आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'D' BENCH, CHENNAI
श्री वी.दुर्गा राव, न्यायिक सदस्य एवं श्री जी.मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI V.DURGA RAO, JUDICIAL MEMBER
AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./**I.T.A.No.3192/Chny/2017**

(निर्धारणवर्ष / Assessment Year: 2013-14)

M/s. Hyundai Motor India Ltd. Plot No.H-1, SIPCOT Industrial Park Irrungattukottai, Sriperumbudur Taluk Kancheepuram Dist. PIN: 602 117.	Vs	The Assistant Commissioner of Income Tax, LTU-2, Chennai.
PAN: AAACH 2364M		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. Sriram Seshadri, C.A & Mr. Ashik Shah, C.A
प्रत्यर्थीकीओरसे/Respondent by	:	Ms. Anita,JCIT

सुनवाईकीतारीख/Date of hearing	:	16.07.2021
घोषणाकीतारीख /Date of Pronouncement	:	01.09.2021

आदेश / O R D E R

PER G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against final assessment order passed by the Assessing Officer u/s.143(3) r.w.s 144C(13) of Income Tax Act, 1961 dated 30.10.2017, in pursuant to the directions of the learned DRP-2, Bengaluru dated 16.09.2017 u/s.144C(5) of Income Tax Act, 1961 for the assessment year 2013-14.

2. The assessee has raised following grounds of appeal:-

"1. The order of the Learned Assessing Officer ("Ld. AO"), the Learned Transfer Pricing Officer ("Ld. TPO") and the direction issued by the Hon'ble Dispute Resolution Panel ("Hon'ble DRP") are not in accordance with the law, contrary to the facts and circumstances of the present case and made in violation of principle of equity and natural justice.

2. Disallowance under section 14A

2.1 On the facts and circumstances of the case, the Ld. AO and Hon'ble DRP erred in disallowing a sum of INR 86,54,491/- under section 14A of the Act by applying provisions of Rule 8D of the Income tax Rules, 1962 ("Rules")

3.Disallowance of subsidy received towards capital expenditure.

3.1 The Ld. AO and Hon'ble DRP ought to have appreciated that the subsidy was a capital receipt not chargeable to tax and that it cannot also be adjusted against the cost of fixed assets in computing the depreciation allowable to the Appellant.

4. Disallowance of Bonus/ Performance reward under section 43B of the Act
4.1 The Ld. AO and Hon'ble DRP have failed to appreciate that the expenditure incurred by the Appellant towards "performance reward" is not in the nature of "bonus" and cannot be disallowed under section 43B read with section 36(i)(ii) of the Act — should we have an alternative claim that it should be allowed at least in year of payment.

5. Tax Treatment of Output VAT Incentive

5.1 On facts and circumstances of the case, the Ld. AO and Hon'ble DRP erred in not adjudicating and not allowing the claim made by the Appellant to treat Output VAT Incentive offered to tax for the subject AY, as a capital receipt not chargeable to tax.

6. Excess levy of interest under section 234C

6.1 The Ld. AO erred in levying excess interest under section 234C of the Act amounting to INR 14,605 without appreciating the fact that levy of section 234C interest should be computed only on the returned income and not on the assessed income.

7. Adjustment for Brand development services

7.1 The Ld. Transfer Pricing Officer ("Ld. TPO") and Hon'ble DRP have exceeded their jurisdiction and erred in making the adjustment towards a fees for a purported brand development service alleged to be provided by the Appellant to its AE, without first establishing that there was any international transaction in this regard between the Appellant and its AE, which can be subject to section 92 of the Act and without appreciating that there is no intention to shift the profits outside India.

7.2 The Ld. TPO and Hon'ble DRP failed in not following the order of this Hon'ble Tribunal in the Appellant's own case from AY 2007-08 to AY 2011-12 wherein similar adjustment towards brand adjustment has been deleted by this Tribunal.

7.3 The Ld. TPO erred in making the adjustment and the Hon'ble DRP erred in upholding the adjustment towards brand development fees without first establishing that a third party manufacturer in India would have received a similar fees from a third party owner of the brand, which is used by the former for the manufacture and sale of goods. In the absence of any comparable transaction, the entire approach of the authorities fails the basic requirement of Transfer Pricing and the charging of the brand development fees in comparable circumstances is not even an arm's length practice.

7.4 Without prejudice to the other grounds, the Ld. TPO and Hon'ble DRP erred in imputing the adjustment under section 92 of the Act towards brand development fees on the basis of Spearman's Rank Correlation method.

7.5 The Ld. TPO/AO and Hon'ble DRP have erred in imputing an adjustment under section 92 of the Act towards brand development fees, when it is acknowledged by the TPO himself that the advertisement and marketing expenditure incurred by the Appellant as a proportion of its sales is not excessive as compared to the similar levels of expenditure incurred by comparable companies.

8. Downward adjustment to the value of imports to the extent included in the domestic car sales segment

8.1 The Ld. TPO erred in rejecting the transfer pricing study carried out by the Appellant without cogent reasons and erred in analyzing domestic segment on a standalone basis.

8.2 The Ld. TPO has erred in benchmarking the international transactions entered into by the Appellant with its AEs on the basis of the segment wise profitability details obtained during the assessment proceedings, without appreciating that the international transactions entered into by Appellant are closely linked and integrated and cannot be viewed in terms of separate segments for Transfer Pricing benchmarking.

8.3 The Ld. TPO has erred in benchmarking on the basis of the segment wise profitability details pertaining to 'Domestic car sales' obtained during the assessment proceedings, without appreciating that the 'Domestic car sales' is not considered as a separate reportable segment as per the Appellant's audited financial statements and that the Appellant does not maintain segment wise books of accounts.

8.4 The Ld. TPO erred in excluding certain items of income which are operating in nature while computing the operating income and operating profits and erred in including certain items of expense/losses, which are not operating in nature while computing the operating costs and operating profits.

8.5 The Ld. TPO erred in not considering the royalty income received by the Appellant in consideration for the license of the trademarks and know-how transferred to MOBIS in relation to the distribution of after sales products, as operating income while computing the operating margins of the tested party.

8.6 The Ld. TPO erred in not considering the incentives received from the Government of Tamil Nadu for its Phase II investments under Ultra Mega Integrated Automobile Projects within Tamil Nadu, as operating while computing the operating margins of the tested party.

8.7 The Ld. TPO erred in not considering the insurance income, discount received from suppliers towards early payment of bills, and commission received towards car finance referrals and car insurance referrals as operating while computing the operating margins of the tested party.

8.8 The Ld. TPO erred in considering foreign exchange loss suffered by the appellant as operating while computing the operating margins of the tested party.

8.9 The Hon'ble DRP erred in upholding the actions of the Ld. TPO.

8.10 The Hon'ble DRP and Ld. AO erred in computing the transfer pricing adjustment beyond the scope and jurisdiction of section 92 of the Act by not restricting the value of the adjustment to the Appellant's international transactions with its Associated Enterprises ("AE").

8.11. The Hon'ble DRP and Ld. AO erred in proposing the transfer pricing adjustment to the entire cost base of the Appellant which predominantly includes third party costs, on wrong basis and assumption of facts without giving an opportunity to the Appellant.

3. The assessee had filed a petition for admission of additional grounds on three occasions i.e., 07.08.2018. 27.11.2019 and 16.01.2020. The relevant additional grounds of appeal raised by the assessee are reproduced as under:-

"1. On the facts and circumstances of the case and in law, We pray that Eicher Motors Limited be held as functionally not comparable with our company and therefore to be excluded from the final set of comparable companies;

2. On the facts and circumstances of the case and in law, the lower authorities ought to have granted adjustment for difference in working capital of HMIL vis-à-vis the comparable companies selected in determining the arm's length price as claimed in the TP documentation.

3. On the facts and circumstances of the case and in Jaw, we pray that the amount received under the Focus Market Scheme is capital in nature and ought to be excluded from the computation of total income of the Appellant for the subject AY;

4. On the facts and circumstances of the case and in law, we pray that education cess and Secondary Education Cess be

allowable as a business expenditure in the computation of total income of the Appellant."

4. Brief facts of the case are that the assessee M/s. Hyundai Motor India Ltd., is wholly owned subsidiary of M/s. Hyundai Motor Company Ltd., South Korea. The assessee is engaged in the business of manufacturing and selling passenger cars in domestic and export market. The assessee company has filed its return of income for assessment year 2013-14 on 28th November, 2013 admitting total income of Rs.1717,21,91,860/- under normal provisions of the Act, and book profit u/s.115JB of the Act at Rs.2145,05,22,193/-. The assessee had entered into various international transactions with its AEs and international transactions were duly reported in Form 3CEB filed in accordance with provisions of Indian Transfer Pricing Regulations contained in section 92, 92A to 92F of the Income Tax Act, 1961. The case was taken up for scrutiny and during the course of assessment proceedings, a reference was made to JCIT (Transfer Pricing) for determination of arm's length price of international transactions of the assessee with its AEs. The learned TPO vide its order dated 31.10.2016 has suggested

certain transfer pricing adjustments towards downward adjustment to the value of imports and upward adjustment for brand development services.

5. The Assessing Officer, in pursuant to directions of the ld. TPO, has passed draft assessment order u/s.143(3) r.w.s 144C(1) of the Income Tax Act, 1961 on 30.12.2016 and made transfer pricing adjustments as suggested by the TPO at Rs.179,07,77,331/-. The Assessing Officer had also proposed certain corporate tax adjustments including disallowances u/s.14A, r.w.r 8D of IT Rules, 1962, disallowance of subsidy received towards capital expenditure, disallowance of focus marketing scheme expenses, and disallowance of bonus / performance reward u/s.43B(c) of the Income Tax Act, 1961. The assessee has filed objections before learned DRP against draft assessment order, but the learned DRP vide its directions dated 16.09.2017 has rejected objections filed by the assessee. The Assessing Officer in pursuant to the directions of the learned DRP has passed final assessment order incorporating

directions of the ld. DRP. Aggrieved, the assessee has filed present appeal before the Tribunal.

6. Ground no.1 filed by the assessee is general in nature and does not require specific adjudication and hence, the same is dismissed.

