IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

ITA No.1523/Del./2022
(ASSESSMENT YEAR : 2017-18)

Honda Motorcycle and Scooter India Pvt. Ltd., Plot No.1, Sector 3, IMT Manesar, Gurgaon – 122 050 (Haryana).	vs.	ACIT, Circle 1 (1), Gurugram.
(PAN : AAACH7467D)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Harpreet Singh Ajmani, Advocate
Ms. Manasvini Bajpai, Advocate
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 24.07.2023
Date of Order : 22.08.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal filed by the assessee is directed against the order of Assessing Officer passed pursuant to the directions of the Dispute Resolution Panel (DRP) for the assessment year 2017-18.

2. The grounds of appeal taken by the assessee read as under :-

> "1. That on the facts and in the circumstances of the case and in law, the order passed by the Assessing Officer ["AO"] under section 143(3) of the Income-tax Act, 1961 ("Act"), to the

extent prejudicial to the Appellant, is bad in law and void ab-initio.

2. That the AO/DRP has erred in not following judicial discipline in view of the orders of this Hon'ble ITAT in the Assessee's own case for AY 2012-13 [ITA No.7714/DEL/2017], AY 2013-14 & AY 2014-15 [ITA No.7463 & 7464/DEL/2018] and AY 2015-16 [ITA No.9073/De1/2019], wherein similar grounds are allowed by this Tribunal.

A. Transfer Pricing Adjustments

3. That the TPO/DRP grossly erred in law in making/sustaining TP adjustments of INR 21,97,22,094/- being payment of Export Commission amounting to INR 20,92,73,824/- and on payment of Model Fee amounting to INR 1,04,48,270/-

4. That the TPO/DRP have erred in rejecting the transfer pricing methodology adopted by the Appellant for benchmarking its international transactions without revealing any basis thereof.

5. The TPO/DRP erred in rejecting the 'combined transaction approach' adopted by the Assessee for benchmarking its operating profitability using the TNMM method.

6. That without prejudice, the TPO/DRP erred in applying the CUP method and the "benefit test" for determining the ALP of the transactions at NIL.

7. That the TPO/DRP erred in making/upholding the adjustments while applying the principles of "commercial expediency", which approach had been rejected judicially and is not mandated under the provisions of section 92CA of the Act.

Re : Payment of Export Commission -INR 20,92,73,824/-

8. That the TPO/DRP erred in recomputing the arm's length price of the international transaction relating to payment of

export commission whereby making an adjustment of INR 20,92,73,824/.

8.1 The TPO/DRP completely erred III not appreciating the functional profile of the Assessee and also completely erred in not appreciating that the transaction of payment of export commission was intrinsically linked with the main activity of manufacture and sale of products and as such could not be alienated to be bench marked separately.

8.2 That the TPO/DRP also erred in coming to the conclusion that there was a service which was being rendered by the Appellant to the AE in terms of developing the brand of the AE in the territories.

8.3 That the TPO/DRP have completely contradicted themselves vis-a-vis this transaction because at one place they hold that it is the Appellant is providing services for building the brands of the AE in terms of its export activities and on the other hand by holding that the services provided by HMJ in terms of providing the dealer network was only an incidental benefit to the Appellant being a part of the MNE and as such would be covered by Para 7.13 of the OECD Guidelines.

8.4 That the TPO/DRP also grossly erred in characterizing the Assessee as a "contract manufacturer" for its export business while selectively reading provisions of the Export Agreement dated 13.07.2000 and which approach has already been rejected by the Tribunal in the preceding years.

8.5 That without prejudice, the TPO/DRP also failed to appreciate that under the export agreement the facility of providing access to the export markets was in itself a benefit for which payment of export commission was warranted.

8.6 That the TPO/DRP also grossly erred in law in understanding the supply chain model in relation to the payment of export commission and also completely failed to appreciate that merely because orders were received from the AEs in those territories would not render the assessee as a contract manufacturer.

8.7 That the TPO/DRP also completely failed to appreciate that the profit margins from the export business were significantly higher even after incurring the expenditure on account of export commission.

8.8 That the TPO/DRP completely failed to apply the correct transfer pricing approach for determining the ALP of this international transaction and further failed to bring any evidence on record that the payment of export commission was in any way excessive as compared to independent transactions of similar nature.

8.9 That the TPO/ DRP erred in rejecting the alternate analysis submitted by the Appellant using CUP as a most appropriate method on the basis of lack of similar comparable/s and stressing on the need of product similarity in applying CUP on one hand and on the other hand applied CUP in a manner which is fundamentally flawed.

Re: Payment of Model Fee -INR 1.04.48.270/-

9. That the TPO/DRP erred on facts and in law making adjustment of INR 1,04,48,270 being Model Fee paid by the Appellant to Honda Motors Japan (HMJ) for exports to AEs.

9.1 That the TPO/DRP completely failed to appreciate that the payment of Model fee is paid for launch of new models/upgraded models as per the terms of the Technical Collaboration Agreement dated 13.07.2000 (refer Article 11.1 of the Agreement).

9.2 The TPO/DRP completely erred in not appreciating the functional profile of the assessee and also completely erred in not appreciating that the transaction of payment of Model Fee was intrinsically linked with the main activity of manufacture and sale of products and as such could not be alienated to be bench marked separately.

9.3 That the TPO/DRP also failed to appreciate that under the Technical Collaboration Agreement the technical know-how was provided for manufacture and modification and upgradation of products.

9.4 That the TPO/DRP grossly erred in re-determining the arm's length price of the international transaction involving 'payment of model fees' paid for 'Color & stripchange' as 'Nil', arbitrarily alleging that the same does not require any specialized technical insights and without reasonably applying any prescribed methods, thereby, violating the basic principles of Indian TP regulations.

B. Corporate tax grounds

Re: Expenditure o[Signage 's -INR 54,57,713/-

10. That the AO/DRP erred in treating an Amount of INR 54,57,7l3/- incurred on Signage's as being capital in nature.

10.1 That AO/DRP erred in not appreciating that expenditure on Signage's displayed at the location of the dealers of the Assessee were for sales promotion and as such was an expenditure in the nature of trading activity and allowable as revenue expenditure.

