., Ltd., in ITA No.2201 of 2013, dated 02.12.2015;

(g) CIT vs. M/s.Sumit Diamond (India) Pvt Ltd., in ITA No.1647 of 2013, dated 01.11.2016;

(h) CIT vs. M/s.Firestone International (P) Ltd., in ITA No.1354 of 2013, dated 15.06.2015;

(i) CIT vs. Keihin Panalfa Ltd in ITA No.11 of 2015, dated 09.09.2015;

(j) Il Jin Electronics (I) (P) Ltd., vs. Assistant Commissioner of Income Tax in ITA No.438/Del/2008, dated 06.11.2009;

(k) New Holland Fiat (I) Pvt., Ltd., vs. DCIT, Mumbai in ITA No.7574 of 2012, dated 03.05.2017;

(l) M/s.Behr India Limited vs. The Assistant Commissioner of Income Tax in ITA No.645/2003, dated 21.04.2017.

5. It is submitted that in the case of ***M/s.Mobis India Ltd.,*** (supra), the Chennai Bench of the ITAT, similar issue was considered and it was pointed out that there is a substantial justification in the argument of the assessee that the transfer pricing adjustment should have been restricted to controlled transactions. The Tribunal placed reliance on the decision of the Delhi Bench of the ITAT in the case of ***Il Jin Electronics (I) (P) vs. ACIT*** *reported in* ***(2010) 36 SOT 227*** and pointed out if the assessee's purchase of raw materials from AE is

27% of the total raw material purchase, then the adjustment of ALP has to be restricted to 27% of the total turnover. It is submitted that though the revenue has preferred Tax Case Appeal before the Division Bench of this Court, the same has been admitted only on three questions of law and this issue has not been framed as a question of law for consideration and therefore, the finding in this regard has attained finality. Relying on the decision in the case of ***The Commissioner of Income Tax-1, Mumbai vs. Alstom Projects India Limited*** in ***Income Tax Appeal No.362 of 2014***, while taking note of the decision of the Delhi High Court in the case of ***CIT vs. Keihin Panalfa Ltd.,*** in ITA No.11 of 2015, dated 09.09.2015, it was held that the transfer pricing adjustment is done under Chapter 10 of the Act and the mandate therein is only to re-determine the consideration received or given to arrive at income arising from international transactions with AE. The transaction with non-AEs are presumed to be at arms length, as there is no relationship which is likely to influence the price. It was further pointed out that if the contention of the revenue is accepted, it would lead to artificial increase in the profits of the transactions entered into with non-AEs by applying the margin at entity level, which is not the object of Chapter X of the Act. Absence of segmental accounting is not an insurmountable issue, as appropriate basis could be adopted as done by the Delhi High Court in ***Keihin Panalfa Ltd.,*** (supra).

6. Mr.N.Venkatraman, referred to the other decisions on the same point and invited the attention of this Court to the relevant paragraphs of the above referred decisions. Thus, the contention of the petitioner is that the DRP does not have jurisdiction to propose a transfer pricing adjustment on transactions other than an international transaction and the impugned order to the said extent amounts to usurpation of non-existence justification without the presence of the jurisdictional facts. Relying on the decisions of the Hon'ble Supreme Court in the case of ***UOI vs. Kamlakshi Finance Corpn., Ltd.,*** reported in ***1991 (55) ELT 433 (SC).,*** it is submitted that judicial discipline demands to give effect to orders of higher appellate authorities which are binding on the lower authorities and the revenue has to unreservedly follow the appellate authorities orders unless operation thereof has been suspended by a competent Court and mere fact of appeal having been filed against the order is no ground for not following it. To give a glimpse of the factual position, Mr.N.Venkatraman, referred to the tabulated statement giving the details of domestic car sales segment. It is submitted that the operating revenue (sales) is Rs.13,543/-crores and the import of raw material and royalty payment from/to import from payments is Rs.2362/- crores i.e., 17.74% and with regard to non-AE transactions i.e., domestic purchase import from third parties and administrative

cost is Rs.10,949/- crores being 82.26% and the total operating cost is Rs.13,311/- crores, which includes AE & non-AE transactions. The second respondent, DPO rightly made the adjustment on the value of international transaction, whereas the DRP in the impugned order has included both the international as well as the domestic transaction and arrived at the short fall in the operating margin on the total operating cost of Rs.13,311/- crores, which is clearly impermissible in the light of the settled legal position.