7. The next issue that came up for our consideration from ground no.2 of assessee appeal is disallowances u/s.14A r.w.r 8D of Income Tax Rules, 1962, amounting to Rs.86,54,491/-. The facts with regard to impugned dispute are that during the year under consideration, the assessee has earned dividend income from mutual funds, which is exempt from tax amounting to Rs.57,826/-, however, did not made any suo-motu disallowance of expenditure relatable to exempt income. Therefore, the Assessing Officer has invoked provisions of Rule 8D of Income Tax Rules, 1962, and determined disallowances of Rs.86,54,491/- u/s.14A of Income Tax Act, 1961.

8. The learned AR for the assessee submitted that the learned DRP has erred in sustaining additions made by the Assessing Officer towards disallowance u/s.14A, without appreciating fact that disallowances contemplated u/s.14A cannot exceed amount of exempt income. In this case, exempt income for impugned Asst. Year is Rs.57,826/-, whereas the Assessing Officer has determined disallowance u/s.14A at Rs.86,54,491/- . In this regard, he relied upon decision of the Hon'ble Supreme Court in the case of Pr.CIT Vs State Bank of Patiala, 99 taxmann.com 286.

9. The learned DR, on the other hand, supporting order of learned DRP submitted that although, the assessee has earned exempt income, but could not made suo-motu disallowance of expenses relatable to exempt income u/s.14A of the Act. Therefore, the Assessing Officer has invoked Rule 8D of Income Tax Rules, 1962 and determined disallowance and hence, there is no merit in the arguments of the assessee that disallowance u/s.14A cannot exceed amount of exempt income.

10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is well settled principles of law that disallowances u/s.14A cannot exceed amount of exempt income. The Hon'ble Supreme Court in the case of Pr.CIT Vs State Bank of Patiala (supra), while dismissing SLP filed by the Revenue against order of the Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs State Bank of Patiala, held that disallowance u/s.14A could be restricted to amount of exempt income only. The Hon'ble Jurisdictional High Court of Madras in the case of Marg Ltd Vs.CIT (2020) 120 Taxmann.com 84, has taken a similar view and held that disallowances under Rule 8D r.w.s 14A can never exceed exempt income earned by the assessee during particular assessment year. In this case, admittedly, exempt income for impugned assessment year was Rs.57,826/- , whereas the Assessing Officer has determined disallowance u/s.14A at Rs.86,54,491/- contrary to settled principle of law. Therefore, considering facts and circumstances of this case and also by following the decisions of Hon'ble Supreme Court and Hon'ble Madras High Court, we direct the Assessing Officer to

restrict disallowances u/s.14A to the extent of exempt income earned for the impugned assessment year.

11. The next issue that came up for our consideration from ground no.3 of assessee appeal is disallowance of depreciation on capital subsidy. During the financial year 2001-02, the State Industrial Promotion Corporation of Tamil Nadu (SIPCOT) had granted subsidiary of Rs.100 lakhs to encourage and recognize huge investments made for setting up of mega project viz., passenger car manufacturing unit in Irungattukottai. The assessee has treated subsidy received from SIPCOT as capital receipt and did not reduce the same from cost of assets, as it was not directly or indirectly used to purchase any asset. The Assessing Officer has held that capital subsidy received from SIPCOT being utilized by the assessee for capital expenditure, same ought to have been reduced from the cost of asset added in that year by contending that subsidy was directly or indirectly used to purchase of asset and as per explanation (10) to section 43 the same needs to be deducted from cost of assets

and consequently, reworked depreciation by reducing amount of subsidiary and disallowed a sum of Rs.2,02,865/-.

12. The learned AR for the assessee submitted that this issue is covered in favour of the assessee by the decision of ITAT., Chennai, in assessee's own case for assessment year 2006-07, where it was held that subsidiary received from SIPCOT is capital receipt not liable for tax.

13. The learned DR, on the other hand, fairly agreed that this issue is covered in favour of the assessee.

14. Having heard both the sides and considered material on record, we find that the Tribunal had considered an identical issue in assessee's own case for assessment year 2006-07 in IT(TP)A.No.14/Chny/2018 and after considering nature of subsidy has allowed claim of the assessee by observing that for earlier years, the CIT(A) has allowed claim of the assessee and the Assessing Officer has accepted decision of the CIT(A) and deleted additions, while passing order giving effect to the order

of the CIT(A). Therefore, consistent with the view taken by the coordinate Bench, we direct the Assessing Officer to delete additions made towards disallowance of depreciation on capital subsidy received from SIPCOT.

15. The next issue that came up for our consideration from ground no.5 of assessee appeal is addition towards VAT incentive received from Government of Tamil Nadu. During the year under consideration, the assessee has received refund of output VAT amounting to Rs.32,75,60,000/- from Govt. of Tamil Nadu and credited to profit and loss account under the head income from other sources. The assessee has treated above incentive as revenue receipt both for its books of account and its tax returns. However, during the course of assessment proceedings, the assessee has raised a fresh claim to treat incentive as capital receipts not chargeable to tax. The Assessing Officer has not adjudicated fresh claim made by the assessee. The learned DRP has rejected objections filed by the assessee without giving any specific direction.

16. The learned AR for the assessee submitted that this issue is also covered in favor of the assessee by the decision of ITAT., Chennai in assessee's own case for assessment year 2011-12, where under identical circumstances, the Tribunal has remanded the matter to the file of the Assessing Officer to consider issue in accordance with law.

17. The learned DR, on the other hand, fairly agreed that this issue has been set aside to the file of Assessing Officer for earlier years and hence, this year also the issue may be remanded back to the file of Assessing Officer.

18. Having heard both the parties and considered material on record, we find that the Tribunal had considered an identical issue for assessment year 2011-12 in ITA No.853/Chny/2014, where the issue has been remanded back to the file of Assessing Officer to consider the issue denovo on merits in accordance with law. Facts being identical for the year under consideration by following the decision of Tribunal in assessee's own case for assessment year 2011-12, we set

aside the issue to file of the Assessing Officer and direct him to reconsider the issue in accordance with law.

19. The next issue that came up for consideration from ground No.4 of assessee appeal is disallowance u/s.43B(c) of the Act, in respect of performance incentive paid to employees. Facts with regard to impugned dispute are that for the financial year relevant to the assessment year 2013-14, the assessee has paid performance reward to employees in the cadre of executives and senior executives. The assessee has provided for expenses for the period beginning from January to March, 2013. However, payment was made only after due date of filing return of income for assessment year 2013-14. The Assessing Officer has disallowed performance incentive paid to staff u/s.43B(c) r.w.s. 36(1)(ii) of the Act, amounting to Rs.13,01,51,983/- on the ground that as per section 43B(c), any sum referred to in clause (ii) of sub-section (1) of section 36, shall not be allowed as deduction, unless the same is paid on or before due date for furnishing return of income u/s.139(1) of the Act. The Assessing Officer further noted that as per section

36(1)(ii), any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profit or dividend, if it had not been paid as bonus or commission is covered. Therefore, he opined that any payment made to an employee which is in the nature of bonus or commission for services rendered is covered u/s. 36(1)(ii) of the Act, and thus, if such payment is not made on or before due date of filing of return of income u/s.139(1) of the Act, then same cannot be allowed as deduction, as per section 43B(c) of the Act.

20. The assessee has filed objections before learned DRP and challenged additions made by the Assessing Officer. The learned DRP vide its directions dated 16.09.2017 has rejected objections filed by the assessee and confirmed additions made by the Assessing Officer. The relevant findings of the ld. DRP is as under:-

> *"7. Ground of objection 6 – contentions against Disallowance of Bonus/Performance reward U/S 43B*
>
> *The learned AO erred in disallowing "Performance reward" amounting to INR 13,01,51,983/- u/s.43B of the Act.*

The Ld. AO ought to have appreciated that the expenditure incurred towards "performance reward" is not in the nature of "bonus" and therefore the provisions of Section 43B(c) of the Act is not applicable.

• Without prejudice to the above, the Ld. AO ought to have appreciated that the Assessee is not covered by the provisions of Payment of Bonus Act, 1965 and as such the said expenditure cannot bedisallowed under Section 43B r.w.s. 36(1) (ii) of the Act.
• Without prejudice to the claim that the same should not be disallowed, it is submitted that the Ld. AO has disallowed the entire expenditure of performance reward accrued during year instead of the amount paid after due date of filing return of income.

Panel: The AO found that the amount of Rs 13,01,51,983 has been debited in P&L account as performance reward/bonus. But it is certified in audit report in form 3CD that the amount remained unpaid. The AO disallowed this amount holding that since the amount has not been paid till the due date of filing return of income, the same cannot be allowed as per section 43B. The assessee contends that the expenditure incurred is towards performance reward and not in nature of bonus. Hence, provisions of section 43B are not applicable.

The arguments of the assessee have duly been considered. Section 43B mandates that certain deductions are to be allowed only on actual payment basis, even though under the mercantile system of accounting income and out go are accounted for on the basis of accrual and not on the basis of actual disbursements or receipts. The section, which is a non-obstante provision, provides a condition of payment for the deduction of the liabilities specified therein, so that the deduction is deferred to the year of payment. The only exception is the year in which the liability accrues or arises, for which the time for payment gets extended to the due date for furnishing the return of income for that year. This non-obstante section means that certain deductions even if allowable as per the provisions of any other section of this Act will not be allowed unless the conditions of section 43B are satisfied. Section 43B(c) provides that any sum referred to in

section 36(1)(ii) will not be allowed as deduction unless actually paid.

Section 36(1)(ii) reads as under:

"any sum paid to an employee as bonus or commission for services rendered where such sum would not have been payable to him as profits or dividend f it had not been paid as bonus or commission"

It is seen that the provision applies for payment of 'bonus' or 'commission' to the employees. The assessee claims that the expenditure incurred is towards 'performance reward which is not in the nature of bonus and hence, will not be covered in section 36(1) (ii). This argument of the assessee is not correct. The payment to the employees on account of performance or payment as commission is in the same nature. It is immaterial if the assessee terms it performance reward This sum would not have been paid to the employees as profits or dividend had it not been paid as commission I performance reward Hence, this Panel is of the considered opinion that the provision of section 36(1)(ii) is squarely applicable in case of the assessee and consequently the mischief of section 43B will kick in to disallow the claim of deduction by the assessee It may also be mentioned that the objection of the assessee on identical issue for AY 2011-12 and 2012-13 has not been accepted by the DRP In view of above the objection of the assesset. is rejected."

