**IN THE INCOME TAX APPELLATE TRIBUNAL**
**BENGALURU "C" BENCH, BENGALURU**

**Before Shri N.V. Vasudevan, Vice President**
**and**
**Ms. Padmavathy S., Accountant Member**

| **IT(TP)A No. 879/Bang/2022**<br>(Assessment Year: 2018-19) | | |
|---|---|---|
| | | |
| M/s. Motorola Mobility India Pvt. Ltd.<br>5th Floor, No. 66/, Plot No. 5<br>Bagmane Tech Park, CV Raman Nagar<br>Bangalore 560093<br>PAN – AAFCP2261E | vs | DCIT, Circle 4(1)(1)<br>2nd Floor, BMTC Building<br>80 Feet Road, Koramangala<br>Bangalore 560095 |
| (Appellant) | | (Respondent) |

| | |
|---|---|
| Assessee by: | Shri Padam Chand Khincha, CA |
| Revenue by: | Ms. Neera Malhoatra, CIT-DR |
| | |
| Date of hearing: | 15/11/2022 |
| Date of pronouncement: | 17/11/2022 |

**ORDER**

**Per: Padmavathy, A.M.**

This is an appeal filed by the assessee against the final order of the assessment passed by the DCIT, Circle 4(1)(1), Bengaluru dated 28.07.2022 for AY 2018-19.

2. The assessee is primarily engaged in the business of software development services and trading in mobile phones. For AY 2018-19 the assessee filed return of income on 29.11.2018 declaring total income of Rs.173,06,46,940/-. Subsequently the case was selected for scrutiny under CASS and accordingly notice under Section 143(2) of the Act was duly served upon the assessee. The assessee has entered into international transactions of software development segment (SWD) and trading segment with its AE. Reference under Section 92CA of the Act was made to the Transfer Pricing Officer (TPO) for determination of the arms length price (ALP) of the

international transactions entered into by the assessee with its AE. The AO made transfer pricing adjustment as follows: -

a) Advertisement and publicity adjustment (AMP) in trading segment Rs.4,47,46,16,651/-
b) Software development segment Rs. 8,08,69,270/-

3. The AO passed draft assessment order incorporating the above TP adjustments. The AO further disallowed an amount of Rs.28,12,365/- in respect of employer's contribution to PF under Section 36(1)(va) of the Act on the ground that the payment was made beyond the due date. Aggrieved the assessee filed its objections before the DRP. The DRP disposed off the objections filed by the assessee vide directions dated 16.06.2022 directing partial relief to the assessee in the software development segment where by the TP adjustment was reduced to Rs.5,65,59,250/-. The AO passed the final assessment order pursuant to the directions of the DRP. The assessee is in appeal against the final assessment order.

4. **Summary of Grounds**

| Ground No. | Issues |
|---|---|
| 1-3 | General |
| 4-16 | TP adjustment of Software Development Segment (SWD) |
| 17-34 | TP adjustment on AMP |
| 35-37 | Academic in nature |
| 38 | Disallowance of Employees contribution to PF |
| 39 | Interest u/s 234C |

**<u>Software development segment</u>**

5. The financials of this segment as per TP report is as under: -

| Particulars | Software Development Services |
|---|---|
| Revenue | |
| Operating Revenue ("OR") | 1,04,02,94,428 |
| Operating Expenses ("OC") | 90,70,90,372 |
| Prifit Before Tax ("PBT") | 13,32,04,056 |
| Operating Profit ("OP") | 13,32,04,056 |
| **OP/OC** | **15.22%** |