10.2 That the AO/DRP failed to appreciate that the expenditure on Signage's did not result in any enduring benefit or bring into existence any asset.

10.3 Without prejudice to the grounds above, the AO/DRP has erred in not allowing the depreciation on the carrying value of the Signage expenditure which was capitalised by the AO during the previous assessment proceedings for A Y 2012-13 to 2015-16.

Re: Sales tools Expenses -INR 1,34,45,919/-

11. That the AO/DRP grossly erred in disallowing an amount of INR 1,34,45,919/- being sales tools expenses under section 37 of the Act.

11.1 That the AO/DRP grossly erred in introducing a new condition under section 37 of the Act that for allowance of expenditure, the same should have been incurred only under a pre-existing contractual liability.

11.2 That without prejudice to the above ground, the AO/DRP grossly erred in not appreciating the fact that the Appellant was entitled to make payments to the dealers in respect of advertising material as per the dealer agreement.

11.3 That the AO/DRP also erred in law in not appreciating that even if the expenditure resulted in benefit to the dealers (third parties), the same was still an allowable expenditure being incurred wholly and exclusively for the purpose of business of the Appellant.

11.4 The AO/DRP also erred in not appreciating that the sales tool expenses were incurred in respect of standardisation of the dealer's showrooms who were selling the product's manufactured by the Appellant and hence the expenditure was wholly and exclusively for the purposes of the Appellant's business.

11.5 That the AO/DRP erred in making the above disallowance when there was no dispute regarding the genuineness of such expenditure.

Re: Capitalization or Royalty -INR 159.17,81,250

12. That the AO/DRP grossly erred in coming to the conclusion that 25% of the running royalty of INR 848,95,00,0001- was to be treated as capital in nature as it resulted in enduring benefit to the Appellant.

12.1 That the AO/DRP erred in relying on the judgment of the Supreme Court in the Appellant's sister company's case, which was distinguishable on facts and related to the acquisition of know-how for the setting up of the manufacturing facility.

12.2 That the AO/DRP also completely failed to appreciate that the payment of running royalty by the Appellant was in respect of up gradation of technology and was revenue in nature.

12.3 That the AO/DRP completely failed to appreciate that the running royalty is intrinsically linked to the trading activity i.e. manufacture and sales of products.

12.4 That the AO/DRP also failed to appreciate that arbitrary allocation of 25% of the running royalty was contrary to any settled position of law and could not be sustained.

12.5 That the AO/DRP also completely failed to appreciate that the Appellant did not acquire any proprietary rights in the know-how and was merely granted the right to use the technology for the purposes of manufacturing two-wheelers.

Re: Claim or Deduction or expenses of INR 265, 78,13,0701- in respect or Technical Know how

13. That the AO/DRP have erred in not allowing deduction of expenses of INR 265,78,13,070/- in respect of Technical know-how duly claimed before the AO and DRP.

13.1 That the AO/DRP have erred in not allowing deduction of expenses of 265,78,13,070/- in respect of Technical know-how in utter disregard to circular no. 14(XL-35) dated 11.04.1955.

Re: Disallowance u/s 80G- INR 2,33. 71,684/-

14. That the AO/DRP erred on facts and in law in disallowing deduction claimed u/s 80G of the Act to the extent of INR 2,33,71,684 alleging that expenses incurred on account of Corporate Social Responsibility ("CSR") are not eligible for deduction u/s 80G of the Act.

14.1 That the AO/DRP erred in disregarding the fact that the deductions claimed under section 80G of the Act pertain to eligible payments specified under section 80G of the Act.

14.2 That the AO/DRP erred in disregarding the fact the donations made are genuine and the assessee has duly acquired certificates u/s 80G while making such donations.

Re: Disallowance U/S 80JJAA - INR

15. That the AO/DRP erred on facts and in law in disallowing deduction claimed u/s 80JJAA of the Act to the extent of INR 30,00,253/-.

15.1 That the AO/DRP erred on facts and in law by applying the provision of amended section to the fact of case while disallowing the claim u/s 80JJAA.

15.2 That the AO/DRP grossly erred in not appreciating that the claim was made as a part of one of the three Assessment Years under pre-amended section 80JJAA where conditions such as wages cannot exceed INR 25,000 per month and that workmen should participate in recognized provident fund were not prescribed under the Act and thus were not applicable for making the claim.

Re: Payment o[Gratuity - INR 20,89,14,750

16. That on the facts and circumstances of the case and in law, in relation to additions made by the AO basis intimation issued under section 143(1) of the Act.

16.1 That AO has erred in passing a non-speaking order under section 143(3) of the Act and as such no details or findings or reference is mentioned basis which addition is made relying on the intimation issued by CPC under section 143(I) of the Act.

16.2 That the AO erred in rejecting the revised income filed by the Assessee and sustaining the addition made in the intimation issued by CPC without issuing show-cause notice prior to making/sustaining additions based on the adjustments made to the returned income in the intimation issued under section 143(1) of the Act which is against the principles of natural justice.

16.3 That on the facts and circumstances of the case and in law, the AO has erred in making addition in relation to excess allowance claimed by the Assessee under section 43B of the Act without appreciating that the differential amount has already been disallowed by the Assessee in the ITR form, thus leading to double disallowance of same amount in the hands of the Assessee which is totally against the provisions of law.

16.4 That the AO erred in not following the direction issued by the DRP in Para 5.9.1 of the Directions issued wherein the AO was directed to consider the facts and pass a speaking order.

Re: Education Cess

17. That the AO/DRP erred in disallowing the claim of Education Cess amounting to INR 20,95,70,801/- as additional claim raised during assessment.

17.1 That the DRP erred in not appreciating that 'cess' will not partake the character of 'tax' as it a form of 'fee' being charged for a particular purpose as held by the constitutional bench of the Hon'ble Supreme Court in the case of Hinger Rampur Coal Co. Ltd. & Ors. v . State of Orissa & Ors. [(1961) 2 SCR 537].

17.2 That the amendment brought in by the legislature cannot be applied retrospectively and that it cannot override the Constitution bench judgment of the Hon'ble Supreme Court.