7. Mrs.Hema Muralikrishnan, learned Senior Standing counsel for the Revenue raised a preliminary objection on the maintainability of the Writ Petition, since the Assessing Officer has to pass consequential order pursuant to the impugned directions issued by the DRP and based on such direction, an assessment order has to be passed under Section 144C(13) within 30 days from the end of the month in which such directions are issued. As against such assessment order, the petitioner has a remedy of filing an appeal before the Appellate Authority and the present Writ Petition is premature and liable to be rejected. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***CIT & Ors., vs. Chhabil Dass Agarwal*** reported in ***357 ITR 357, CIT vs. Vijaybhai N.Chandrani*** reported in ***357 ITR 713*** and the decisions of this Court in the cae of ***Dr.Nedunchezhian vs. Deputy Commissioner of Income Tax &***

Anr., reported in ***279 ITR 342 (Mad)*** and ***Fisher Xomox Sanmar Ltd., vs. Assistant Commissioner of Income Tax*** reported in ***294 ITR 620 (Mad)*** wherein it has been held that once there is an effective alternative remedy, Writ Petition is not maintainable.

8. With regard to the contention raised by Mr.N.Venkatraman, it is submitted that the petitioner did not have data in relation to profits earned by it in respect to the cost pertaining to the international transactions. It is further submitted that the assessee is selling product manufactured with parts purchased from AE and the balance from non-AE and when the product is sold, overall profit margin is recorded without any data, as what would be the profit in relation to the purchases from its AE. Therefore, it is submitted that it cannot be presumed that the profit percentage earned in relation to costs related to international transactions as well as on non-international transactions were the same. It is possible that the margin of profit on costs related to international transactions is not the same as profit margin on costs related to non-international transaction, but ultimately overall profit margin is being shown. Thus, it is submitted that any impact on the basis of calculation of ALP has to be considered as adjustment under Section 92CA and the same cannot be proportionately reduced by considering that part of the purchases was from non-AE also. It is further submitted that whatever the reduction

in margin of the assessee visa-a-visa comparables is on account of inflated purchases from AE and the same gets considered when the ALP is calculated by applying TNMM. It is further reiterated that if the petitioner is aggrieved by the order passed by the third respondent, their Assessing Officer, they can prefer appeal before the ITAT, which is the proper and appropriate forum. It is further submitted that the DRP under Section 144C(8) of the Act, has inherent power to confirm, reduce or enhance the variation proposed in the draft order and after considering all the materials, the DRP has recorded factual findings and issued the directions which would be implemented by the Assessing Officer and if the petitioner is aggrieved, they can file appeal against such order. It is further submitted that the petitioner had claimed TNMM aggregation in the assessment year 2011-12 and the second respondent had rejected the TP documentation resulting in an adjustment and when the petitioner approached the DRP, the said adjustment was deleted. It is further submitted that the claim made by the petitioner is incorrect, as the second respondent vide order dated 29.01.2015, made an adjustment of Rs.51.66/- crores, after obtaining segmental profitability of AE-Export segment and non-AE segment and on finding that there was difference between the margin. The adjustment was upheld by the DRP vide order dated 28.12.2015. It is submitted that each assessment is independent and different and the Assessing Officer can take different view in the subsequent year, when new facts come to his knowledge. It is further submitted that the DPO had computed ALP of the value of International transaction in proportion to the adjusted operating cost resulting in proportionate downward adjustment. However, the DRP was of the view that proportionate adjustment made was not justifiable and adjustment had to be made on the entire cost base and consequently enhancing the amount of adjustment. In the impugned order, the proposition for adjustment was explained by giving an illustration, which will clearly show that there is absolutely no merit in the petitioner's contention. On the above grounds, the learned counsel seeks to sustain the impugned order.

9. In reply, Mr.N.Venkatraman, submitted that the act does not specifically provide for alternate remedy to the petitioner against the impugned order and the remedy suggested is only after the Assessing Officer passes final orders. Thus, in the absence of an efficacious alternate remedy, the present Writ Petition is maintainable. The impugned order being in contradiction with the various decisions of the High Courts and the decisions of the jurisdictional ITAT, the order has to be held to be beyond the jurisdiction of the first respondent. While it may be true that each assessment year is independent of the other, various decisions, it has been held that where issue has been considered and decided consistently in the earlier assessment year in a

particular manner, the same view should continue to prevail in the subsequent year, unless there is some material change in facts. The first respondent has not been able to point out even a single distinguishing feature in respect of assessment year in question, which has prompted the first respondent to take a different view from the earlier assessment year, wherein TP adjustment was restricted to the extent of international transactions undertaken with the AE's of the petitioner. The respondent has filed a rejoinder affidavit to the counter affidavit meeting the factual averments set out by the petitioner.