6. The assessee chose 13 comparables as listed below:

| Sl. No | Name of the Company | Weighted Average in (%) |
|---|---|---|
| 1 | CG-VAK Software & Exports Ltd | 9.76 |
| 2 | DCIS DOT Corn Solutions India Pvt Ltd | 3 90 |
| 3 | EC Info Systems India Pvt Ltd | 40.97 |
| 4 | Evoke Technologies Pvt Ltd | 4.79 |
| 5 | Harbinger Systems Pvt Ltd | 6.70 |
| 6 | Isummation Technologies Pvt Ltd | 3.69 |
| 7 | OFS Technologies Ltd (now known as Acewinagritek ltd) | 25.86 |
| 8 | Orion India Systems Pvt Ltd | 21.97 |
| 9 | R Systems International Ltd | 21.32 |
| 10 | Rheal Software Ltd | -4.39 |
| 11 | Saga soft India Ltd | 17.52 |
| 12 | Sasken Communication Technologies Limited | 9.58 |
| 13 | Sure IT Solutions India Pvt Ltd | 18.40 |
| | **Median** | **9.76%** |
| | **35th Percentile** | **6.70%** |
| | **65th percentile** | **18.40%** |

7. Considering the 35$^{th}$ percentile (6.60%) and 65$^{th}$ percentile (18.4%) the assessee concluded that the margin of 15.22% is within the arms length. The TPO rejected the TP documentation of the assessee. The TPO therefore applied certain filters and selected fresh comparables whose 35$^{th}$ percentile (20.19%) and 65$^{th}$ percentile (26.83%) with a median of 23.60% which the TPO considered for arriving at the TP adjustment as under as listed below: -

| **SWD Segment** | | |
|---|---|---|
| **Particulars** | **Formula** | **Amount (in Rs.)** |
| Taxpayers operating revenue | OR | 104,02,94,428 |
| Taxpayers operating cost | OC | 90,70,90,372 |
| Taxpayers operating profit | OP | 13,32,04,056 |
| Taxpayers PLI | PLI=OP/OC | 15.22% |
| Median Margin of comparable set | M | 23.60% |
| Arm's Length Price | ALP=(1+M)*OC | 112,11,63,698 |
| Price Received | OR | 104,02,94,428 |
| **Shortfall being adjustment** | **ALP – OR** | **8,08,69,270** |

8. The DRP disposed off the objections filed by the assessee by directing inclusion of few more comparables and providing partial relief to the assessee to the tune of Rs.2,43,10,020/-

9. The learned A.R. during the course of hearing submitted that out of the grounds raised (Ground no.4 to 16) with regard to TP adjustment of software development segment if ground No. 7 with regard to application of turnover filter is adjudicated then the rest of the grounds will not be pressed. The learned A.R. further submitted that the turnover of the assessee for the relevant assessment year stands at Rs.104 crores. The TPO while applying the turnover filter of Rs.1 crore to 200 crores has applied only the lower turnover of 1 crore but failed to consider the upper turnover filter of 200 crores. The learned A.R. in this regard relied on the decision of the coordinate bench of the Tribunal in the case of Autodesk India Pvt. Ltd. (2018) 96 taxmann.com 363. The learned A.R. further submitted that out of the final list of 26 comparable if 11 comparable are eliminated by applying upper turnover filter the assessee's margin will fall within the the margin range between 35th percentile (11.65%) and the 65th percentile (20.62%) and therefore not TP adjustment would be warranted.

10. The learned DR supported the order of the lower authorities.

11. We have heard the rival contentions and perused the material on record. We notice that the issue of applying the upper turnover filter of 200 cores has been considered by the coordinate bench in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), where it is held that: -

> 17.7. We have considered the rival submissions. The substantial question of law (Question No.1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt.Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as

rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT Vs. Pentair Water India Pvt.Ltd. Tax Appeal No.18 of 2015 judgment dated 16.9.2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5.8.2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt.Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon’ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon’ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on

the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra).