21. The learned A.R for the assessee submitted that the learned DRP erred in sustaining additions made by the Assessing Officer towards disallowance of performance incentive paid to employees u/s.43B(c) of the Act, without appreciating fact that said payment is neither bonus nor commission and thus, same cannot be brought within the ambit

of provisions of section 36(1)(ii) r.w.s.43B(c) of the Income Tax Act, 1961. In this regard, he relied upon decision of the Hon'ble Madras High Court in the case of M/s.Shanmugavel Mills Ltd Vs CIT 202 taxmann.com 640 and the Hon'ble Delhi High Court in the case of Sriram Pistons & Rings Ltd. Vs. CIT 307 ITR 363.

22. The learned DR, on the other hand, strongly supporting orders of Assessing Officer as well as learned DRP submitted that merely for the reason that assessee has given different nomenclature to a particular expenses, it does not take away right of the revenue to treat the same within the ambit of relevant provisions of the Act. In this case, the assessee has paid performance incentive to staff, because none of its employees are covered under Bonus Act. But, fact remains that provisions of section 36(1)(ii) also covers any sum payable to an employee as bonus or commission for services rendered where such sum would not have been payable to him as profits or dividend, if it had not been paid as bonus or commission. Since, the assessee has paid incentive for services rendered

which covered under the provisions of section 36(1)(ii) and thus, if the same is not paid on or before due date for filing of return of income, then same cannot be allowed as deduction u/s.43B(c) of the Income Tax Act, 1961.

23. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, none of the employees of the assessee are covered under payment of Bonus Act, because all employees' salary is above threshold limit fixed under payment of Bonus Act. It is also an admitted fact that the assessee is paying performance incentive/reward to employees regularly and such incentive has been paid for services rendered by the employees. Therefore, it is necessary to examine performance incentive paid to employees in light of provisions of section 36(1)(ii) read with section 43B(c) of the Income Tax Act, 1961. As per section 36(1)(ii) of the Act, any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend, if it had not been paid as bonus or commission is allowable as deduction. The provisions of Section 43B(c) provides that any

sum referred to in section 36(1)(ii) will not be allowed as deduction, unless actually paid. Therefore, from a combined reading of provisions of section 36(1)(ii) read with section 43B(c), it is seen that provisions of section 36(1)(ii) is not only covers for payment of bonus to staff, but it also applies to commission paid to the employees for services rendered. The assessee claims that expenditure incurred is towards performance reward, which is not in the nature of bonus and hence, will not be covered u/s. 36(1)(ii) of the Act.

24. We have given our thoughtful consideration to facts brought out by the ld. AO in light of arguments of the ld. AR for the assessee and we do not ourselves subscribe to the arguments of ld. AR for the assessee, for simple reason that once performance incentive is paid for rendering services, then such payment is in the nature of bonus or commission which comes under the provisions of section 36(1(ii) of the Act. It is immaterial whether the assessee terms it as performance reward or bonus. But, what is relevant is nature of payment and purpose of payment. In this case, it is in the nature of

bonus or commission and such payment is for services rendered by employees. Just because nomenclature was changed to some other name, a particular expenditure would not change its original character. In this case, sum was paid to employees for services rendered and further, this sum would not have been paid as profits or dividend had it not been paid as commission or performance reward. Therefore, we are of the considered view that provisions of section 36(1)(ii) of the Act is squarely applicable and consequently, mischief of section 43B(c) would come into play, if such payment is not made on or before due date of furnishing of return of income. In this case, admittedly, the assessee has paid performance incentive only after due date of filing of income-tax return. Insofar as case laws relied upon by the assessee, we find that facts those case laws are different from facts of present case and has no application to case of the assessee. Therefore, we are of the considered view that there is no error in the reasons given by the Assessing Officer as well as learned DRP to disallow performance reward u/s.43B(c) of the Act. Hence, we are inclined to uphold the order of Assessing Officer as well as

directions of learned DRP and reject ground taken by the assessee.

25. The next issue that came up for consideration from ground no.7 of assessee appeal is transfer pricing adjustment made towards brand development services. During the year under consideration, the learned TPO has made upward adjustment of Rs.76,99,17,331/- in relation to brand fees receivable from its AEs towards enhancement of brand value of assessee parent company. The learned TPO used Spearman's Rank Correlation method to conclude that there is positive correlation between the brand value of Hyundai Motor India Limited and market capitalization of Hyundai market Corporation, South Korea. Therefore, by applying Spearman's Rank Correlation method, the ld. TPO has computed incremental brand value and attributed a portion of the same to the assesseein proportionate to its sales.

26. The learned A.R submitted that this issue is covered in favour of the assessee by the decision of ITAT., Chennai in

assessee's own case for the assessment year 2009-10 to 2011-12 in ITA Nos.853/Chny/2014, 563/Chny/2015, 842/Chny/2016, where it was held that accretion of brand value as a result of use of brand name of foreign AE under technology use agreement, which has been accepted to be an arrangement at an arm's length price does not result in a separate international transaction to be benchmarked. Facts for the year under consideration are similar to facts already considered by the Tribunal and hence, additions made by the Assessing Officer towards brand development services should be deleted.

27. The learned DR, on the other hand, strongly supporting order of the TPO as well as learned DRP submitted that because of huge spending on advertisement and brand promotion expenses by the assessee, brand value of M/s. Hyundai Motor Corporation, South Korea is substantially enhanced, which is evident from facts brought out by the TPO that M/s. Hyundai Motor Corporation has benefitted a lot from the assessee and hence, the learned TPO has rightly used Spearman's Rank Correlation method to conclude that there is

a positive correlation between the brand value and market capitalization of HMC, Korea. Therefore, he has attributed portion of the same to the assessee in proportionate to its sales and made transfer pricing adjustment towards brand fees receivable from its AE enterprises. The learned DR further referring to some article published in website submitted that the assessee has rendered various services to enhance brand value of M/s. Hyundai Motor Corporation throughout the world. Although, there is no direct agreement between the assessee and its parent company for development of brand, but there is indirect arrangement between the assessee and its AEs which resulted in enhancement of global brand value of Hyundai Motor Corporation, which is clearly evident from data published by Interbrand, a private agency on its website, as per which market capitalization of Hyundai has gone up substantially. Therefore, there is no error in reasons given by the TPO as well as learned DRP to sustain additions made towards brand service fees and their orders should be upheld.

28. We have heard both the parties, perused material available on record and gone through orders of the authorities below. Admittedly, additions made by the TPO towards brand development services is recurring issue, which was subject matter of deliberations from the Tribunal right from assessment year 2009-10 to assessment year 2011-12. The Tribunal in the assessee's own case for assessment year 2009-10 to 2011-12 had considered an identical issue and held that in absence of mutual agreement or arrangement between two or more AEs for allocation, apportionment or contribution to any cost or expenses for a benefit, service or facility, it cannot be held that there is an international transaction for brand development. The Tribunal further held that increase in brand value due to use of foreign AEs brand name in HMIL's products cannot be considered as provision for services, as per international transaction definition u/s.92B of the Income Tax Act, 1961. The Tribunal further held that the expression 'benefit' and 'service' have different connotations. A service has to be a conscious activity and not a passive exercise. Not all benefits arise as a result of services rendered by someone and further all services

do not result in benefits to the other parties. For the purpose of definition of international transaction, in Indian context rendering of service is what needs to be considered and not benefits. Since, there is no formal agreement or arrangement between the assessee and its AEs for rendering of service in the alleged brand promotion activity, the accretion in global brand value of its parent company cannot be attributable to the assessee by adopting some theory. In this case, facts are identical and pari materia to the facts already considered by the Tribunal for earlier years. Therefore, consistent with a view taken by the coordinate Bench in assessee's own case for earlier assessment years, we are of the considered view that the learned TPO as well as learned DRP were erred in making transfer pricing adjustments towards brand services by adopting Spearman's Rank Correlation method and concluded that there is positive accretion between brand value and market capitalization of HMC Korea and hence, we direct the Assessing Officer/TPO to delete transfer pricing adjustment made towards brand development services.

29. The next issue that came up for our consideration from additional ground no.3 of assessee appeal is amount received from Focus Market Scheme to be treated as capital in nature and exclude from total income. Facts with regard to impugned dispute are that Government of India with an intention to promote exports to certain regions / countries introduced Focus Market Scheme which provides incentive of 2.5% of FOB value for each licensing year commencing from 1st April, 2006. The export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. During the year under consideration, the assessee was eligible for above scheme, as it makes export to specified markets. Accordingly, the assessee has received an amount of Rs.150.57 crores as incentive from Govt. of India. The license under the scheme was given only for exports to potential new markets / specified products and not for all exports or all products to all markets. The assessee has treated amount received under Focus Market Scheme as revenue in nature and has offered to tax. Based on certain subsequent decisions, the

assessee has raised additional ground and argued that subsidy received under Focus Market Scheme is capital in nature and not chargeable to tax.

30. The learned A.R for the assessee submitted that the character of receipt has to be determined with respect to purpose for which subsidy is given and in the present case, if you consider the purpose for which subsidy was given, it is clearly in the nature of capital receipts, because said subsidy was given to explore new market across the globe. Therefore, the same is in the nature of capital receipt and not chargeable to tax. In this regard, he relied upon the decision of ITAT Chennai, in the case of Eastman Exports Global Clothing Pvt. Ltd. in ITA No.47 & 48/Chny/2016, where the issue relating to taxability of licenses received under Focus Market Scheme was held to be capital in nature. The assessee has also relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs Ponni Sugars & Chemicals Ltd., 306 ITR 392.

