IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI ‘I-1’ BENCH, NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5189/DEL/2018
[A.Y 2014-15]

Keihin Automotive India Pvt Ltd [Now amalgamated and known as Keihin India Manufacturing Pvt Ltd Plot No. 663, Phase – 5, Udyog Vihar Gurugram, Haryana	Vs.	The Addl. C.I.T Special Range-5 New Delhi

PAN : AAACK 5968 J

[Appellant] [Respondent]

Date of Hearing : 24.08.2021
Date of Pronouncement : 24.08.2021

Assessee by : Ms. Pallavi Dinodia, CA
Shri R.K. Kapoor, CA

Revenue by : Shri Surender Pal, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 21.06.2018 framed u/s 143(3) r.w.s 144C(5) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

2. The grievances of the assessee read as under:

"1. The Ld. Transfer Pricing Officer ('TPO')/Ld. Assessing Officer ('AO') and consequently the Hon'ble Dispute Resolution Panel ('DRP') have erred in law and on facts and circumstances of appellant's case, in making a transfer pricing ('TP') adjustment of Rs.4,06,60,617/-on account of Arm's Length Price of the International Transactions of the appellant under section 92CA of the Income Tax Act, 1961 ('the Act'), wholly on illegal, erroneous and untenable grounds.

2. The order of Assessment including order of the Ld. TPO is bad in law and not in accordance with the facts of the appellant.

3. The Ld. TPO/Ld. AO and consequently the Hon'ble DRP have grossly erred in law and on facts and circumstances of the appellant's case by not granting the import duty adjustment carried out by the appellant on account of difference in import duty cost of appellant and that of the comparables, which is in contravention with the provisions of Rule 10B(3) of the Income Tax Rules, 1962 ('the Rules'); and:

3.1 The Hon'ble DRP, did not appreciate that the import duty adjustment, was calculated based on level of comparative imported raw materials and import duty cost thereon, based on the financial details of the comparable companies to the extent available in public domain and reasonable assumptions.

4. The Ld. TPO/ Ld. AO and consequently the Hon'ble DRP have grossly erred in law and on facts and circumstances of the appellant's case in refusing capacity adjustment asked for by the appellant, although the FAR differences and under-utilization of capacity were appreciated by the Ld. TPO while granting depreciation adjustment. The Ld. TPO / Hon'ble DRP erred in law in restricting the capacity adjustment only to depreciation.

5. Without prejudice to the above grounds, the Ld. TPO/Ld. AO and consequently the Hon'ble DRP have erred in law and on facts and circumstances of the case of the appellant in computing the Transfer pricing adjustment by allocating the entire difference between the arm's length operating profit and actual operating profit to the controlled transactions of the appellant and not in the proportion in which the international transactions forming part of the cost base of the appellant bears to the total operating cost of the appellant i.e. 77.84%.

5.1 The Ld. TPO/Ld. AO/Hon'ble DRP erred in law in not restricting the adjustment to the proportion of international transactions with AEs on the cost side which were admittedly 77.84% of the total operating cost.

6. The penalty proceedings initiated u/s Sec 271(l j(cj are on wholly illegal and untenable grounds since there was no concealment of any income nor submission of inaccurate particulars of income, nor any default according to law by the appellant.

That each ground is independent of and without prejudice to the other grounds raised herein."

3. Representatives of both the sides were heard at length. Case records carefully perused and judicial decisions relied upon by the assessee duly considered..

4. Briefly stated, the facts of the case are that the appellant company is engaged in the business of manufacturing of Compressed Natural Gas [CNG] assembly parts for the automotive industry. The year under consideration is the second full year of commercial operations and the assessee followed Aggregated Transactions Approach to arrive at the Arm's Length Price ('ALP') of its majority of the controlled transactions, considering itself as the tested party.

5. The assessee arrived at its PLI by claiming the following adjustments in the TP Study:-

i) Capacity utilization adjustment in respect of Personnel Costs and Depreciation expenses, and

ii) Import duty and related cost adjustment on consumption of imported raw materials.

6. Benchmarking summary of international transactions as per the TP Study is as under:

Nature of transactions (adjusted by the Ld. TPO)	Value (INR)	Most Appropriate Method	Profit Level Indicator ('PLI')	Arm's Length Result	Result of assessee
1. Purchase of raw materials	24,18,79,425	Transactional Net Margin Method ('TNMM')	Operating Profit Operating Revenue OP/OR	3.52%	9.78%
2. Purchase of Traded Goods	8,25,18,387				
3. Availing of technical support services	6,81,50,800				
4. Payment of royalty	51,48,759				
5. Job work charges	1,30,905				
Total	**39,78,28,276**				

7. The transfer pricing assessment was completed by the TPO vide order dated 23.10.2017 wherein the TPO made transfer pricing adjustment of Rs. 4,06,60,617/-. While completing the transfer pricing adjustment, the TPO accepted the adjustment of non operating expenses and capacity utilisation expenses in respect of depreciation by following the order of the DRP for A.Y 2013-14 and other adjustments claimed by the assessee were denied.

8. Objections were raised before the DRP and the DRP affirmed the order of the TPO vide order dated 11.05.2018 rejecting the contentions of the assessee for capacity utilisation adjustment for personnel expenses, adjustment importing duty and related costs on raw material and proportionate transfer pricing adjustment. Final assessment order was, accordingly, passed which is under consideration before us.