12. Respectfully following the decision of the coordinate bench we hold that companies listed below whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies.

| S.No. | Company Name | Turnover (in Crs Approx) |
|---|---|---|
| 1. | Exilant Technologies Private Limited | 332 |
| 2 | Tech Mahindra Limited | 23,661 |
| 3 | L&T Infotech Limited | 6906 |
| 4 | Mindtree Limited | 5325 |
| 5 | Persistent Systems Ltd. | 1732 |
| 6 | Wipro Ltd. | 44710 |
| 7 | Tata Elxsi Ltd. | 1386 |
| 8 | Nihilent Ltd. | 280 |
| 9 | Thirdware Solution Ltd. | 204 |
| 10 | Infosys Ltd. | 61941 |
| 11 | Cybage Software Pvt Ltd. | 774 |

13. The rest of the grounds raised by the assessee with regard to the TP adjustment in the SWD segment are dismissed as not pressed.

**<u>TP adjustment towards AMP expenses</u>**

14. The TPO held that the AMP expenses incurred by the assessee is a separate international transaction and proceeded to make the TP adjustments towards the same for an amount of Rs.447,46,17,651

15. The DRP upheld the action of the TPO and sustained the adjustment in total in complete agreement with TPO in all aspects including consideration of the expenditure as international transaction, consideration of direct selling expenses as brand promotion expenses, consideration of Residual Profit Split Method (RPSM) as the most appropriate method and bench marking the transaction by application of Bright Line test method.

16. During the course of hearing the learned A.R. submitted a detailed written submission contending the TP adjustment made towards the AMP expenses and the same has been taken on record for consideration. The ld AR also submitted that the TPO did not make any adjustment towards the margins of trading segment which included the AMP cost and therefore he cannot consider the AMP expenses as a separate international transaction and make an adjustment towards the same. The learned A.R. further submitted that the assessee is covered by the decision of the coordinate bench in assessee's own case where the Tribunal has held that no separate adjustment is warranted where the AMP expenses have been part of the operating cost of trading segment.

17. The learned D.R. supported the orders of the lower authorities. The learned DR drew our attention to the findings of the DRP in para 22.4 of the order which is extracted below: -

> 22.4 Thus, if the Indian subsidiary is discharging both distribution and marketing functions -both the functions need to be benchmarked separately so as to determine as to whether it has been adequately compensated (for each of these functions) as per the arm's length principle. However, since the tax payer had not benchmarked the marketing function, or considered the same to be an international transaction, it was imperative for the TP0 within the provisions of section 92CA(3) of the IT Act in accordance with section 92 CA(1) and 92CA (2) to cull out the said transaction and determine the ALP of this International Transaction on the basis of material or information or documents available with him. The Hon'ble Delhi High Court has upheld this action of the TPO, culling out this embedded international transaction. However, the means of identification Of such international transaction as applied by TPO (the bright line method) has only been rejected.

The learned D.R. therefore submitted that the adjustments towards AMP expenses has been correctly carried out by the TPO.

18. We have heard the rival contentions and perused the material on record. We notice that the coordinate bench in assessee's own case for AY 2017-18 has considered similar issue and held as under: -

13. We heard the rival submissions and perused the material on record. We notice that in schedule 234 of the financial statements of the assessee, the AMP expenses and warranty expenses are part of the overall other expenses amounting to Rs.256,15,87,616/-. We also notice that in the segment financials considered for TP analysis, the said other expenses have been split between trading segment and software development segment to be Rs.226,73,11,742/- and Rs.29,42,75,874/- respectively. From this fact, it is clear that the warranty expenses and AMP expenses have been considered as part of operating cost for the purpose of computing the margins of the assessee. We also notice from the order passed under section 92CA of the Act that the TPO has not made any adjustments towards the margin of trading segment thereby accepting the ALP analysis of the assessee with regard to trading segment. The Coordinate Bench of the Tribunal in the case of Epson India (supra) has considered similar issue and held that :