31. The learned DR, on the other hand, strongly supporting orders of learned DRP submitted that the issue is covered against the assessee by the decision of ITAT., Chennai for the assessment year 2007-08 in ITA No.2157/Chny/2007, where the issue has been decided against the assessee . He further submitted that if you go through the nature of amount received under focus market scheme, it was given for the purpose of enhancement of profitability of the assessee by exploring new markets for which the assessee is not required to spend any capital expenditure which gives enduring benefit. Further, expenses incurred by the assessee to explore new market is in the nature of sales promotion expenses required to be incurred after commencement of production and thus, it cannot be at any stretch of imagination held as capital in nature to exclude from tax. Moreover, the assessee itself has offered to tax the same as revenue in nature and hence, there is no merit in the arguments of the assessee that said expenditure is capital in nature.

32. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The Government of India, Ministry of Commerce and Industry has come out with Foreign Trade Policy for the period 1st September, 2004 to 31.03.2009 and as per the said policy, it has announced a scheme for exporters of certain goods to certain regions called Focus Market Scheme . As per said scheme, export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. The assessee being eligible exporter had received licenses/duty credit scrip/ market linked focus scrips amounting to Rs.150.57 crores for the year under consideration. The assessee has considered amount received under focus market scheme as revenue receipt and offered to tax. However, based on some subsequent decisions of appellate authorities has filed an additional claim seeking exclusion of said receipt from taxation on the ground that it is in the nature of capital receipt and not exigible for tax. Therefore, in order to understand whether amount received from Focus Market Scheme is

revenue in nature or capital receipt, which is exempt from tax, one has to understand objectives of Focus Market Scheme announced by Govt. of India. As per Foreign Trade Policy document, the objective of the scheme is to offset high freight cost and other disabilities to select international market with a view to enhance our competitiveness to these countries. On the basis of objectives of the scheme alone, it can be easily concluded that amounts received under the scheme is revenue in nature, because it is primarily focusing to reduce cost of our exporters to compete with other export markets to these regions. However, various courts including Hon'ble Supreme Court in number of cases has examined nature of subsidy received from Govt. of India on the basis of purpose test and has held capital or revenue in nature depending upon purposes for which said subsidy was given. In our considered view, this controversy can be resolved if we apply test laid down in the judgement of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. Vs. CIT (228 ITR 253). The importance of judgement of Hon'ble Supreme Court in the above case lies in the fact that it has discussed and analyzed

the entire case laws on the issue and it has laid down basic test to be applied in judging the character of subsidy. That test is the character of receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply purpose for test. The point of time at which subsidy paid is not relevant. The source is immaterial. The form of subsidy is immaterial.

33. Therefore, in the light of decision of the Hon'ble Supreme Court, in the case of Sahney Steel & Press Works Ltd. Vs. CIT(supra), if we examine facts of the present case, we are of the considered view that duty credit scrips received by the assessee from Govt. of India for export of certain goods to some specified regions is certainly in the nature of revenue receipt, because which is primarily given to offset higher freight cost and other disabilities to select international markets, with a view to enhance our export competitiveness to these countries. We further, are of the opinion that this subsidy was given by way of assistance in carrying on of trade or business and to meet recurring expenses, but it was not for acquiring any capital

asset. It was not to meet part of the cost to manufacturing activity. It was not granted for production or bringing into existence any new asset. The subsidy was given year after year only after setting up of industry and only after commencement of production and therefore, such subsidy could only be treated as assistance given for the purpose of carrying on business of the assessee. It is well settled principles of law that any subsidy given for the purpose of offsetting part of cost of setting up of new industry, as per industrial policy of various State Governments or Govt. of India is considered as part of capital contribution and capital in nature, whereas subsidy given after commencement of production of products and further for enhancing profitability of the assessee is certainly in the nature of assistance given for running of business of the assessee more profitable and hence, it is definitely revenue in nature.

34. In this case, on perusal of facts available on record including foreign trade policy of Government of India, it is very clear from documents that main objective of Focus Market Scheme is to offset high freight cost and other disabilities of

exporter to select international market with a view to enhance our export competitiveness to these countries. The expenditure incurred by the assessee under this scheme for exploring new market across the globe is mainly freight cost and other recurring expenses like sales promotion expenses, including manpower cost of staff employed in marketing department. Those expenses are generally in the nature of revenue expenditure and thus, can be considered as revenue expenditure. Since, the assessee got duty credit scrip benefit to offset cost incurred for exploring new market including higher freight cost and further, said expenditure is in the nature of revenue expenditure, then any subsidy including duty credit scrips given by Govt. of India for such purpose is definitely in the nature of revenue receipt. Thus, at any stretch of imagination, the amount received under Focus Market Scheme cannot be considered as capital in nature, which is given to offset cost or part of cost of any asset or facility created by the assessee. Moreover, in this case, the assessee itself had considered amount received under Focus Market Scheme as revenue receipts and offered to tax, considering nature and

purpose of receipt of subsidy from the Govt. of India. It is a well known fact that the assessee is best judge to decide a particular item of income or expenditure, because it is well aware facts of its case. In this case, the assessee, after considering nature and purpose of amount received under Focus Market Scheme, has very well considered the same as revenue receipt and offered to tax. Therefore, based on some judgements of higher forum making a claim for excluding said receipt from tax by claiming that it is in the nature of capital receipt is not correct, unless the assessee demonstrates that facts of those case laws considered by appellate forum and facts of assessee's case are similar in nature. As regards various case laws relied upon by the assessee including the decision of ITAT., Chennai in the case of Eastman Exports Global Clothing Pvt.Ltd. in ITA No.47 & 48/Chny/2016, we find that the ITAT, Chennai Bench in above case has not apprised facts in right perspective of law and hence, the judgment of Chennai Bench is not considered. As regards decision of Hon'ble Rajasthan High Court in the case of Pr.CIT Vs. Nitin Spinners Ltd. in Income Tax Appeal No.31 of 2019, we find that

facts of case before Hon'ble High Court and facts of present case are different and hence, same is not considered.

35. In this view of the matter, and considering facts and circumstances of the case, we are of the considered view that duty credit scrips received from Govt. of India under Focus Market scheme is revenue in nature and further, same was given to offset higher cost of freight and other disabilities of exporters to be more competitive in exports to certain regions. Thus, the same cannot at any stretch of imagination be considered as capital in nature. Hence, we reject the ground taken by the assessee.

36. The next issue that came up for our consideration from additional ground no.4 of the assessee is deduction towards education and secondary education cess u/s.37(1) of the Act. The learned A.R for the assessee submitted that this issue is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of Sesa Goa Ltd. Vs JCIT (2020) 423 ITR 426, where the Hon'ble Bombay High

Court after considering various facts including Select Committee of Parliament report on exclusion of word 'cess' from the word 'tax' has held that education cess and secondary education cess is an expenditure deductible u/s.37(1) of the Act.

37. The learned DR, on the other hand, strongly opposing additional ground filed by the assessee submitted that the assessee has not made any claim by debiting cess into profit & loss account and hence, claim of the assessee by filing additional ground on the basis of subsequent decision of the court cannot be entertained.

38. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that the Hon'ble Bombay High Court has considered an identical issue in the case of Sesa Goa Ltd.(supra) and held that education cess & secondary and higher education cess are liable for deduction in computing income chargeable under head of 'profits and gains of business or profession'. The Hon'ble Rajasthan High Court in the case of

Chambal Fertilizers & Chemicals Ltd. Vs. JCIT 107 Taxmann.com 484 has taken a similar view and held that education cess is not disallowable expenditure under the provisions of section 40(a)(ii) of the Act. Therefore, we are of the considered view that there is merit in the additional grounds filed by the assessee requesting deduction for education cess & secondary and higher education cess, as business expenditure deductible u/s.37(1) of the Act. But, fact remains that assessee has taken up this issue for the first time by filing additional grounds and the Assessing Officer does not have any occasion to examine claim of the assessee. Therefore, we are of the considered view that issue needs to go back to file of the Assessing Officer and hence, we set aside the issue to file of the Assessing Officer and direct him to re-examine claim of the assessee in light of our discussions given herein above and also by considering ratio laid down by the Hon'ble Bombay High Court and Hon'ble Rajasthan High Court in the cases cited above.

39. The next issue that came up for our consideration from Ground Nos.8.1 to 8.11 and additional Ground Nos.1 & 2 of

assessee appeal is transfer price adjustment made by the AO towards international transactions of the assessee with its Associated Enterprises.

40. The assessee is engaged in the business of manufacture and sale of passenger vehicles in domestic as well as export market. The sourcing, purchasing, manufacturing and warehousing facility of the assessee is common for cars manufactured for all geographies. The various stages involved in the manufacturing process is explained by the assessee as per which the process up to the stage of trial run and pre-delivery inspection is common for both export and domestic sales. Further, the inputs for manufacture, such as import of raw materials, domestic purchase of raw materials, spares, etc., are also common for domestic and export sales. Based on the functional analysis of process, in the TP documentation, the assessee has tested its international transactions with its AE at entity level by applying Transaction Net Margin Method (TNMM) as the most appropriate method. The assessee has selected 5 companies as comparables and adopted operating profit by sales as profit level indicator ('PLI'). The assessee's margin

was at 6.04% on sales while the comparable companies' margin was arrived at 4.46%. Accordingly, claims that international transactions were considered to be at Arm's length price.