Re: Consequential Grounds

18. That the AO has erred in initiating penalty proceedings under Section 270A of the Act."

3. Apropos issue of transfer pricing adjustment related to export commission : The assessee is a subsidiary of Honda Motor Co. Ltd. Japan. Honda group is engaged in the business of manufacture and sale of motorcycles and scooters. Honda is one of the world leaders in manufacture and distribution of automobiles, motorcycle and power products and has substantial expertise, technical know-how, brand equity, a worldwide marketing network in the above field. The assessee had entered into an Export Agreement dated 13.07.2000 under which Honda Motor Co. Ltd. Japan (HMJ) accorded consent to the assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports. The assessee in its

TP study had benchmarked the transactions related to Export Commission taking combined transaction approach using TNMM. The TPO rejected this approach without any basis and selected two transactions and decided to benchmark them separately using CUP method. On such payment of export commission, the TPO / DRP determined the arm's length price at NIL, for the following reasons-

(a) No service was provided by the AE to deserve any commission.

(b) The assessee was a contract manufacturer and only exports as per orders received from the AE

4. Ld. Counsel of the assessee submitted that the transaction of payment of export commission was intrinsically linked with the main activity of manufacture and sale of products and as such could not be alienated to be bench marked separately. He submitted that the TPO order is self contradictory because at one place, it is held that the assessee is providing services for building the brands of the AEs in terms of its export activities and on other hand, it was held that the services provided by HMJ in terms of providing the dealer network was only an incidental benefit to the assessee being part of MNE and as such would be covered by Para 7.13 of the OECD Guidelines. He submitted that the assessee paid the export commission to its parent entity (HMJ) to get access to various markets globally and this access is only possible due to the

existence of the AE's network of HMJ in these countries. Ld. Counsel further submitted that the TPO observed that no special benefit was received by the assessee by the said expense and as such, no service was provided by the AE and therefore, held the arm's length price ('ALP') of export commission paid to be Nil. He submitted that the ITAT had remanded this adjustment in assessee's own case for AY 2008-09 to 2011-12. He submitted that the TPO has not followed the directions of the ITAT and has determined the Arm's Length of the transaction to be at NIL. Thus, the department has consistently disregarded the directions of this Tribunal as well as the decisions of the Hon'ble High Court. He further submitted that be that as it may, after considering the outcome of the remand proceedings, coordinate bench of this Tribunal has decided the issue in favour of the assessee for appeals pertaining to AY 2013-14 and 2014-15. He also submitted that this issue is covered by the decision of ITAT dated 09.11.2021 in assessee's own case for AY 2016-17 bearing ITA No. 477/Del/2021 and order dated 19.05.2021 in assessee's own case for AY 2015-16 bearing ITA No. 9073/DEL/2019.

5. We have heard both the parties and perused the records. We find that this issue is squarely covered in favour of the assessee by the decisions of ITAT in its own case for AYs. 2015-16 & 2016-17 (supra).

The relevant portion of ITAT order for AY 2016-17 is reproduced hereunder :-

> "8. Ground number 2 is with respect to the transfer pricing adjustment on account of payment of export commission of ₹ 495,348,444/– and ₹ 91,598,320/– on payment of royalty on export to associated enterprises. The learned transfer pricing officer has rejected the transfer pricing methodology adopted by the assessee for benchmarking its international transaction. The learned TPO also rejected principles of commercial expediency argued by the assessee stating that it is not mandated as per the provisions of Section 92CA of the act. The determined ALP of these transactions at Rs Nil. The coordinate bench in assessee's own case for assessment year 2015 – 16 has considered this issue as under:-
>
> > "7. Ground No. 2 is with respect to adjustment on account of export commission and royalty paid to associated enterprises. This is challenged by the assessee from Ground No. 2 to Ground No. 7 of the above appeal.
> >
> > 8. The ld. AR submitted this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case in ITA No. 7463 and 7464/Del/2019 for Assessment Year 2013-14 and 2014-15 dated 30.09.2020. He submitted that there is no change in the facts and circumstances of the case with respect to TPO adjustment of export of commission. With respect to the transfer, pricing adjustment related to royalty paid on sales he also submitted that the coordinate bench in assessee's own case for Assessment Year 2008-09 to 2014-15 allowed this ground in favour of the assessee holding that the assessee has sold the good on principle-to-principle basis and has received the sale consideration. He further relied upon the decision of the coordinate bench in assessee's own case in ITA No. 7963 and 7964/Del/2019 for Assessment Year 2013-14 and 2014-15. Thus, he submitted that this issue is fully covered in favour of the assessee by the order of the coordinate bench in assessee's own case and therefore this ground should be allowed.

9. The ld. DR vehemently supported the orders of the lower authorities. He submitted that the coordinate bench while deciding the case of the assessee has not considered the decision of the Hon'ble Supreme Court in case of Honda Seil Cars Ltd. 319 ITR 713 but coordinate bench has mainly relied upon the Article 2, 13 and 11 of the technology know how agreement. He extensively relied on paragraph 23 to 25 of the orders of the Hon'ble Supreme Court. He further relied on Article 15 and Article 17 of the above agreement. Therefore, he submitted that the above argument might be considered where the royalty is considered as capital expenditure.

10. We have carefully considered the rival contentions and perused the orders of the lower authorities. Ground number 2 - 5 and challenging the rejection of the transfer pricing methodology adopted by the assessee for benchmarking international transaction as well as the application of the principles of commercial expediency and need test applied by the learned transfer pricing officer and confirmed by the learned dispute resolution panel. The ground number 6 along with its sub- grounds (14 in number) is in substance challenging the determination of the arm's-length price of international transaction of export commission of ₹ 484,862,986 at Rs. nil. The ground number seven is with respect to the payment of royalty to its associated enterprise of ₹ 120,022,040/- to Honda Motors Japan for export, which is also determined by the learned transfer pricing officer at Rs. nil holding that there is a failure of benefit test. The claim of the assessee before us that both these issues are covered in favour of the assessee by the decision of the coordinate benches in assessee's own case in earlier years. We have also considered the decision of the coordinate bench in assessee's own case for AY 2013-14 and 2014-15 where, it is claimed that the issue is squarely covered in favour of the assessee.