> "8. We have heard the rival submissions and perused the materials on record. The assessee has chosen RPM as the most appropriate method (MAM) for arriving at ALP. The assessee has chosen 7 comparables based on various filters applied and the median of weighted average of adjusted gross profit on sales % of these comparables was 4.44% (page 189 to 190 of paper book). The gross profit margin of the assessee from undertaking distribution activities during the year under consideration resulted in gross profit of 17.87% on sales (Page 254 of the paper book). Since the assessee's margin is more than the arm's length range, the margin of the assessee from its distribution activities is considered to be at arm's length from TP perspective. In a corroborative analysis done under Transaction Net Margin Method (TNMM) the assessee's margin is taken to be at arm's length as the median of the comparables was 1.08% whereas the operating profit of the assessee from undertaking the distribution activities was 3.12% (Page 255 of the paper book). We notice that the while arriving at the operating profit of the assessee the 'Selling and Marketing expenses' to the tune of Rs.68,16,40,898 has been included. The TPO in the order (Page 13 of TPO order para 4.7.5) has mentioned that TP analysis with respect to AMP and the mark up the methods as used by the assessee like RPM with GPM as the PLI and TNMM with OP/OC as the PLI are not suitable, however he had not rejected the TP analysis of the distribution segment. This issue is particularly dealt with by the Hon'ble Delhi High Court in the case of Sony Ericsson mobile communication India Private Limited (supra) where it is held that -
>
> > 101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above, lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(1)(e),

> which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible.

9. The coordinate bench of the Tribunal in the case of Himalaya Drug Company (supra) has held that for the AMP expenses to fall under the category of 'international transaction' the revenue should show that there existed an agreement between the assessee and its AE in the matter of incurring AMP expenses. We notice that in assessee's case the revenue has not shown that there is any agreement in place between the assessee and the AE with regard to incurring AMP expenses. The Hon'ble Tribunal has also held that when the MAM for the entire international transaction is accepted by the TPO, no separate adjustment is required to be done for AMP expenses. The Hon'ble Tribunal has held that -

> 34. We notice that the co-ordinate bench has, following various decisions, held that the revenue has to first show that the AMP expenses would fall under the category of "international transactions". For that purpose, the revenue has to show that there existed an agreement between the assessee and its AE in the matter of incurring of AMP expenses. Admittedly, it is not shown in the instant case that there existed any agreement relating to incurring of AMP expenses. Thus, we notice that there is no change in facts relating to this issue between the current year and the AY 2010-11/2011-12. It was also held that when TNMM method is applied to benchmark the entire international transactions, then there is no requirement of making separate TP adjustment on account of AMP expenditure. In the earlier paragraphs, we have also held that TNMM as most appropriate method and has also held that the international transaction of Exports to AEs is at arms length.
>
> Hence, no separate adjustment is required to be made in respect of AMP expenses on this account also.

10. We have considered the Ld DR's submission that the coordinate bench of the Tribunal in assessee's own case (supra) has remanded the case back to the TPO. In the said assessment years, the case was remanded back mainly for the purpose of determining whether the AMP expenses in an international transaction or now. The relevant para from the judgment is reproduced here for reference " In the present case also TPO had not brought anything on record to show existence of

international transaction whereby the assessee was obliged to incur AMP expenditure for the purpose of promoting brand, intangible to its AE. Similarly the assessee- company also has not furnished FAR analysis of AMP functions in its TP study. In our considered opinion, the matter requires remission to the TPO for undertaking fresh analysis to establish existence of international transaction in respect of AMP expenditure and true nature of transaction between the appellance and its AE. After due analysis of FAR of the AMPfunctions carried out by the appellant and having regard to the actual conduct of the appellant vis-à-vis its AE and economic substance of the transactions between the appellant and its AE if the TPO is of the opinion that there existed an international transaction in the form of AMP function, then to undertake the exercise of determination of ALP by adopting a suitable method of compensation to the appellant for performing the AMP functions of its AE"

11. For the year under consideration, the issue for consideration is treating the AMP expenses as a separate transaction from the distribution segment and making TP adjustment for the same. The Ld AR submitted that whether AMP expenses is a separate international transaction is not contended in the year under consideration and prayed that the decision rendered by the coordinate bench on this specific count need not be applied in the year under consideration.

