IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No.138 of 2017

Principal Commissioner of Income Tax 4
No.121, Mahatma Gandhi Road
Chennai 600 034. .. Appellant

Vs.

M/s. Motonic India Automotive Pvt. Ltd.
No.200/5A, 5B, 10 & 11
Vayalur Village, Surkauram Road
Thiruvallur 602 015
PAN AAFCM3603F .. Respondent

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Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'D' Bench, dated 17.8.2016 in ITA No.741/Mds/2014 for the Assessment year 2009-10, against the order dated 21/01/2014 and made in PAN/GI No.AAFCM3603F on the file of the Assistant Commissioner of Income Tax, Company Circle IV(3), Chennai and against the order dated 21/01/2013 and made in PAN No.AAFCM3603F on the file of the Deputy Commissioner of Income Tax, Transfer Pricing Officer V, Chennai.

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For Appellant : Mr.Karthik Ranganathan
Senior Standing Counsel

For Respondent : Mr.Vikram Vijayaraghavan
For M/s.Subbaraya Aiyar Padmanabhan

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J U D G M E N T

(Delivered by Dr.Vineet Kothari,J)

The Revenue has filed this appeal, aggrieved by the order passed by the Income Tax Appellate Tribunal on 17th August 2016 allowing the Assessee's appeal and remanding the case back to the Transfer Pricing Officer for the Assessment Year 2009-10.

2. The only grievance raised by the learned counsel for the Assessee is that while remanding the case back to the Transfer Pricing Officer, the Income Tax Appellate Tribunal should not have made observations on the merits of the Transfer Pricing adjustment which has to be considered by the Transfer Pricing Officer upon such remand.

3. The learned counsel for the Assessee, Mr.Vikram Viayaraghavan, has, however, vehemently submitted that on the same material and evidence were available before the Transfer Pricing Officer in the first round of litigation itself and he had taken a particular stand in the matter and therefore, the Tribunal has made such impugned observation while remanding the case back to the Transfer Pricing Officer, following its Pune Bench decision in Demag Cranes & Components (India) Pvt. Ltd. v. DCIT, Pune [ITA No.120/PN/2011 dated 04.01.2012] vide paragraph 6.1 of its order that now the Transfer Pricing Officer is bound to pass the order upon remand only in that particular manner.

4. The learned counsel also submitted that though the Tribunal has allowed such additional grounds on appeal, which were raised during the course of argument vide paragraph 4 of the order, as the earlier grounds were treated as not pressed, the matter was remanded back to the Transfer Pricing Officer, on such additional grounds that were allowed to be raised, to pass fresh orders.

5. Having heard the learned counsel for the parties, we are of the opinion that the Tribunal, while remitting the matter back to the Transfer Pricing Officer, should not have curtailed the discretion to be exercised by the Transfer Pricing Officer, in accordance with law. The Tribunal was well within the powers to allow the new additional grounds raised by the Assessee before it, but when the matter was being remitted back to the Transfer Pricing Officer, the directions of mandatory nature as to how to make adjustments only in a particular manner, etc. would frustrate the very purpose of remand. The Tribunal, while relying upon its Coordinate Bench decision in the case of Pune Bench, made the following impugned observations:

> "... Accordingly, we direct the A.O. to give suitable adjustment against the custom duty component while determining the ALP.
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> 7. The next additional ground is with regard to air freight charges adjustment while computing the ALP. In our opinion, the assessee is in the field of manufacturing and testing of throttle

body, rocker arm, solenoid valve, LPG gas mixer, vaporizer, LPG Tank etc. and the assessee has to transport the raw materials very urgently to meet the end of the customers. The assessee is importing the entire various components which is required to manufacture its final products. In the course, it incurred air freight charges, which is abnormal expenses and adjustments to be made while determining the ALP, as it is affecting the operating profits. The plea of the assessee is to be accepted, more so, there is a binding decision of the co-ordinate Bench of the Tribunal in the case of Transwitch India Pvt. Ltd. v. DCIT in ITA No.6083/Del/2010 for the assessment year 2006-07, wherein the adjustments towards abnormal expenses incurred by the assessee to be considered while determining the ALP. Accordingly, we direct the TOP to consider the same while determining the ALP.

8. The next ground is with regard to variation in exchange rate adjustment while determining the ALP. According to the ld. AR, the assessee entered into contract in adverse prices fixed on the prevailing exchange rate and due to fluctuation in exchange rate, there is loss and that exchange fluctuation to be considered while determining the ALP.

9. We find force in the argument of the ld. AR. It is normal that exchange rate is subject to fluctuation due to economic conditions. While determining the ALP, one has to consider these factors, more so, our view is fortified by the decision of the Tribunal in the cases of Honda Trading Corp. India Pvt. Ltd. v. ACIT in ITA No.5297/Del/2011 for the assessment year 2007-08 and DHL Express (India) Pvt. Ltd. v. ACIT in ITA No.7360/Mum/2010 for the assessment year 2006-07. Accordingly, we direct the TPO to provide considerable exchange fluctuation adjustment while determining the ALP. Accordingly, this issue is remitted to the file of the TPO for determining the ALP after considering the above three components, i.e. customs duty adjustment, air freight adjustment and foreign exchange fluctuation adjustment." (emphasis supplied)

6. From the above, it is clear that though the issue relating to Customs Duty Adjustment, Air Freight Adjustment and

Foreign Exchange Adjustment were directed to be reconsidered by the Transfer Pricing Officer for determining the Arms Length Price (ALP) in the case of the Assessee, the Tribunal has, in fact, fixed how such adjustments have to be made or not to be made. This hardly leaves any discretion to deal with these issues afresh with the Transfer Pricing Officer, since the Transfer Pricing Officer, being the lower Authority, would be bound by the observations and findings of the Tribunal.

7. This, in our opinion, frustrates the very purpose of remand for enquiry by the Transfer Pricing Officer into these three issues by the Transfer Pricing Officer, as directed by the Tribunal itself. Therefore, we allow the present appeal of the Revenue and while upholding the remand order passed by the Tribunal, we observe that the Transfer Pricing Officer will pass such fresh order in pursuance of the remand directions, uninfluenced by the observations of the Tribunal, on the merits of the case. It goes without saying that the Assessee will be again given the due opportunity of hearing to make out its case before the Transfer Pricing Officer and fresh orders may be passed by the Transfer Pricing Officer, after providing reasonable opportunity of hearing to the Assessee in this regard.

8. With the above observation, the appeal of the Revenue is allowed. No costs.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

kpl Sub Assistant Registrar

To

1. The Income Tax Appellate Tribunal
Madras 'D' Bench, Chennai.

2. The Principal Commissioner of Income Tax 4,
No,121, Mahatma Gandhi Road,
Chennai - 600 034.

3. The Deputy Commissioner of Income Tax,
Transfer Pricing Officer V, Chennai.

+1cc to Mr.Karthik Ranganathan, Advocate, S.R.No.11589

+1cc to M/s.Subbaraya Aiyar, Advocate, S.R.No.11103

TCA No.138 of 2017

VD(CO)
SSM(01/04/2019).