11. With respect to the TP adjustment to the export commission, which is claimed by the assessee that it is intrinsically, looked that the main activity of manufacturing and sale of products and as such could not be identified separately for benchmarking. It is also

claimed by the assessee export commission is paid to its parent entity to get access to various global markets where the AE exists as network. The identical issue arose in the case of the for Assessment Year 2013-14 and 2014-15 wherein, coordinate bench deleted adjustment relying on the decision of ITAT in assessee's own case for Assessment Year 2008-09 in ITA No. 132/Del/2013. The ITAT quoted in para no. 12 and 13 of that order has followed the same. With respect to the issue of adjustment on account of payment of export commission, the coordinate bench has dealt with the same at para No. 7. The coordinate bench has given its reasons to delete the above adjustment in para No. 7.6 to 7.17 as under:-

"7. Now, we will address to the grievance relating to addition on account of payment of export commission - Under technical know-how agreement dated 13.07.2000 the assessee was entitled to use technical know-how provided by Honda Motor Company Limited Japan for manufacture and sale of two wheelers and parts in India and was not authorized to sell its products or part in any other territory than in India without prior written consent of HMJ. The assessee entered into a separate export agreement dated 13.07.2000 under which HMJ accorded consent to the assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports.

7.1 Under TNMM analysis the operating profit ratio of the assessee @ 4.60% was higher than average of operating margin of -2.24% earned by the comparables companies. Considering that the operating profit margin of the selected comparable companies was lower than the OPM of the assessee, such international transactions were considered as being at arms length TNMM.

7.2 The TPO held that the assessee has not received any services that an independent entrepreneur would be willing to pay for and accordingly considered the arms length price of the said transaction of payment of export commission of nil.

7.3 While treating the ALP as nil the TPO held that the assessee is a contract manufacturer and further held that by its export activities the assessee is developing the brand of the AE and actually has carried out service to the AE.

7.4 It was also pointed out that the assessee has made export to AE's related parties in Chile, Peru and Mexico and such exports are apparently for the benefit of the AE's of parent company.

7.5 The TPO/DRP/DR were of the strong belief that the services rendered by the AE for facilitating exports were unclear.

7.6 At the very outset we have to state that the observations of the TPO/DRP that the assessee was only a contract manufacturer has been out rightly rejected by the Tribunal in assessee's own case in earlier assessment years.

7.7 The primary issue which needs to be examined is whether the assessee was benefited by making such export sales. The following chart would throw light on this issue:-

7.8 From the above chart it can be seen that the average price in respect of exports to AE's was higher than the price of the same product sold in the domestic market to non AE.

7.9 Further we find from the comparative profitability statement, the profitability derived by the assessee from export of goods at 8.91 % is significantly higher than the profitability derived by the assessee from sale of goods in the domestic market @ 5.50%. The comparative profitability statement is as under:-

7.10 For the sake of repetition, the entire edifice of the TPO/DRP's finding is based upon the assumption that the assessee is operating as a contract manufacturer with respect to export of good.

7.11 In our understanding of the facts of the case in hand, we are of the considered view that the TPO/DRP have grossly failed in distinguishing between the function of the license manufacturers and contract manufacturers.

7.12 A perusal of the business profile of the assessee viz-a-viz agreement with the parent, we find that the assessee is a licensed manufacturer such as the assessee, the seller is entitled to compensation which includes returns attributable to exploitation of intangibles such technical know-how etc i.e. market determined prices. On the other hand, in the case of a contact manufacturer, the manufacturer acts in accordance with the instructions of the buyer and is only entitled to routine cost plus returns. It would be pertinent to refer to the decision of the Tribunal in assessee's own case in ITA No. 132/Del/2013 held as under:-

7.13 A similar decision was taken by the Tribunal in the case of Hero Motocorp Limited in ITA No. 5130/Del/2010 wherein the Tribunal has held as under:-

7.14. In the light of the above the first limb of finding of the TPO/DRP is removed.

7.15. We find that while making the disallowance the TPO has held that assessee failed to demonstrate the benefits derive by it. This proposition of the TPO/DRP also do not hold any water in the light of the principle laid down by the Hon'ble jurisdiction High Court of Delhi in the case of Cushman and Wakefield (367 ITR 730). It would not be out of place to mention here that in earlier assessment years, this quarrel was restored to the files of the TPO to decide the issue afresh in the light principle laid down by the Hon'ble High Court in the case of Cushman and Wakefield (supra).

7.16. We have been told that in the set aside assessment proceedings the TPO has once again made the addition following the earlier findings that the assessee had failed to provide evidence.

> 7.17 Considering the facts of the case as mentioned elsewhere we are of the considered view that the assessee has successfully demonstrated not only the benefits but has also shown that the profitability is higher (as per the charts exhibited elsewhere). Considering the totality of the facts we have no hesitation in directing the AO/TPO to delete the impugned addition on account of export commission.
>
> 7.18 This ground is accordingly allowed."
>
> 12. Thus, we find that the both the issues of transfer pricing adjustment with respect to determination of ALP of Rs. Nil on export commission and payment of royalty are decided in favour of the assessee. The ld. DR could not show as well as the ld. AR vehemently submitted that there is no change in the facts and circumstances of the case. In view of this Ground Nos.2 to seven of the appeal are allowed."
>
> 9. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2015–16, we allow ground number 5 of the appeal and thereby direct the learned transfer pricing officer/learned assessing officer to delete the adjustment on account of the arm's-length price of the export commission payment of ₹ 495,348, 444/–."

6. Following the aforesaid precedent, we allow this ground and thereby direct the TPO/AO to delete the adjustment on account of ALP of the export commission payment.

7. Apropos issue of transfer pricing adjustment relating to model fee paid for strips and color change : The TPO/DRP have made the aforesaid disallowance by holding that model fee paid by the assessee to its AE is nothing but in the nature of royalty which is already paid separately to the AE. It was held that the model fee appearing as a separate transaction is

in essence a duplicate transaction already subsumed in the royalty payment by the assessee to its AE.