10. Heard the learned counsels appearing for the parties and perused the materials placed on record.

11. Before deciding the question as to whether the transfer pricing adjustment should be limited only to an international cross boarder transaction i.e., in respect of imports made from AE's or otherwise, it would be first essential to decide as to the maintainability of the Writ Petition, as this is a preliminary objection raised by the Revenue. The DRP has issued the impugned direction under Section 144C(5) of the Act. Pursuant thereto, the third respondent, the petitioner's Assessing Officer has to pass an order under Section 144C(13) within 30 days from the end of the month, in which direction was issued. When the Writ Petition was heard for admission on

30.01.2017, the Court granted an order of interim stay of further proceedings, if no order has been passed as on the said date. It appears that the Assessing Officer had not passed any orders as on 30.01.2017, pursuant to the impugned directions issued by the DRP and therefore, there is an order of stay on the third respondent from passing an assessment order based on the impugned direction.

12. The direction issued by the DRP, (impugned direction) binds the Assessing Officer and in essence, the assessment order would be an order giving effect to the direction issued by the DRP. Against such order of assessment, the petitioner has an effective alternate remedy of filing an appeal before the Income Tax Appellate Tribunal (ITAT).

13. Section 144C was inserted in the Income Tax Act by Finance Act, 2009, with a view to provide speedy disposal and to create an alternate dispute resolution mechanism within the income tax department (see notes on clauses to Finance Bill, 2009). Prior to insertion of Section 144C, the assessee could file an appeal to the CIT (Appeals) challenging the assessment order. On creation of the DRP, one more option is given to the assessee to approach the DRP raising objections against the variations made by the Assessing Officer. On such objections being filed, the DRP is expected to consider the draft assessment order, objections of the assessee, evidence/records that

may be furnished by the assessee, reports if any called for from the Assessing Officer/Valuation Officer/TPO and issue directions, as it thinks fit, to enable the assessing officer to complete the assessment. The directions so issued by the DRP is only after opportunity to the assessee. The directions given by the DRP are binding on the Assessing Officer. Thus, the proceedings before the DRP is not an appeal over the draft assessment order, but an alternate mechanism provided to the assessee, a corrective mechanism. With this view in mind the legislation has fixed a time frame of nine months.

14. The petitioner's contention is that while it may be true that against an assessment order, the petitioner has an effective remedy, but as against the impugned order, there is no alternate remedy provided under the Act and if the petitioner does not approach this Court for appropriate remedy against the impugned direction, the third respondent would proceed to give effect to the order of the first respondent resulting in prejudice to the petitioner including demands for significant amount of taxes, resulting from the conclusions made in the impugned order passed by the first respondent. The challenge to the impugned order on the transfer pricing adjustment is largely based on the decisions relied on by Mr.N.Venkatraman, the earliest of which being in the case of ***CIT vs. Firestone International*** reported in ***60***

Taxmann.com 235 (Bombay). It is submitted that though an appeal has been filed before the Hon'ble Supreme Court against the order in ***Firestone (2016 73 Taxmann.com 39)***, there is no order of interim stay granted by the Hon'ble Supreme Court. Reliance was placed on the decision in the case of ***M/s.Mobis India Ltd.,*** (supra), a decision of the jurisdictional Tribunal in the case of the petitioner's group company, in which the Tribunal took note of the decision in the case of ***Il Jin Electronics,*** holding that the adjustment for ALP has to be restricted to the purchase of raw material from the AE, which in the said case was 27% of the total turnover. It may not be necessary for this Court to refer to the other decisions of the Bombay High Court or the decisions of the Tribunals at Mumbai, Delhi and Pune, as they have been rendered following ***Firestone, Il Jin Electronics*** etc. However, at this stage, it is essential to note a common, but a very important distinguishing feature in all the decisions referred to by Mr.N.Venkatraman. That is to say, none of the decisions arose out of a challenge in a Writ Petition to the order passed by the DRP. In all the decisions, the directions issued by the DRP has been given effect to by the Assessing Officer and as against which appeal was preferred to the Tribunal and in some cases, it has travelled upto the High Court. In particular in the case of ***M/s.Mobis India Ltd.,*** (supra), the same procedure was adopted, where the Assessing Officer proceeded to frame a draft assessment order based on the recommendations of the

TPO in which the Assessing Officer proposed an addition of Rs.9,58,60,55,22/- for the arms length price adjustment, apart from other additions. These were for income arising out of an invoice raised subsequent to the end of the relevant previous year, disallowance of amortization cost of leasehold land, disallowance of payment made for acquiring software licence and reimbursement of expenses for non-deduction of tax at source. The assessee (Mobis) elected to move the DRP as done by the petitioner and raised objections one of which being with regard to the adjustment on account of the alleged difference in arms length operating profit to the proportionate AE transaction.