12. Considering the ratio laid down by the Hon'ble Delhi High Court in the case of Sony Ericsson mobile communication India Private Limited (supra) and the other decisions of the coordinate bench of the Tribunal, with respect to treating AMP expenses as a separate transaction when the TPO has not otherwise rejected the gross margin and the net margin of the assessee, we hold that there is no separate adjustment to be made in respect of AMP expenses. The appeal is allowed in favour of the assessee."

14. Considering the facts of the present case and respectfully following the decision of the Coordinate Bench of the Tribunal, we hold that the AMP expenses and warranty expenses cannot be treated as a separate international transaction when the TPO has not otherwise rejected the margins of the assessee in the trading segment. Therefore, the adjustments made in this regard is deleted and the appeal is allowed in favour of the assessee."

19. For the year under consideration the margins of the trading segment has been computed as under: -

| **Particulars** | **Amount – Rs.** |
|---|---:|
| Operating Revenue (OR) | 67,61,10,33,378 |
| Operating Expenses (OC) | 66,93,03,59,491 |
| Profit Before Tax (PBT) | 67,95,47,729 |
| Operating Profit (OP) | 68,06,73,887 |
| OP/OR | 1.05% |

20. On perusal of the records it is the noticed that the operating cost of Rs. 66,93,03,59,491/- which is considered for arriving at the above margins includes the AMP expenses. The breakup of the operating cost is as given below: -

**(Amount in INR)**

| Particulars | SWD Segment | Trading | Total |
|---|---|---|---|
| **EXPENSES** | | | |
| **Purchase of stock-in-trade: Mobile Phones** | **-** | **64,39,42,25,406** | **64,39,42, 25, 406** |
| | | | |
| **Changes in inventories of stock-in-trade** | | **-3,08,79,14,085** | **-3,08,79,14,085** |
| | | | |
| Salaries, Wages and Bonus | **56,54,49,921** | **25,62,73,573** | 82 17 23 494 |
| Staff Welfare Expenses | **27,13,976** | **12,30,030** | 39 44 006 |
| **Employee benefit expense** | **56,81,63,897** | **25,75,03,603** | **82,56,67,500** |
| | | | |
| Interest expense | | **14,27,32,945** | 14,27 02,945 |
| Interest on finance lease | - | **10,35,457** | 10,35,457 |
| Interest on shortfall of advance tax | - | **2,82,00,833** | 2 82,00,833 |
| Factoring charges | - | **4,69,25,660** | 4 69 25,660 |
| **Finance costs** | **-** | **21,118,64,895** | **21,88,64,895** |
| | | | |
| **Depreciation and amortisation expense** | **5,52,76,725** | **4,81,42,452** | 10,34,19,177 |
| | | | |
| Power and fuel | **2,04,90,498** | **31,28,244** | 2,36 18,742 |
| Rent | **11,47,93,699** | **1.31,06,136** | **12** 78,99,835 |
| Repairs and maintenance- others | **3,49,11,822** | **20,63,42,659** | 24,12,54,481 |
| Insurance | | **64,45,039** | 64,45,039 |
| Rates and taxes | **34,69356** | **3,02,15,518** | 3 36,84,874 |
| Rates and taxes | **2,13,51,933** | **2,77,81,060** | 4,91,32,993 |
| As auditor: | | | |
| Audit fee | - | **87,86,000** | 87,86,000 |
| Tax audit fee | | **3,00,000** | 3 00,000 |
| Reimbursement of expenses | - | **1,96,440** | 1 96,440 |
| Expenditure towards Corporate Social | | **1,52,59,828** | 1 52 59,828 |
| Professional fees | **7,35,28,006** | **3,86,08,680** | 11,21,36,686 |
| Provision for warranty | | **1,90,36,76,503** | 1,90,36,76,503 |
| Freight, clearing and warehousing charges | | **10,06,55,693** | 10,06,55,693 |
| Communication Expenses | **93,77,462** | **21,57,465** | 1,15,34,927 |
| **Advertisement and Business Promotion** | **-** | **2,82,58,72,100** | **2,82,58,72,100** |
| Bank Charges | | **22,37,894** | 22,37,894 |
| Net loss on disposal of assets | **42,26,508** | **60,11,888** | 1,02,38,396 |
| Net loss on foreign currency transaction and | | **6,93,82,458** | 6,93,82,458 |
| Miscellaneous Expenses | **15,00,467** | **32,50,254** | 47 50,72: |
| **Other expenses** | **28,36,49,750** | **5,26,34,13,859** | **5,54,70,63,609** |
| **Total Expenses** | **90.70,90,372** | **67,09,42,36,129** | **68 00 13 26,501** |