8. The submissions of the assessee in this regard are that the assessee has entered into a Technical Know- How Agreement dated 13.07.2000 with is parent entity HMJ to use the technical know- how for manufacture and sale of two wheelers and parts in India. The products offered by the assessee in the Indian market are required to be constantly updated owing to the changes in the technology and the needs of the industry. Over the years, HMJ has invested considerable amount of money for the development of new products based on the research analysis of the domestic market provided by assessee. It is pertinent to note that the development of new models is imperative in the industry in which the assessee operates because constant updation of the products/ models and launch of new models is one of the key business drivers for the assessee's business. The Model Fees is paid to HMJ under the above stated agreement and the relevant clauses of the agreement in this regard are reproduced below for ready reference:

> "Article 1. DEFINITIONS
>
> Unless otherwise clearly required by the context, the following terms as used in this Agreement, shall have the respective meanings as defined below:
>
> "1. The term. "Products" shall mean the Honda two-wheelers and three-wheelers, the specific models and types of which are listed in Exhibit I attached hereto, and such additional models and

types of two-wheelers and three-wheelers as may from time to time be decided as agreed upon by the parties hereto, in writing after execution of this Agreement and shall include new models or types of two-wheelers and three-wheelers changed pursuant to the Model change (as defined hereinbelow). Such additional models and types of two-wheelers and three-wheelers and such new models or types of two-wheelers and three wheelers pursuant to Model change shall be specified in a "Model Agreement" (hereinafter referred to as the "Model Agreement") to be entered into between the parties hereto in each instance, according to which Exhibit I hereto shall be revised;

"Article 11 - CONSIDERATION

11.1 In consideration of the right and license granted to the LICENSEE under Article 2 hereof and upon furnishing of the Technical Information. under Article 3.2 hereof, the LICENSEE shall pay to the LICENSOR the following:

a) the amount of lump-sum fee in respect of the initial model at the rate specified in the Exhibit I hereto.

b) The amount of additional lump-sum fee and the manner of payment thereof, shall, for each additional model or type of product as agreed upon by the parties, be decided under New Model Agreement for each additional model or type of product."

Thus, as part of the agreement, the assessee pays a model fees for launch of new models/ upgraded models as per Article 11.1 of the Agreement. The fee is charged on a lump sum basis, depending on the launch of new models/upgraded models. The TPO has not relied on any provisions of the Act or the methods prescribed under the Rules for benchmarking the transaction. The TPO has just picked up the amounts from the details provided by the assessee with regard to payment of Model Fee and

decided to take it as NIL for the fee paid for modifications related to 'color and strip changes'. The DRP / TPO despite considering the above transaction exceeded his jurisdiction in disallowing mark-up charged by the AE in complete disregard to the contractual arrangement between the parties. The DRP / TPO whilst benchmarking an international transaction, their scope is limited to determination of arm's length price and it is not open to step into the shoes of a businessman to adjudge commercial expediency of a transaction. Ld. Counsel of the assessee placed reliance on the following decisions:

(i) Hon'ble Delhi High Court in Sony Ericsson Mobile Communication India (P.) Ltd. v. CIT ITA No. 16/2014

(ii) Sabic Innovative Plastics India Pvt Ltd Vs Assistant Commissioner of Income Tax (ITA No.1125/Ahd/ 2014 and IT (TP) No. 427/Ahdfl6 Assessment years: 2009-10 and 2011-12

(iii) Frigoglas India Pvt. Ltd. vs DCIT [ITA No. 1906/Del/2015]

(iv) Hero Motor Corp v. DCIT, [2019] 108 taxmann.com 433 (Delhi - Trib.)

(v) DCIT v. Honda Cars India Ltd., [2020] 180 ITD 235 (Del. Trib.)

9. Upon careful consideration, we find that the payment is according to an agreement. The disallowance has been made by the TPO not on the basis of any method prescribed under the rules or benchmarking the transactions. The Revenue authorities cannot sit into the shoes of

businessman to decide which agreement should be made or which should not be. Hence, in effect, authorities below have opined that payment has no commercial expediency. This, in our considered opinion, is not as per the provisions of the Act. Hence, we accept the submissions of the ld. Counsel of the assessee and direct that the expenditure should be duly allowed.

10. Apropos disallowance of Rs.54,57,713 of signage expenses as capital in nature : On this issue, ld. Counsel of the assessee submitted that the assessee had purchased glow sign board/ signals, which were displayed at the location of the dealers of the assessee. The sole purpose of incurring these expenses is to increase the sales at the stores etc. and thus is solely for the purpose of business and allowable as revenue in nature. At the same time, these are not giving any enduring benefit to the assessee, given the dynamic and competitive nature of the business. The Assessing Officer disallowed the claim of the assessee in a cryptic manner. He observed that the explanation given by the assessee is not satisfactory and following the DRP directions held the expense to be capital in nature and allowed depreciation @15%. The expenditure on Sign boards is revenue in nature and ld. Counsel of the assessee placed reliance on the following decisions :-

(i) CIT v. Pepsico India Holdings Pvt. Ltd. [(2007) 207 Taxman 5 (Del)],

(ii) CIT v. Orient Ceramics & Inds Ltd. [(2013) 358 ITR 49(Del),

(iii) CIT vs Rakhra Technologies P. Ltd. [(2012) 347 ITR 484 (P&H)]

Ld. Counsel further submitted that this issue is covered in favour of the assessee in assessee's own case for AY 2012-13 to 2016- 17. In this regard, he referred to the decision of ITAT in assessee's own case for AY 2016-17 & 2015-16.