15. The DRP, after considering the objections, issued directions with regard to transfer pricing adjustment and based on the directions final assessment order was framed by the Assessing Officer. Challenging such order, the assessee (Mobis), filed appeal to the Tribunal. In the said challenge, the Tribunal has examined the factual position and after recording its finding on facts, has referred to the decision in the case of ***Il Jin Electronics (I) (P)***(supra), and rendered a finding on how the adjustment had to be made. Therefore, it is essential that the factual matrix has to be gone into before recording a finding as to whether the direction issued by the DRP is proper or not and how the ALP to be determined applying the decisions in ***Firestone, Il Jin Electronics*** etc. The assessee would admit that

each assessment is an independent proceedings, but would state that in light of the decision of the jurisdictional Tribunal, judicial discipline demands that the order of the Tribunal as held in ***Kamlakshi Finance Corpn., Ltd.,***(supra). What is important to note is that the decision of the Tribunal in Mobis was rendered on appreciation of the factual position and examination of the direction issued by the DRP, which was given effect to by the concerned Assessing Officer. Therefore, on facts, Mobis was granted relief by the Tribunal.

16. It is to be noted that though the petitioner has challenged the directions issued by the DRP in its entirety Mr.N.Venkatraman, confined his submissions only with regard to the enhancement made by DRP, and the assessee will challenge the other findings once the assessment is complete. Thus, it has to be seen whether the DRP has recorded any factual findings while disagreeing with the TPO with regard to computing quantum of adjustment. The finding recorded by the DRP in this regard is contained in paragraph 18.1, which is as follows:-

> *"The argument of the assessee could have some force if the data in relation to profits earned by assessee in relation to costs pertaining to international transactions were available. However, this is not so. The assessee is selling a product, for the manufacture of which, part purchases are from AEs and remaining*

from the non-AEs. When the product is sold only overall profit margin is recorded without any data as to what would be the profit in relation to purchases from AE. But it cannot be presumed that the profit percentage earned in relation to costs related to international transactions as well as non-international transaction was same. So it is always possible that the margin of profit on costs related to international transaction is not the same as profit margin on costs related to non-international transactions but ultimately overall profit margin is being shown."

17. After recording the above finding, the DRP has adopted a hypothesis with regard to an assessee having international transactions and how the arms length price needs to be determined. The case of the hypothetical assessee is dismissed in paragraphs 18.2, 18.3 and 18.4 of the impugned directions. After the above discussions, on facts the DRP has recorded as hereunder:-

"18.5.........Any impact on the basis of calculation of ALP by MAM (here TNMM) has to be considered as adjustment under Section 92CA and the same cannot be proportionately reduced by considering that a part of the purchases was from non-AE also. Whatever is the reduction in the margin of the assessee vis a vis comparables is on account of inflated purchases from AE and the same gets considered when ALP is calculated by applying TNMM. As regards assessee's reliance on Judicial decisions, the above factual matrix was not brought to the knowledge of

> *Hon'ble Judicial Authorities and so those decisions cannot be applied to the case of the assessee. The AO/TPO is, therefore, directed to effect adjustment without restricting the same to the proportion of international transaction to the total operating cost. "*

18. Therefore, it would be too far fetched plea on the part of the petitioner to state that *sans facts*, the decision in ***Mobis***, and other cases, (***Firestone, Il Jin Electronics*** etc) should be applied and the finding with regard to the adjustment of the ALP should be set aside, is a proposition, which cannot be acceded to. The DRP while issuing directions has directed adjustment by examining the facts. This direction is required to be implemented by the Assessing Officer after which it ripens into an assessment order open to challenge in terms of the provision of the Act. This appears to be precisely the reason for terming the impugned order as a direction under Section 144C (5) of the Act and it ripens into an order on being given effect to by the Assessing Officer. Therefore, I am convinced that the decisions cited by Mr.N.Venkatraman, cannot be applied, at this juncture, as the factual position requires to be considered, which obviously cannot be done in a Writ Petition and therefore, the impugned direction issued by the DRP has to be given effect to and the third respondent has to pass an order of assessment, which can be questioned by the petitioner by filing an appeal before the Tribunal.

19. For all the above reasons, the Writ Petition is dismissed with direction to the third respondent to give effect to the directions issued by the DRP, dated 13.12.2016, by passing an assessment order, after which, it is open to the petitioner to challenge the same before the Tribunal. All contentions are left open. No costs. Consequently, connected Miscellaneous Petition is closed.

20.10.2017

Index:Yes/No

pbn

To

1.The Secretary,
Income Tax Department,
Dispute Resolution Panel-2,
7th Floor, Income tax office,
BMTC Building, 80 feet road,
Koramangala, Bangalore.

2.Joint Commissioner of Income-tax,
Transfer pricing officer 2(i/c),
Room No.320, III floor, Main Building,
No.121, M.G.Road, Nungambakkam,
Chennai – 600 034.

3.Deputy Commissioner of Income-tax,
Large Taxpayer Unit-II,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extn.,
Chennai – 600 101.

T.S.SIVAGNANAM, J

pbn

Pre-Delivery Order in
W.P.No.2088 of 2017 &
W.M.P.No.2058 of 2017

20.10.2017