41. During transfer pricing proceedings, the TPO did not accepted TP study conducted by the assessee at entity level by applying TNMM as most appropriate method and on the basis of segmental financials furnished by the assessee, the ld.TPO has carved out domestic segment (manufacturing and spares) alone and benchmarked it with comparable companies selected by the assessee in the TP documentation. The ld.TPO has also made adjustment to the operating margin by treating royalty income, VAT, incentive, commission/discount received and insurance claim as non-operating revenue. The ld.TPO had also treated forex loss as operating expenditure for the purpose of computing margin. Thus, the TPO has recomputed operating margin of the assessee and has re-characterized international transactions of the assessee by segregating domestic sales segment as a separate international transaction and proposed

TP adjustment of Rs.102,08,60,000/-. The relevant findings of the TPO are as under:

"4. Details of International Transactions:

Sl.No.	Nature of transaction	Amount (Rs.)	Method Adopted
1.	Import of raw materials, components and spare parts	4,386,52,57,327	TNMM
2.	Export of cars and CKD parts	3,957,92,82,233	
3.	Purchase of capital Goods	431,74,23,785	
4.	Payment of Royalty	400,69,67,522	
5.	Payment of Technical know how fees	27,41,50,000	
6.	Service availed	41,68,02,303	
7.	Trade Receivable	558,02,61,746	
8.	Trade Payables	438,23,14,994	
9.	Advance from customers	16,08,521	
10.	Payment of guarantee fee	1,05,56,244	Other Method
11.	Interest Income	10,87,20,398	
12.	Export of samples	1,31,64,983	
13.	Reimbursement Expenses	96,04,66,596	
14.	Recovery of Expenses	2,95,50,331	

5. Specified Domestic Transactions:
Directors' salary – Rs.98.68 million

6. Margin level adjustment:

6.1 Need for segmentation:
The assessee is engaged in manufacturing and selling cars in India as well as exporting them to its AEs abroad. During the Financial Year 2012-13, the assessee aggregated all the international transactions and benchmarked the same by applying TNMM using third party comparable companies.

During the course of T.P. assessment proceedings the assessee was called upon to furnish segmental results showing the margins from AE export segment and domestic segment separately. This approach was required since the FAR profile of these two segments were different. It was observed that the margins from these two segments are not required to be the same. The segmental financials furnished by the assessee confirmed the observation as may be seen from the table below:

Description	Margin on revenue		Margin on cost	
	Domestic	Export	Domestic	Export
Vehicles	3.88 %	9.70 %	4.03 %	10.74 %
Spares	6.30 %	8.40 %	6.72 %	9.27 %
CKD units		14.38 %		9.04 %
Others		16.80 %		9.94 %
Total	3.88 %	6.04 %	4.04 %	6.43 %

In view of the huge variations between the profit margins of domestic segment and export to AE segment in both the categories of vehicles and spares, an attempt was made to compare the domestic margins of the assessee on a standalone basis with reference to the margins of external comparables for the following reasons:

- The turnover of the domestic segment consisted of 3,83,611 of cars sold as against only 80,711 cars sold in the AE segment.
- Revenue wise the domestic segment contributed Rs.1,69,885 million whereas export segment turnover was only Rs.97,638 million;
- Both the segments involved substantial AE transactions affecting the operating cost

6.2 Assessee's Objection to segmental testing:

The assessee questioned the above approach on the ground that it lacks purpose and wisdom. The assessee's contention was that only a portion of the imports attributable to the domestic segment is being benchmarked separately and therefore this approach may not give a complete picture of the Arm's Length price of the international transactions

unless an entity level approach is taken. Exports to AE is the predominant international transaction and this alone can be tested with the third party margin.

6.3 Position of this Office:

The contention of the assessee is not correct. The purpose of determination of Arm's Length Price is to ascertain the transactions embedded under each segment whose FAR analysis is different. In the reply the assessee has admitted that "the same material imported from AEs are utilized for both domestic and export segments". But the assessee has not explained as to why there are huge variations between the profit margins of domestic and export segments. Since the assessee failed to furnish the exact quantum of international transactions in relation to each segment on the cost side, the AE transactions affecting the cost side of the financials are proportionately allocated as done by the assessee in the segmental results. The same would form the basis for giving a parity approach while determining the quantum of adjustment.

6.4 Computing the profit margin of the domestic segment:

6,4.1 Show Cause Notice:
While computing the operating income, the assessee has taken certain non-operating items also. Therefore vide show cause notice dated 28-9-2016 the assessee was called upon to state its objections, if any, to exclude certain incomes which are taken as operating income and to include forex loss which is taken as non-operating. Vide reply dated 11-10-2016 the assessee raised its objections, which are discussed item-wise hereunder:

6.4.2 . Royalty income - Rs.1116 millions:

Assessee's claim:
In an earlier year, the assessee had transferred its genuine parts division, which is after sales service parts, to M/s. Mobis India Ltd. Apart from the consideration for the

transfer of genuine parts. division, Mobis India agreed to pay the running royalty calculated at a percentage on sales of genuine parts division. The assessee's claim is that royalty received has to be treated as operating revenue since this is similar to the royalty payment made to AE for use of technology and use of trademarks, which forms part of the operating cost while computing the margin of the assessee. Hence assessee claimed that royalty income received from Mobis India also should form part of the revenue.

Position of this Office:
Mobis India Ltd. has carved out, as per requirement of AS 17, separate segments showing the margins from genuine parts division and manufacturing division separately. It is an admitted position that the Functions, Assets and Risk in relation to these two segments are different. Besides, the margins are also found to be different. A portion of the profit generated from the genuine parts division which is calculated at fixed percentage on turnover is passed on to the assessee as running royalty. As such, this income is not generated from the regular operation of the assessee, namely, manufacture and marketing of passenger cars. This income is actually a profit share in consideration of transfer of a profit making apparatus in an earlier year. Therefore royalty income, which is classified correctly as 'other income' in the profit and loss account, is treated as non-operating in nature. This treatment is also in tune with the stand taken by this office last year

6.4.3 Incentives from Government - Rs.328 million:

Assessee's claim:
It is the claim of the assessee that VAT refund collected on sales within Tamilnadu and paid to Commercial Tax department should form part of the operating revenue. As per the MOU with the Govt of Tamilnadu dated 22.01.2008 under Ultra Mega Integrated Automobiles Projects Policy, the assessee is eligible to, in the event of making committed investments in Eligible Fixed Assets (EFA), get refund of output value added tax collected on sales within Tamilnadu

up to a certain time period. This incentive is linked to the capital investment in eligible fixed assets, which is the eligibility criteria for the assessee to seek the incentive.

Position of this office:

It is mentioned in the Notes forming part of the financial statements under 'Government Grants' as under:

> "Subsidies given by the Government which are based on the performance of the Company are recognised in the profit and loss account in the year of performance/ eligibility in accordance with the related scheme, and when there is no uncertainty in receiving the incentives."

This is actually an entry in the books of accounts recognising the revenue and subject to realisation and reversal in the later years, if not received". When that is the case, the assessee's claim that it would constitute revenue from operations appears less convincing. Besides, the assessee has failed to substantiate its pricing taking note of the incentive from the Government. It is also correctly classified in the financials as an item distinct from 'Revenue from Operations' and shown under the head 'Other income'. Such a classification cannot be treated as without any meaning. Therefore the incentive income is treated as non-operating in nature. This treatment is also in tune with the stand taken by this office last year.

6.4.4 Commission / Discount received- Rs.73 **million:**

Assessee's claim:

The assessee claims that it receives discount/commission as follows:

- Discounts offered by suppliers as a result of timely/early payment of bills raised towards purchase of materials/components
- Amount received towards Car Finance referral and car insurance referral

Position of this Office:

The above items are classified as 'other income' in the financials. They arise as a result of activities after the sale of the cars. Therefore they cannot partake the character of operating revenue. Insurance referral income is treated on par with that of commission income. Discount partakes the character of interest income which represents the difference between credit price as per invoice and the actual amount paid before the payment became due. The assessee's claim that discount received from the suppliers should be equated with the discounts provided to customers and dealers does not stand to reason. In view of the above, insurance referral commission and discount received from suppliers are treated as non-operating in nature. This treatment is also in tune with the stand taken by this office last year

6.4.5. Insurance Income - Rs.36 millions:

Assessee's claim:

The assessee contended that the above income should be considered as operating revenue. The assessee has taken insurance to protect against the risk of loss/damage of manufactured cars and parts. As the main revenue generating activity for the assessee is manufacturing of cars, in the event of any unforeseen happenings, any damage or loss of manufactured cars or parts, the operations of the assessee will be disrupted and any monetary loss will have serious impact on the business of the assessee. Hence it is imperative to mitigate the risk of such loss and as a result to cover the loss, the assessee has opted for the insurance cover. Based on the above it is evident that insurance income of the assessee pertains to cover the risk of its operating business and thus should be considered as operating item as it directly relates to the core business activity of the assessee.

Position of this Office:

The following break-up of insurance income was furnished by the assessee:-

Nature	Amount	Remarks
Domestic car	317381	claim relates to damage/loss

loss-claim		inside factory for billed domestic cars
Export car loss-claim	33613875	Claim relates to damage/loss inside factory, in transit, at port for billed export cars
Impact damage	1956404	*claim* relates to damage/loss inside factory for unbilled cars
Total	35887660	

From the above break-up, it is seen that the breakup of domestic car loss claim is to the extent of Rs.19,33,712 (Rs.3,17,381 + Rs.1616331 (computed, out of 1956404, in proportion to the domestic cars sold) only. The impact of this claim on the margin is negligible and therefore ignored.

6.4.6 Foreign exchange loss — Rs.726.69 million:

Assessee's claim:

The assessee has claimed that forex gain and losses should be treated as non-operating in nature. The assessee had huge international transactions denominated in foreign currency and the exposure is admittedly not covered through hedging or swap or other forward contracts. The assessee has decided to take the risk of volatility in the reporting currency and the transaction currency. Whether the foreign exchange loss as recorded in the books is operational in nature or not depends upon the position taken by the assessee and as admitted as part of the foreign exchange risk profile submitted by the assessee in the TP study. The assessee has declared that it is exposed to foreign exchange fluctuation risk. Accordingly, it should be treated as non-operating in nature.

The assessee has raised two additional issues in connection with foreign exchange loss.

1. Erroneous consideration of entire forex loss of domestic

segment:-

The assessee claimed that while re-computing the margin of HMIL, TPO had erroneously considered the total foreign exchange loss of Rs.726.69 million disclosed in the P & L account entirely towards domestic segment instead of attributing the same to both domestic and export segments. The amount attributable to the domestic segment should only be considered for arriving at the operating margin. The assessee claimed that it is only Rs.150.05 million.