11. Upon careful consideration and hearing both the parties, we find that this issue is squarely covered in favour of the assessee in assessee's own case for AY 2015-16 & 2016-17. For the sake of reference, relevant portion of the order of AY 2016-17 is given below :-

> "12. Coming to ground number 7 of the appeal with respect to the disallowance of expenditure of signage is of Rs.7,545,398/– we find that this issue is also been dealt with by the coordinate bench in assessee's own case for assessment year 2015 – 16 as under:-
>
> > "13. Ground No. 8 of the appeal is with respect to the expenses of signage, which was considered by the ld. AO as capital expenditure whereas the assessee claimed it to be revenue expenditure. On carefully consideration of rival contentions, we find that this issue is squarely considered the coordinate bench in ITA No. 7463 and 7064/Del/2018 at para No. 3 of the order. In that para the coordinate bench held that the order of ITAT in assessee's own case for Assessment Year 2012-13 in ITA No. 7714/Del/2017 wherein, as per para No. 26 the coordinate bench held that the expenditure on the signage is allowable to the assessee as revenue expenditure signage are fixed at dealers premises and it dies bit

satisfy the test of ownership with the assessee. Thus it was held that same is revenue expenditure as under:-

"3. Disallowance of expenditure on signages - A similar issue was considered and decided by the Tribunal in A.Y. 2012-13 in ITA No. 7714/Del/2017. The relevant findings read as under:-

"26. We have heard the rival contentions and perused the record. The expenditure was incurred on signage for display of the name of the assessee at the dealer's premises. However, once the same is fixed at dealers site then the Courts have held that it does not satisfy the test of ownership with the assessee and the expenditure is to be allowed as revenue expenditure, We find support from the ratio laid down by the Hon'ble Delhi High Court in CIT vs Honda Siel Power Products Ltd.(supra). Thus, we are of the view that the expenditure to the extent claimed by the assessee is to be allowed in the hands of the assessee and not/the entire expenditure. Ground of appeal No. 6 is thus partly allowed."

3.1 Respectfully following the decision of the coordinate bench, we hold accordingly."

14. Therefore, respectfully following the decision of the coordinate bench in assessee's own case ground No. 8 of the appeal of the assessee is allowed holding that signage expenditure of Rs.1,65,62,386/- is revenue in nature."

13. Therefore respectfully following the decision of the coordinate bench in assessee's own case, we also hold that signage expenditure is revenue in nature. Accordingly the disallowance of Rs.7,545,398/– is deleted and ground number 7 of the appeal of the assessee is allowed."

Following the aforesaid order of the coordinate Bench, we delete the disallowance and allow this ground of the assessee.

12. Apropos disallowance of sales tools expenses : These sales tools/fixtures are placed at dealer's outlets and are manufactured by third party in accordance with the specifications provided by the assessee. The sales tool subsidy expense represents 50% of the price charged by the third party manufacturer to manufacture such specified sales tool/fixtures which is borne directly by the assessee in accordance with the Agreement entered between Applicant and the third party manufacturer. The AO / DRP has disregarded this expense and held it to be of capital in nature as the same is not supported by the Agreement.

13. At the outset, ld. Counsel of the submitted that it is significant to bring to the attention of the ITAT that this is a contractual obligation and has been expended wholly and exclusively for the purpose of business of the assessee. AO/DRP disallowed the said expense holding not to be a contractual liability. It is a contractual liability and even otherwise allowable expenditure. In this regard, he relied upon the orders of Tupperware India (P) Ltd. Vs. CIT (2015) 234 Taxmann 56 (Del) and SA Builders Vs. CIT [2007] 288 ITR 1 (SC). He further submitted that this issue is squarely covered by the decision of the ITAT in assessee's own case for AY 2015-16 & 2016-17 (supra).

14. We have heard both the parties and perused the material on record and also the decisions of the coordinate Bench of the Tribunal in assessee's own case. The coordinate Bench of the Tribunal in AY 2016-

17 on this issue has held in favour of the assessee and the relevant portion of the said order is reproduced as under :-

> " Respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2015 – 16, we also hold that sales tool expenditure are revenue expenditure in nature and therefore the disallowance made by the learned assessing officer of Rs.1,92,90,061/- is directed to be deleted. Accordingly, ground number 8 of the appeal is allowed."

Hence, following the precedent, we delete the disallowance made by the AO and allow this ground.

15. Apropos the issue of capitalization of royalty expenses paid to HMJ : The assessee had paid Royalty expenses of Rs.848,95,00,000/- in lieu of granting license under the Royalty and Technical Know-how Agreement and INR 265,78,13,070/- in lieu of granting technical guidance under the Technical know - how Agreement. The assessee did not acquire any new asset or any enduring benefit from the payments made under the agreement. AO /DRP held it to be enduring benefit and hence capital relying upon the judgement of Honda Siel Cars of Royalty India Ltd. Vs. CIT (82 Taxmann.com 212). Ld. Counsel of the assessee submitted that the facts are distinguishable from the facts of the case of the assessee. He submitted that the Hon'ble Supreme Court has categorically held that the decision applies only to the payment of royalty made during the formative years and the year under consideration is the 15th year, thus payment cannot be said to be made for setting up of the

business. He submitted that the issue is also covered in favour of the assessee in assessee's own case for AY 2012-13 to 2016-17. He referred to the decision of ITAT in assessee's own case for AY 2016-17 (supra).

16. Upon careful consideration and hearing both the sides, we find that this issue is squarely covered by the decisions of ITAT in assessee's own case and the same was decided vide paras 16 to 18. For the sake of reference, we reproduced para 18 as under :-

> "18. The fact also shows that assessee was already engaged in the manufacturing of motorcycle and Scooter and payment of royalty expenses was not with respect to setting up of manufacturing facility. Therefore respectfully following the decision of the coordinate bench, we also allow ground number 9 of the appeal of the assessee and direct the learned AO to delete the addition of Rs.1,591,781,250/– on account of capitalisation of royalty expenses holding it to be revenue in nature.

Accordingly, following the aforesaid decision of the coordinate Bench of the Tribunal, we delete the addition made by the AO.

17. Apropos the issue of disallowance u/s 80G of the Income-tax Act, 1961 (for short 'the Act') : The assessee made certain donation to approved institutions or funds and claimed 50% of the total donation made as deduction u/s 80G. This amount also formed part of the CSR initiative of the assessee company which amounts to INR 22,81,29,964/-. It is observed that the assessee has duly disallowed CSR expenditure of INR 22,81,29,964/- debited to the statement of profit and loss under

section 37 of the Act. DRP rejected the claim of the assessee by saying that the donation is pursuant to the CSR policy of the company and lacks the test of voluntariness as required under section 80G. The AO has disallowed the claim on the ground that anything donation over and above the CSR u/s 80G will be only allowed as the CSR expense is not an allowable expense u/s 37 of the Act. Ld. Counsel of the assessee placed reliance on the following decisions :-

(i) JMS Mining (P.) Ltd. vs. PCIT [2021] 130 taxmann.com 118 (Kolkata - Trib.)