| | | | |
|---|---|---|---|
| **Less: Non-Operating Expenses** | | | |
| **Interest expense** | | | |
| Interest on finance lease | - | 10,35,457 | 10,35,457 |
| Interest on shortfall of advance tax | | 4,69,25,660 | 4,69,25,660 |
| Net loss on disposal of assets | - | 1,52,59,828 | 1,52,59,828 |
| Expenditure towards Corporate Social | | 10,06,55,693 | 10,06,55,593 |
| | | | |
| **Total Non-Operating Expenses** | **-** | **16,38,76,638** | **16,38,76,638** |
| | | | |
| **Operating Expenses ("OC")** | **90,70,90,372** | **66,93,03,59,491** | **67,83,74,49,863** |

21. From the above it is clear that the operating expenses includes the AMP cost of Rs.282,58,72,100/-. It is further noticed that the AO in the TP proceedings has not made any adjustment towards trading segment by holding as under in page 66 of the order u/s.92CA

> "The taxpayer has adopted Transactional Net Margin Method as the using the Operating Profit to Operating Revenue as **PLI** and conducted a search which yielded a set of 7 comparable companies whose weighted PLI was 0.89%. The taxpayer's PLI was 1.05%. Hence the taxpayer treated its Internal Transaction relating to Import of goods for sale to be at Arm's Length."

22. Considering the above facts and respectfully following the decision of the coordinate bench in assessee's own case for AY 2017-18 we hold that no adjustment is required to be made towards AMP expenses and the same cannot be treated as a separate international transaction when TPO has not otherwise rejected the margins of the assessee in the trading segment. The TP adjustment made in this regard is therefore deleted.

**<u>Disallowance in respect of employee's contribution to PF</u>**

23. During the course of hearing the learned A.R. fairly submitted that the issue related to the employee's contribution of PF is settled by the Hon'ble Supreme Court against the assessee in the case of Checkmate Services (P.) Ltd. Vs CIT-1, [2022] 143 taxmann.com 178 (SC).

24. We have heard both the parties and perused the material on record. We notice that the Hon'ble Supreme Court in the case of *Checkmate Services*

*(supra)* has considered the issue of whether the employees contribution paid before due date for filing the return of income u/s.139(1) whether otherwise allowable u/s.43B, putting to rest the contradicting decisions of various High Court. The relevant extract of the decision is as given below –

> 52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund isto be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.
>
> 53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is,

thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.

25. In view of the above decision of the Hon'ble Supreme Court, we hold that the employees contribution to PF and ESI should be remitted before the

due date as per explanation to section 36(1)(va) i.e. on or before the due date under the relevant employee welfare legislation like PF Act, ESI Act etc., for the same to be otherwise allowable u/s.43B. The grounds taken by the assessee on this issue is dismissed.

26. In the result, the appeal filed by the assessee is partly allowed.

27. Dictated and pronounced in the open Court on 17th November, 2022.

Sd/-
**(N.V. Vasudevan)**
**Vice President**

Sd/-
**(Padmavathy S)**
**Accountant Member**

Bengaluru, Dated: 17th November, 2022

*Copy to:*

1. *The Appellant*
2. *The Respondent*
3. *DRP-2 Bengaluru*
4. *The DR, ITAT, Bengaluru*
5. *Guard File*

*By Order*

//True Copy//

*Assistant Registrar*
*ITAT, Bengaluru*

n.p.