Position of this Office:
Forex loss charged to the profit and loss account is Rs.726.69 million which is the net figure. Normally loss arises as a result of the accounts payable related to the revenue items. The assessee has revenues in foreign exchange. It is common knowledge that in the export segment in relation the receivables there will always be a gain on realisation of the receivables. Therefore, the loss position is net. In this context, what would be of relevance is the TPO has treated the gain rightly as part of export segment and the loss in relation to the payables as part of the domestic segment in the absence of the exact quantum of imported materials used by the assessee. In fact, the loss before netting the gain should form part of the operating cost of the domestic segment which would further reduce the margin of the assessee. Regarding the claim that the entire loss has been loaded on to the domestic segment, it is for the assessee to come out with the necessary.forex portfolio ledger to substantiate its claim. This has not been done. Therefore, this claim is not acceptable.

2. Forex loss on account of ECB to be treated as non operating

Assessee's claim:
Without prejudice to Its claim with regard to the treatment of entire forex loss, the assessee claimed that out of the total forex loss of 726.69 million, the loss on account of ECB loan (capital in nature) amounting to Rs. 516.36 million has

to be allowed as non-operating in nature.

Position of this Office:
The assessee did not furnish the entire forex account portfolio substantiating the losses and gains from transactions and translations in relation to revenue and capital items. Besides, the assessee has failed to reconcile the figures of forex loss as per cash flow statement and the forex loss added back as part of total income. The computation shows unrealised loss on Korean Exim loan is Rs.47.595 crores. In the absence of the necessary d this claim is not entertained.

6.4.7 Erroneous computation of value **of international** tractions in the show cause notice:
Assessee's claim:
The assessee claimed that the technical knowhow fees of Rs.274.15 million has actually been capitalised in the books and therefore it warrants similar treatment as has been given to acquisition of capital assets. Only 10% of Rs.274.15 million has to be taken as the quantum of international transactions pertaining to both domestic and export segment.

Position of this office:
This contention of the assessee will be suitably considered while quantifying the adjustment. The international transaction that would be relevant for domestic segment would be taken at Rs.30002 million instead of Rs.30155 million.

6.4.8 Computation of adjustment in the domestic segment:

The adjustment is computed as under:-

S No	Particulars	Amount [Fig. IN MIO]	Remarks
1	Operating Revenue [OR]	1,45,364.02	

2	Operating Cost [OCJ	1,41,935.46	
3	Operating Profit [OP]	3,428.56	(1-2)
*I	PLI - Tested Farty [OP/ORJ in %	2.36%	(3/1)
5	Value of International Transaction	30,002.00	
6	Proportion of International Transaction to OC in %	21.14%	(5/2)
7	Arm's Length Comparable Margin	5.68%	
8	Arm's Length Profit - at entity level	8,258.12	(1*7)
9	Arm's Length Cost - at entity level	1,37,105.89	(1-8)
10	Arm's Length Cost - after parity	28,981.14	(9*6)
11	**TP Adjustment - after** parity	1,020.86	(5-10)

a	Arm's Length Cost - after Parity	28,981	('10)
b	Transfer Price - Value of International Transaction	30,002	('5)
C	Variation	1,021	(b-a)
d	3% of Transfer Price	900	(3% of b)
e	Whether Variation exceeds 3% of Transfer Price	Yes	(if c>d)
f	TP Adjustment - after parity [Final]	1,021	('c)

Therefore, a downward adjustment of Rs.102,08,60,000/- is proposed to the Assessing Officer in respect of the AE transactions relevant to the domestic segment of manufacture of cars and spares."

42. The AO, in pursuant to transfer pricing adjustment, as suggested by the TPO vide his order dated 31.10.2016 has passed draft assessment order u/s.143(3) r.w.s. 144C(1) of the Income Tax Act, 1961 (hereinafter the 'Act') on 30.12.2016 and proposed TP adjustment of Rs.102,08,60,000/- towards value

of imports pertains to domestic sales segment. The assessee has filed objection before the DRP-2, Bangalore against order of the ld.AO and challenged TP adjustment suggested by the TPO in respect of domestic car sales segment on standalone basis by rejecting the TP study conducted by the assessee at entity level by applying TNMM as most appropriate method. The assessee had also challenged re-computation of operating margin by considering certain non-operating incomes as operating income including royalty received from Mobis Ltd towards after sales service segment and forex losses.

43. The ld.DRP vide its direction dated 16.09.2017 issued u/s.144C (5) of the Act, rejected contentions raised by the assessee on re-characterization of TP study conducted by the assessee by segregating domestic car sale segment on standalone basis, by holding that as per the provisions of the Act, each class of transactions has to be examined having regard to the Arm's length price by applying most appropriate method. Under CUP method, the price charged in an uncontrolled transaction or a number of such transactions are

relevant. Similarly, under TNMM, the profit realized by an independent enterprise from a comparable uncontrolled transaction or a number of such transactions are relevant. Thus, the Act does not say that TNMM is to be applied at the enterprise level and once TNMM is applied at the enterprise level, all international transaction are at arm's length price. As there are international transactions pertaining to the domestic segment of the assessee, separate benchmarking of the same by applying most appropriate method by the TPO cannot be considered as inappropriate. The ld.DRP has also taken support from some judicial precedents and also OECD guidelines to come to the conclusion that arm's length principle should be applied on a transaction by transaction basis for arriving at most precise approximation of fair market value.

44. As regards re-computation of operating margin by including certain non-operating income as operating in nature like royalty income, insurance claim and forex losses, has rejected objections filed by the assessee, on the ground that forex loss is always an operating expenditure because it is inextricably linked with business transactions of the assessee

and hence, it cannot be considered as non-operating revenue. Similarly, royalty received from Mobis Ltd., is also in the nature of sharing of certain profit for transferring it's after sales service business to another entity and hence, it cannot be said that it is having nexus with business activity of the assessee. The ld.DRP has also rejected contention of the assessee for selecting multiple year data by holding that as per Rule 10B(4) it is mandatory to use only current year data. Further, revised OECD Guidelines 2010 had also discussed the issue of use of multiple year data. The crux of these guidelines is that multiple year data needs to be looked at when there is a correlation between the assessee's circumstances and that of the comparables, due to certain economic conditions, or if there is a difference due to different business or product cycles or if the results of some comparables over the years can lead to discovery of anomalies rendering them incomparable. However, the OECD also cautions that, use of multiple year data does not necessarily imply the use of multiple year averages. The ld.DRP has also taken support from various judicial precedents to support its findings to reject objections

filed by the assessee. The relevant findings of the DRP are as under:

> "Panel: The above grounds are related and hence they are considered together. The submissions of the assessee have duly been considered. It is seen that the TP study of the assessee is rejected after recording reasons. Hence the contention cannot be accepted.
>
> On analysis of the TP study of" the assessee, the TPO recognized the margins of the arm's length comparables with mean margin of 5.68% computed by the assessee. From the segmental data furnished be the assessee as part of TP proceedings, the margin on cost for the domestic segment- manufacture and sales of vehicles in domestic market, was arrived at 2.36%. 1.1 is observed that the assessee has submitted its objections to the proposed action of TPO vide its written reply. The TPO has considered these contentions while carrying out the comparability exercise. The TPO has discussed the reasons and justification for accepting /rejecting the contentions of the assessee. Hence, the approach of the TPO cannot be faulted with.
>
> Further, as regards the submissions of the assessee on benchmarking of domestic segment on standalone basis, it lass been judicially held that as per the provisions, each class of transactions has to be examined having regard to the arm's length principle by applying the most appropriate method. Under CUP method, the price charged in an uncontrolled transaction or a number of such transactions are relevant. Similarly, under TNMM, the profit realized by an independent enterprise from a comparable uncontrolled transaction or a number of such transactions are relevant. Thus, the .Act does not say that TNMM is to be applied at the enterprise level and once TNMM is applied at the enterprises level, all the international transaction are at arm's length. As there are international transactions pertaining to the domestic segment of the assessee, separate benchmarking of the same by applying most appropriate

method by the TPO cannot be considered as inappropriate. Hence, the approach of the TPO is both logical and legal.

It is also observed that the approach of TPO gets support in various judicial decisions. In the case of Development Consultants Pvt. Ltd., Vs. DCIT, 115 PTJ 577, it was held that arm's length price should be determined on a transaction by transaction basis. In the case of Star India Pvt. Ltd. vs. ACIT, the Hon'ble Mumbai ITAT has held that ALP should be determined with respect to the functions performed, assets employed, risks assumed by the assessee but not on a consolidated basis. The Honourable ITAT in case of Bombardier Transportation India Private Limited, while upholding the action of the TPO in disallowance of management services, held that the payment of intra group services to AE is a separate international transaction independent of financial results and capable of verification separately. Decision of ITAT Delhi in case of Benetton India Pvt Ltd ITA No. 3829/Del/2010 and Aztec Software Limited 107 ITS 141 also are in the similar line.

It is observed that the OECD guidelines also require that Arm's Length principle should be applied on a transaction by transaction basis for arriving at the most precise approximation of fair market value. The TPO has discussed very logically the issues invo1ved in his order giving cogent reasoning ‹nd justification for his decision. Considering all the aspects, and for the reasons mentioned in preceding discussions, the action of TPO is upheld and the objection of the assessee is rejected.

10. Ground of objection 10 - contentions on the operating and non-operating nature of certain income and expenses for the purpose of computation of the operating margins of the tested party (applicant)

- The Ld. TPO erred in excluding certain items of income, which are operating in nature while

computing the operating income and operating profits and erred in including certain items of expense / losses, which are not operating in nature while computing the operating costs and operating profits.

- The Ld. TPO erred in not considering the royalty income received by the Applicant in consideration for the license of the trademarks and know-how transferred to MOBIS in relation to the distribution of after sales products, as operating while computing the operating margins of the tested party.
- The Ld. TPO erred in not considering the incentives received from the Government of Tamil Nadu for its Phase II investments under Ultra Mega Integrated Automobile Projects within Tamil Nadu, as operating while computing the operating margins of the tested party.
- The Ld. TPO erred in not considering the insurance income, discount received from suppliers towards early payment of bills, and commission received towards car finance referrals and car insurance referrals as operating while computing the operating margins of the tested party.
- The Ld. TPO erred in considering foreign exchange loss as operating while computing the operating margins of the tested party.
- The Ld.TPO has considered the economic analysis submitted by the Applicant, but had considered single year margins of comparable companies, thereby ignoring multiple year data while determining the operation margins of the comparable companies.