(ii) Goldman Sachs Services (P) Ltd. vs. JCIT (2020) (117 taxmann.com 535) {ITAT Bangalore}

(iii) First American (India) Pvt. Ltd. (ITA No. 1762/Bang/2019)

(iv) Allegis Services (India) Pvt. Ltd. (ITA No. 1693 /Bang/ 2019)

Ld. Counsel further submitted that if the intention was to deny deduction of CSR expenses under section 80G, appropriate amendments on lines of section 37(1) should also have been made under section 80G of the Act. In the absence of any such amendment, CSR expenses should not be disallowed under section 80G of the Act.

18. We have heard both the parties and perused the records. We find that ITAT, Bangalore Bench in the case of Goldman Sachs Services (P.) Ltd. (supra) has held that the other contributions made under section 135 (5) of the Companies Act are also eligible for deduction/s 80G of the Act

subject to satisfying the requisite conditions prescribed for deduction u/s 80G of the Act. For this purpose, the issue is remanded to the file of AO to examine the same whether the payments satisfy the claim of donation u/s 80G of the Act. We find that the case law is fully applicable to the facts of the case. There is no restriction in the Act that expenditure when disallowed for CSR cannot be considered u/s 80G of the Act. Hence, we remit the issue to the file of AO to verify whether these payments were qualified as donations u/s 80G of the Act or not, if they qualify as donation u/s 80G of the Act then the requisite amount deserves to be allowed.

19. Apropos issue of disallowance u/s 80JJAA of the Act : The assessee has claimed deduction u/s 80JJAA of the Act amounting to Rs.6,85,27,062/- in relation to employees/ workmen employed by the assessee during the year. The assessee claimed 1051 employees as are additional employees employed during the previous year as per the amended section from AY 2017-18. AO held that applying the amended section, out of 1051 employees, employees without PF number and employees having monthly salary above Rs.25,000 are held to be not eligible for deduction u/s 80JJAA of the Act. Ld. Counsel of the assessee placed reliance on the decision of CIT vs. Texas Instruments India (P.) Ltd. [2021] 127 taxmann.com 59 (Karnataka). Ld. Counsel for the

assessee submitted that sub-section 3 of section 80JJAA clearly states that unamended provision as existed prior to the amendment by Finance Act, 2016 shall apply to an assessee eligible to claim any deduction for any assessment year commencing on or before 01-04-2016. He further submitted that that deduction can be taken under section 80JJAA of the Act even when a workmen completes 300 days in 2 consecutive years and not necessarily in a single year since liberal interpretation is to be given to section 80JJAA of the Act keeping in mind the basic intent and purpose of introduction of such section.

20. Upon hearing both the parties and perusing the records, we agree that AO has erred in applying amended provisions of section 80JJAA of the Act. Hence, we remit the issue to the file of AO to examine the factual aspects in terms of the unamended provisions of section 80JJAA. The issue of liberal interpretation raised by the ld. Counsel for the assessee is not tenable. The AO will act as per the sanguine provisions of the Act.

21. Apropos issue of claim of deduction of expenses in respect of technical know-how : The assessee raised an additional claim of deduction of expenses of Rs.265,78,13,070/ - in respect of Technical Know how. The assessee contented that in light of Circular No. 14(XL-35) dated 11.04.1955, it has been made clarified by the CBDT that the

officers of the Department shall genuinely provide reliefs/remedies available to assessee in cases wherein the assessee has missed to claim any relief available to during the assessment and therefore the claim of deduction shall be allowed by the AO. AO / DRP summarily rejected the plea of the Appellant by placing reliance on the Hon'ble SC decision in the case of Goetze India Ltd. v. CIT, [2006] 284 ITR 323 (SC) and held that the assessee has raised the claim during the assessment proceedings by filing submission and not by filing revised return. Therefore, in light of the above-mentioned judicial precedent, AO/DRP rejected the additional claim of the assessee. Ld. Counsel of the assessee submitted that this issue is also covered in favour of the assessee in assessee's own case for AY 2013-14 to 2016-17. He further submitted that that the Revenue has not filed any appeal before the Hon'ble Punjab and Haryana High Court on this ground.

22. Upon careful consideration, we find that this issue is squarely covered by the decisions of the ITAT in assessee's own case in AYs 2013-14 to 2016-17. For the sake of reference, we are reproducing the relevant paras from the order of ITAT in AY 2016-17 as under :-

> "4. Ground No.10, reads as under:
>
> > 10. That the A.O/LEARNED DRP have erred in not allowing deduction of expenses of INR 250,17,14,636/- in respect of Technical know-how duly claimed before the A.O and DRP.

10.1 That the A.O/Learned DRP have erred in not allowing deduction of expenses of 250,17,14,636/- in respect of Technical know-how in utter disregard to circular no.14(XL-35) dated 11.04.1955.

5. Briefly, the facts relating to this issue are the assessee is a resident corporate entity and is a subsidiary of Honda Motorcycle Co. 3 ITA No.477/Del./2021 Ltd., Japan. Basically, assessee is engaged in the business of manufacturing and distribution of motorcycles, scooters etc. in India.

6. In the year under consideration, the assessee had paid Rs.250,17,14,636 towards fee for technical know-how. However, in the return of income, the assessee did not claim it as deduction.

7. In course of assessment proceedings, in submission dated 10.12.2019, the assessee claimed deduction of the aforesaid amount as Revenue expenses.

8. While examining the issue, firstly, the Assessing Officer observed that the claim cannot be allowed as the assessee should have claimed it in the return of income filed for the impugned assessment year.

9. In this context, he relied upon the decision of Hon'ble Supreme Court in case of Goetz India Ltd. vs. CIT – 284 ITR 323. Against the rejection of claim of deduction, assessee raised objection before learned DRP. However, relying upon its direction on similar issue in assessee's own case in assessment year 2015-16, learned DRP upheld the decision of the Assessing Officer.

10. Before us, learned counsel appearing for the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessment year 2015-16. In this context, he drew our attention to the relevant observations of the Tribunal while deciding the issue in ITA No. 9073/Del/19 dated 21.05.2021.

11. Learned Departmental Representative, though, agreed that the issue is covered by the decision of the Tribunal, however, he relied upon the observations of the Assessing Officer and learned DRP.

12. We have considered rival submissions and perused the material available on record.

13. On going through the material available on record, we find, the issue, whether, technical know-how fee paid is in the nature of capital or revenue expenditure is a legacy issue and is continuing from preceding assessment years. While, deciding the issue in the immediately preceding assessment year i.e. assessment year 2015-16, the Tribunal, in the order referred to above, followed its earlier decision and allowed assessee's claim. The relevant observations of the Tribunal in this regard are as under:

> "25. We have carefully considered the rival contention and perused the orders of the lower authorities. The identical claim with respect to the deduction of expenses in respect of technical knowhow arose before the coordinate bench in case of the assessee in ITA number 7463 and 7464/del/2018 for assessment years 2013 – 14 and 2014 – 15 wherein at para number six the coordinate bench dealt with this issue. The coordinate bench considered the decision of the coordinate bench in assessee's own case for assessment year 1213 as under :-
>
> "6. Additional claim of deduction of expenses in respect of technical knowhow- A similar issue has been decided in A.Y. 2012-13. The relevant findings read as under :-
>
> 47. Now coming to the next issue raised which is by way of additional ground of appeal. Since it is legal issue, it is admitted for adjudication. The assessee fairly pointed out that the lump sum Royalty was capitalized in its books of accounts and also not claimed as an expenditure in the return of income. However, because of the settled position by way of the decision of the Jurisdictional High Court in CIT v. Hero Honda Motors Ltd. (supra), the same is being claimed as business expenditure. The relevant findings are as under:-
>
> "The Hon'ble ITAT in the appellant's own case for assessment Year 2011- 12 reiterated that the facts in the case of the appellant differ from, the facts of Honda Siel Cars Ltd. (supra) because the amount expended is in relation to the running royalty and not for the purpose of setting up of plant.
>
> Further, reference is also made to the decision of the Delhi Tribunal in the case of Honda Cards India Ltd vs DCIT : ITA No.4491/Del/2014 dated 18.08.2017 (pages 414- 457 of the CLPB) and also confirmed by Hon'ble Delhi High Court in ITA No.45/2019 vide order dated. 13.05.2019 (refer pages 457A-457F of the CLPB), wherein the Tribunal after

> referring to the decision of the Supreme Court in the case of Honda Siel Cars (supra) observed that the Supreme Court has carved out the distinction between the payments at the time of setting up of the manufacturing facility and the payments made once the manufacturing process has already began. In the former case, royalty expenditure for setting up the manufacturing facility is capital in nature while in the latter case, the royalty expense is revenue in nature.
>
> "48. The SLP filed against the said decision has been dismissed by the Hon'ble Supreme Court. Applying the said ratio, we are of the view that the assessee was entitled to claim the aforesaid expenditure as revenue expenditure in the hands of the assessee.
>
> 49. Coming to the stand of the Revenue that where the assessee itself had not claimed as deductible in its hands, then the same cannot be allowed by the additional ground of appeal. We find no merit in the stand of the Ld. DR for the Revenue as there is no estoppel in law; especially where the issue has been decided by the Jurisdictional High Court on similar facts. Accordingly, we allow the additional ground of appeal raised by the assessee.
>
> 6.1 Respectfully following the findings of the coordinate bench we decide accordingly. In view of this issue being squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case for the earlier years, we respectfully following the same allow ground number 11 of the appeal of the assessee."
>
> 14. Factual position being identical in the impugned assessment year, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we direct the Assessing Officer to allow assessee's claim of deduction in respect of technical know-how payment. Ground is allowed."

Following the aforesaid decision of the coordinate Bench, we allow this ground in favour of the assessee.

23. Apropos issue of payment of gratuity : Ld. Counsel submitted that assessee urged before the DRP that the disallowance made for

Rs.20,89,14,750 under section 143 of the Act is bad in law. Ld. Counsel for the assessee submitted that the said disallowance is made without providing any opportunity to assessee and the draft assessment order passed by the NFAC is non- speaking on this ground. He submitted that the case of the assessee is that the AO erred in rejecting the revised income filed by the assessee and sustaining the addition made in the intimation issued by CPC without issuing show-cause notice prior to making/ sustaining additions based on the adjustments made to the returned income in the intimation issued under section 143(1) of the Act which is against the principles of natural justice. He further submitted that the AO has completely erred in making addition in relation to excess under section 43B of the Act without appreciating that the differential amount has already been disallowed by the assessee in the ITR form, thus leading to double disallowance of same amount in the hands of the assessee. Ld. Counsel for the assessee submitted that the DRP directed the AO to pass speaking order on the same. However, the AO has not dealt with the issue in the final assessment order. Against this, the assessee has filed an appeal before the AO to rectify the same, which is still pending.

24. Upon careful consideration, we find that the issue should be remitted to the AO in the interest of justice. AO shall factually verify the

averments of the assessee and decide as per law, by giving the assessee proper opportunity of being heard.

25. Apropos issue of education cess : On this issue, assessee is aggrieved by the levy of education cess. We have heard both the parties and perused the records. We find that the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of JCIT vs. Chambal Fertilizers & Chemicals Ltd. 450 ITR 164. Hon'ble Apex Court expounded that term 'tax' under section 40a(ii) of the Income Tax Act should include cess. Ld. Counsel of the assessee in his elaborate submission tried to distinguish this case law. But we are not convinced. Hence, we decide this issue in favour of Revenue.

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

Order pronounced in the open court on this 22nd day of August, 2023.

Sd/-	**sd/-**
(CHALLA NAGENDRA PRASAD)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 22nd day of August, 2023
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.