Panel: In above grounds, the assessee objects to the action of the AO treating royalty income, know how, incentive received from government, discount and insurance received

as non-operating while computing the operating margin of the assessee. The assessee also contends that the TPO was not correct to consider forex loss as operating. Further it is contended that multiple year data of the comparables should be considered.

The submissions of the assessee have duly been considered. It is observed that the TPO has considered the contentions of the assessee raised before him on above issues or royalty income, incentive received from government, discount and insurance received. The TPO has discussed in detail the reasons and justifications for his action at page 4-6 of his order. This Panel has perused the same and finds the approach of the TPO justifiable.

In respect of Forex loss the TPO has considered all the contentions of the assessee into account and arrived at the conclusion that the Forex loss is operating. This Panel is in agreement with the TPO order and hence no change is called for.

As regards the contention relating to the rejection of multiple year data by the TPO, we note that Rule 10B(4) which makes it mandatory to use only the current financial year's data. The word used in this Section is "Shall" implying thereby that neither the tax payer nor the Department has any choice regarding the use of data pertaining to the financial year in which the tax payer has entered into the international transactions. The proviso to Rule l0B(4) allows for use of earlier period data only if it reveals certain facts which leave an influence on the determination of transfer prices of the transactions being corn)3a1 ed. The implication here is that the earlier year data is in addition to the data pertaining to the relevant financial year. In terms of the proviso, the appellant has not been able to demonstrate with evidence how the data of past years influenced the price of the transaction.

It is seen that the revised OECD Guidelines 2010 have discussed the issue of use of multiple year data. The crux of these guidelines is that multiple year data needs to be looked at when there is a correlation between the assessee's circumstances and that of the comparables, due to certain economic conditions, or if there is a difference due to different business or product cycles or if the results of some comparables over the years can lead to discovery of anomalies, rendering them incomparable. However, the OECD also cautions that, "use of multiple year data does not necessarily imply the use of multiple year averages."

With regard to the judicial decisions relied upon by the assessee, it is seen that the Hon'ble jurisdictional ITAT as well as numerous other ITATs have now passed a number of judicial pronouncements supporting the use of current year data alone for the purpose of comparability, if the special conditions mentioned in the proviso are not capable of being demonstrated by the assessee. Some of these judicial decisions are mentioned below:

- Honeywell Ltd. [2000-TIOL-104-ITAT-Pune]
- Aztech Software Technology [294 ITR (AT) 32 (Bang) (SB)]
- Customer Services India (P) Ltd [2009-TIOL-424-ITAT-Del]
- ScheefenackerMotherson Ltd. [2009-TIOL.-376-ITAT-Del]
- Geodis Overseas (P) Ltd. (2011-II-3'1-ITAT-Del-TP)
- TNT India Pvt. Ltd. (2011-TII-39-ITAT-Bang-TP)
- NGC Network (India) Pvt. Ltd. (2011-T II-45-ITAT-Mum-Intl)
- Birla Soft Limited (2011-'1'1 I-70-ITAT-Del-TP)
- Haworth (India) Pvt. Ltd. (2011-TII-64-ITAT-Del-TP)
- Deloitte Consulting India Pvt Ltd. (ITA No.

1082/Hyd/2011)

> In view of the above discussion, the action of the TPO of rejecting the use of multiple year data is considered to be to be justified and the objection raised by the assessee in this ground is rejected."

45. The ld.AR for the assessee submitted that the ld.TPO / DRP has erred in benchmarking international transactions by segregating domestic car sales segment on standalone basis without appreciating the fact that international transactions that are closely linked are to be aggregated and benchmarked and therefore, adjustment based on segmented results is not warranted. The ld.AR further submitted that the ld.TPO has not brought on record any functional differences between two segments, but only alleged that profit of two segments are varied without considering the fact that the assessee has tested its international transactions at entity level and proved itself as a tested party by selecting 5 comparables of similar nature with their margin as per which, the assessee's operating margin is much higher than the comparable companies margin. The ld.AR further submitted that approach of the ld.TPO is erroneous as he has artificially carves out a portion of total international transactions which is apportioned to domestic car

sales segment, at the same time, failed to test the remaining portion of the same international transactions for arm's length price. The ld.AR further submitted that the ld.TPO while segregating the transactions into domestic sales segment and export sales segment, has failed to consider the fact that comparables selected by the assessee in its TP documentation is also having domestic sales as well as export sales segment and thus choosing very same comparable selected by the assessee for entity wide benchmarking is incorrect. The ld.AR referring to Rule 10A(d) of Income Tax Rules, 1962 and guidance note on report under Section 92E of the Act, issued by the Institute of Chartered Accountants of India ('ICAI') and also OECD Transfer Pricing Guidelines 2010 and United Nations Practical Manual on Transfer Pricing for Developing Countries, submitted that where there is existence of closely linked transactions, the same could be considered as one composite transaction and for this purpose, common transfer pricing analysis needs to be carried out by applying most appropriate method. In this regard, he has relied upon the

decision of ITAT in the case of Cummins India Ltd., vs. DCIT, Pune, 80 taxmann.com 62.

46. As regards re-computation of operating margin by considering certain items in the Profit & Loss account as operating / non-operating in nature, the ld.AR submitted that the AO has erred in re-computation of margin by considering royalty income from Mobis as non-operating income. The TPO has grossly erred in appreciating the fact that royalty received by the assessee from Mobis is inextricably linked with sales made by the assessee, because the assessee was earlier generating revenue from after sales service business and the same has been considered as operating, whereas for the year, the total business segment of after sales services has been transferred to Mobis. Further, Mobis agreed to pay a license fee at 8.5% on domestic sales value, which is directly linked to each and every car sales made by the assessee. The ld.AR further submitted that the TPO has considered royalty paid by the assessee to its AE's as operating cost whereas resulting income received has been treated as non-operating revenue,

without appreciating the fact that both royalty payment as well as royalty income is araised out of trademark and known-how obtained by the assessee from its parent HMC, Korea vide Technology and Royalty Agreement dated 1st July, 2006. When royalty expense is considered as operating expense, royalty income which is related to royalty expense should also be given the same treatment.

47. As regards, commission / discount income, incentive, insurance income, the assessee has treated these incomes as operating in nature, because all are linked to main business activity of the assessee. The TPO without giving any reasons has changed nature of income and re-computed operating margin. As regards, forex losses to be treated as non-operating expenditure, the ld.AR submitted that the assessee has consistency considered foreign exchange gain or loss as non-operating item for several years and the same has been accepted by the Department. However, for the year under considering, the TPO has considered foreign exchange loss as operating without following the principles of consistency. Further, substantial portion of the forex loss is attributable to

restatement of External Commercial Borrowing ('ECB'), which forms part of financing activity and hence, it would be incorrect to treat same as part of operating cost for benchmarking purpose. The ld.AR further referring to Ground Nos.8.10 and 8.11 submitted that the TPO has made proportionate adjustment on the basis of international transactions pertaining to domestic car sales segment, whereas the ld.DRP without providing an opportunity to the assessee, enhanced said adjustment by adjusting shortfall of margins to entire cost which predominantly consists of third party cost. It is a well settled principle of law that TP adjustment has to be computed only in respect of international transactions and not at an entity level, which is evident from the fact that as per the provisions of Section 92(1) and Rule 10B(1)(e), it had specifically refers to any income arising from international transaction shall be computed having regard to the arm's length price. Therefore, the ld.DRP without appreciating relevant provisions has enhanced TP adjustment to total cost, which is incorrect. In this regard, the ld.AR relied upon the following judicial precedents.

1) High Court of Madras in assessee's own for assessment year 2012-13 in W.A. No.1344 of 2017.
2) ITAT, Chennai in the case of Doosan Power Systems India Pvt. Ltd. in IT(TP)A 83/Chny/2018.
3) ITAT, Chennai in the case of Yongsan Automotive India Pvt. Ltd in ITA No.357/Mds/2017
4) ITAT, Chennai in the case of Mobis India Ltd in 38 Taxmann.com231
5) ITAT, Chennai in the case of Misuba Sical India Pvt. Ltd., in ITA No.400/Chny/2017.
6) ITAT, Mumbai in the case of IOT Design and Engineering Ltd., in ITA No. 4722/Mum/2016.

48. The ld. DR, on the other hand, strongly supporting order of the ld. DRP submitted that there is no error in re-characterization of international transactions by the TPO by segregating domestic car sales segment on a standalone basis, because as per the provisions of the Act, arm's length price needs to be tested on transaction by transaction method having regard to the nature of transactions by adopting most appropriate method. Further, once aggregate transaction are

tested by adopting TNMM as most appropriate method, there is no bar to test other transactions of its nature by considering most appropriate method. The TPO as well as the ld.DRP has brought out various reasons to segregate transactions on a standalone basis and held that the assessee is having different margins from different segments and hence, it needs to be separately benchmarked. Therefore, there is no error in the orders of the TPO as well as the ld.DRP. He, further submitted that as regards re-computation of operating margin by considering certain operating / non-operating income, the TPO as well as the ld.DRP has given valid reasons to consider royalty income, commission / discount income, incentives and insurance as non-operating, because those incomes are not recurring in nature, which accrues to the assessee on day to day basis and further, derived from main business activity of the assessee. As regards foreign exchange loss, it is a well settled principle of law by various decisions of Courts and Tribunals that forex loss is also revenue in nature, which is operating income / expense, because same arises out of sales or purchase transaction of the assessee or other capital financing

activities. Therefore, forex loss / gain cannot be considered as non-operating. The TPO / ld.DRP have given valid reasons to reject objection filed by the assessee and hence, their orders should be upheld.

49. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We have also carefully considered various case laws cited by the ld.AR for the assessee. The assessee is a wholly owned subsidiary of Hyundai Motor Company, South Korea. The assessee is engaged in manufacturing and selling cars in India and exporting them to AE's abroad. The assessee has entered in to various international transactions with its AE's and claimed it as tested party and benchmarked the same by applying TNMM as most appropriate method. The TPO did not accept TP study conducted by the assessee and according to him, there is huge variation between profit margins of domestic segment and export to AE segment, in both categories of vehicles and spares. Accordingly, he has rejected TP study conducted by the assessee and re-characterized TP study by segregating domestic car sale segment on a standalone basis

and made TP adjustment. We have given our thoughtful consideration to the reasons given by the ld.TPO / DRP and arguments advanced by the ld.AR for the assessee and we, ourselves do not subscribe to the arguments advanced by the ld.AR for the assessee for segregation of domestic car sale segment on a standalone basis for the simple reason that as per the provisions of the Act, each class of transactions has to be examined having regard to the Arm's length price by applying most appropriate method. Under CUP method, the price charged in an uncontrolled transaction or a number of such transactions are relevant whereas, under TNMM, the profit realized by an independent enterprise from a comparable uncontrolled transaction or a number of such transactions are relevant. Therefore, as per the provisions of the Act, it does not say that once, TNMM is applied at the enterprise level, all international transactions are at arm's length price. Since, there are international transactions pertaining to domestic segment, separate benchmarking of the same by applying most appropriate method by the TPO is in accordance with law and thus, the approach of the TPO in segregating domestic car sale

segment on a standalone basis is both logical and legal. We, further noted that the assessee is having different margins for different segments of business, as per which, its margin from domestic car sale segment is 2.36% whereas, its margin from export sale segment is 6.04%. Further, revenue-wise domestic segment contributed more revenue, when compared to export segment. Both segment involved substantial AE's transactions affecting operating cost. Therefore, we are of the considered view that separate benchmarking of transactions on segment-wise was is very much required, because the FAR profile of two segments are different. We, further, noted that OECD Guidelines also require that arm's length principle should be applied on a transaction by transaction basis for arriving at the most precise approximation of fair market value. Therefore, we are of the considered view that there is no error in reasons given by the TPO to segregate domestic car sale segment on a standalone basis and benchmarked transactions of the assessee with its AE's. As regards, case laws relied upon by the ld.AR for the assessee, we find that there are divergent views on the issue, where some appellate forums have held

that international transactions that are closely linked are to be aggregated and benchmarked, whereas some appellate forums had held that arm's length price should be determined on a transaction by transaction basis, based on functions performed, asset employed and risk assumed by the assessee. Further, the Act is very clear, as per which each international transaction has to be benchmarked based on the nature of transactions by applying most appropriate method. There is no common rule for applying TNMM as most appropriate method for all transactions. Some international transactions have to be tested by applying CUP method, resale price method or cost plus method and selection of appropriate method is depends upon nature of transactions. Therefore, we are of the considered view that there is no merit in the arguments taken by the ld.AR for the assessee that the TPO / DRP has erred in segregating domestic car sale segment on a standalone basis for the purpose of benchmarking ALP of international transactions with its AE.

50. Be that as it may. The fact remains that the TPO while segregating domestic car sale segment on a standalone basis

has benchmarked transactions by considering 5 comparables selected by the assessee in its TP documentation. It was the claim of the ld.AR for the assessee that 5 comparables selected by the assessee are all having domestic as well as export sales and thus, for bench marking purpose, the ld TPO either shall have to select new comparables or segregate domestic segment of comparables, otherwise it gives distortion figures. The TPO has segregated domestic car sales of the assessee and tested by applying margin of comparables which is inclusive of export sales. We find merit in the arguments of the ld.AR for the assessee for the simple reason that when the ld TPO is considering a particular segment on a standalone basis, then it is the duty of the TPO to benchmark relevant segment by selecting appropriate comparables, whose functions performed, asset employed and risk assumed are also similar to FAR analysis of the assessee's segment. In this case, the TPO having segregated domestic car sale segment on a standalone basis, has failed to select appropriate comparables or to carved out domestic sale segment of comparables to compare margins of the assessee with comparable companies. Therefore, we

are of the considered view that the approach of the TPO is inconsistent and needs to be reconsidered.

51. As regards re-computation of margin of the assessee by considering certain operating / non-operating incomes, we find that the AO has considered royalty income received from Mobis, commission / discount income and insurance claim received by the assessee as non-operating. The TPO has given his own reasons for reaching to a conclusion that all these incomes are non-operating in nature. We have given our thoughtful consideration to the reasons given by the TPO in light of various arguments advanced by the assessee and we ourselves do not subscribe to the reasons given by the TPO for the simple reason that the assessee right from financial year 2007-08 onwards appointed Mobis Ltd to take up after sales service activities carried on by the assessee by transferring its business to Mobis. As per the agreement between the assessee and Mobis, Mobis agreed to pay license fee at 8.5% on the domestic sales value. The assessee has considered royalty income received from Mobis as operating in nature, because revenue received from Mobis for after sales service

business in inextricably linked with car sales made by the assessee. Further, the assessee has paid royalty to its parent company HMC, Korea for sharing technology and know-how and same has been treated as operating expenses by the TPO. The assessee has received royalty income from Mobis under similar agreement for sharing technology and know-how, but the same has been considered as non-operating by the TPO. When the TPO has considered royalty payment by the assessee to its parent company as operating in nature, then there is no reason for the TPO to consider royalty income received from Mobis as non-operating income. Therefore, we are of the considered view that the ld.TPO was erred in considering royalty received from Mobis as non-operating. Hence, we direct the ld. TPO to consider Royalty income as operating income for computing operating margin.

52. As regards commission / discount income, incentives and insurance claim income, we find that all these incomes are generated from main business activity of the assessee of manufacturing and sales of cars. The assessee has received commission / discount on procurement of raw materials and

insurance claim is received towards damaged cars manufactured by the assessee. When the assessee is recognizing income from sale of cars as operating in nature, then insurance claim received towards damaged cars is also operating in nature and hence, we are of the considered view that the ld. TPO has erred in considering commission / discount income, incentives and insurance income as non-operating income. Hence, we direct the ld. TPO to consider commission / discount income, incentives and insurance claim as operating income for the purpose of computing operating margin.

53. As regards forex loss, the assessee has treated it as non-operating income. The main reason given by the assessee to treat forex gain / loss as non-operating in nature that most of the loss / gain is arised from repayment of External Commercial Borrowings, which is a finance activity and not related to business activity of the assessee. The assessee further claimed that, it had consistently recognizing gain / loss as non-operating in nature and the same has been accepted by the Department for earlier assessment years. We have considered reasons given by the ld.TPO in light of arguments advanced by the

ld.AR for the assessee and find that there is no merit in arguments of the ld.AR of the assessee for the simple reason that mere treatment of the assessee in its books of accounts is not a sufficient reason for treating a particular item of expenditure / income is operating or non-operating in nature. But, what is to be seen is the nature of income. In this case, the assessee has derived forex loss on account of fluctuation in foreign currency and said loss is arised during the course of business of the assessee, either for import of raw materials or export of goods or borrowings from external sources. Further, loss arised on account of fluctuation in foreign currency for payment made to suppliers of materials or receipts from buyers of assessee product is also arised out of main business activity of the assessee and thus, the same cannot be considered as non-operating in nature. As regards, the claim of the assessee in light of principle of consistency, we find that although the AO requires to follow principles of consistency in giving treatment of particular item of income or expenditure, but res judicata is not applicable to Income-tax proceedings. Moreover, the law is evolving day by day, based on various factors including

amendment to the Act and judgments of various courts and tribunals, as per which it is difficult for the AO to give a particular treatment for any item of income or expenditure, when the law has been substantially changed in subsequent assessment years. Further, it is a well settled principle of law that forex gain or loss is revenue in nature and operating income/expenditure. Therefore, we are of the considered view that there is no merit in the arguments taken by the ld.AR for the assessee that forex loss should be considered as non-operating in nature. Hence, we reject arguments taken by the assessee.

54. As regards working capital adjustment claimed by the assessee by filing additional ground, we find that the issue is now settled by various decisions including the decision f ITAT, Chennai in the case of Doosan Power Systems India Pvt. Ltd., in ITA No.581/Mds/2016, where myself is one of the party to the decision held that working capital adjustment needs to be given while computing operating margin of the assessee. Therefore, there is merit in additional ground taken by the assessee

requesting working capital adjustment. But, fact remains that since assessee has taken additional ground, the facts with regard to claim of the assessee was not before the TPO. Hence, this issue needs to go back to the file of the TPO to examine the claim of the assessee in light of facts related to working capital adjustment.

55. As regards proportionate adjustment, we find that the ld.TPO has made TP adjustment in respect of international transactions pertains to domestic car sale segment, whereas the ld.DRP has enhanced said adjustment by adjusting the margins to entire transactions of the assessee, which predominantly consist of third party cost. We find that as per the provisions of Section 92 of the Act and Rule 10B(1)(e) of the Rules, it is very clear that any income arising from an international transaction shall be computed having regard to arm's length price, that means, very purpose of said provisions is to establish arm's length nature of the international transactions only. The transactions with non AE's has to be presumed to be at arm's length, because there is no relationship which is likely to influence pricing. It is also a

settled principle of law by the decision of Hon'ble High Court of Madras in assessee's own case for assessment year 2012-13 in W.A No.1344 of 2017, where it was clearly held that transfer pricing adjustment can be done only in respect of international transactions and cannot be done on the basis of entity level values. Therefore, we are of the considered view that the ld.DRP is erred in making TP adjustment at entity level and hence, we direct the TPO to restrict TP adjustment only to international transactions pertain to domestic car sales segment.

56. In this view of the matter and considering facts and circumstance of this case, we are of the considered view that the whole issue of transfer pricing adjustment in respect of import of goods pertains to domestic car sales segment needs to go back to the file of the TPO to reconsider the issue in light of our discussions given herein above in preceding paragraphs. Hence, we set aside the issue to the file of the TPO and direct him to reconsider the issue after affording reasonable opportunity of hearing to the assessee.

57. In the result, appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 1st September, 2021

Sd/-	Sd/-
(वी. दुर्गा राव)	**(जी. मंजुनाथ)**
(V.Durga Rao)	(G.Manjunatha)
न्यायिक सदस्य /Judicial Member	लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 1st September, 2021
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant 2. Respondent 3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.