9. Ground Nos. 1 and 2 are of general in nature and need no separate adjustment.

10. Ground No. 3 relates to non granting of adjustment on import duty.

11. This issue was considered by this Tribunal in assessee's own case in A.Y 2013-14 in ITA No. 7801/DEL/2017 order dated 08.06.2021 and has decided this issue against the assessee and in favour of the Revenue. The relevant findings of the order of the Tribunal read as under:

> "With respect to ground number 3.4 where the claim of the assessee is that the import duty adjustment carried out by the

assessee on account of huge difference in import duty cost of the assessee as well as of the comparable should also be eliminated from the operating expenses of the assessee, we hold that as necessary consumption of the material is only booked in the profit and loss account for which the materials are imported for onward sale/ manufacturing whose revenue has been booked in the profit and loss account, the above adjustment cannot be granted. This is so for the reason that the duty structure of the material imported by the assessee and the sale price of the assessee takes into consideration all these commercial aspects of the trading or operation of the business of the assessee. Naturally, if the import duty factor (rate) is higher when raw materials imported by the assessee naturally the sale price will reflect the recovery of those import duty also from the buyers."

12. Respectfully following the aforesaid findings of this Tribunal, we hold accordingly. Ground No. 3 stands dismissed.

13. Ground No. 4 relates to the refusal of capacity adjustment as asked by the assessee.

14. We find that while dismissing the objection of the assessee, the DRP observed as under:

"vi. On this issue, the DRP in its directions for AY 2013-14 dated 22.09.2017 directed as under:

> "3.5.2 With regard to idle capacity adjustment, *we* do not approve ad-hoc adjustment of 37% of cost of sales ? (import duty on tangibles) and personnel cost, as has been done by the assessee. Assessee has to show that the capacity utlilisation of the assessee *was* 63% and that of the comparables averaged at 100%. No fact can be assumed in the name comparability adjustment."

vii. The factual matrix of the case remains the same for this AY also. So there is no reason to differ from the above direction of the DRP. The TPO has provided for the underutilization of capacity by adjustment in depreciation. The order of the TPO is upheld on this issue.

6. Without prejudice to the above, the Ld. AO/TPO has erred in law and on facts and circumstances of the case of the assessee in computing the proposed Transfer pricing adjustment by allocating the entire difference between the arm's length operating cost and actual operating cost of the assessee and not adjusting it in the proportion that international transactions forming part of the cost base of the assessee bear to the total operating cost of the assessee i.e. 77.84%."

15. It can be seen from the above directions of the DRP that it has simply followed the directions given by it in A.Y 2013-14, which quarrel travelled upto this Tribunal in ITA No. 7801/DEL/2017 order dated 08.06.2021 and this Tribunal has decided this quarrel in favour of the assessee and against the Revenue. The relevant findings read as under:

> "With respect to ground number 3.3 where the capacity utilization adjustment carried out by the assessee in respect of personnel cost being the first year of operation has not been granted by the lower authorities, we hold that as assessee has submitted complete details of the employees stating their name, designation, experience, educational qualification, role and responsibility and the amount of salary paid, more particularly when there is a disproportionate difference between the salary expenditure incurred by the comparable companies with the salary expenditure of the assessee and there are seconded employees who are necessarily deputed to the assessee for the purpose of development of the business, the claim the assessee needs to be re-examined with the details furnished. This is more so when learned dispute resolution panel accepted that there is a higher depreciation claim in the case of assessee compared to the comparable companies. In view of this we set aside ground number 3.3 of the appeal back to the file of the learned transfer pricing officer with a direction to examine the claim of the assessee that those expenditure on salary of the employees who are working for

the development of the business and not for earning the operating profit for the year requires proper adjustment."

16. As no distinguishing fact has been brought to our notice, respectfully following the decision of this Tribunal [supra], we direct accordingly. Ground No. 4 is allowed for statistical purposes.

17. Ground No. 5 relates to the grievance that in computation of transfer pricing adjustment, the Assessing Officer erred by allocating the entire difference between the arm's length operating profit and actual operating profit to the controlled transactions of the appellant.

18. The proportionate transfer pricing adjustment as claimed by the assessee is as under:

Table 7: Computation of Proportionate TP Adjustment

Particulars	Reference	Amount (INR)
Operating Revenue of the assessee *(refer Page No. 9 of original TP order - Page No. 103 of Appeal Set)*	A	51,83,87,140
Comparable Adjusted Operating Margin *(refer Page No. 10 of original TP order - Page No. 104 of Appeal Set)*	B	7.40%
Arm's Length Operating Profit	C=A*B	3,83,60,648
Arm's length Operating Cost	D=A-C	48,00,26,492
Actual Operating Cost	E	52,06,87,109
TP Adjustment *(refer Page No. 10 of original TP order - Page No. 104 of Appeal Set)*	F=E-D	**4,06,60,617**
Total Controlled Transactions forming part of cost base of assessee *(refer below Table)*	G	33,85,11,582
Total Controlled Transactions forming part of cost base of the assessee / Actual Operating Cost of the assessee	H = G /E	65.01%
Proportionate TP Adjustment	I = F*H	2,64,34,474

19. We find that this quarrel travelled upto the Hon'ble High Court of Delhi in ITA Nos. 11 & 12/2015 and decided by the Hon'ble High Court vide order dated 09.09.2015. The relevant findings of the Hon'ble High Court read as under:

> "12. The contention that the adjustment on account of expenses as determined by the TPO must be attributed entirely to the international transaction is bereft of any merits. During the Financial Year 2003-04 relating to the Assessment Year 2004-05, the Assessee had reported an operating income of Rs.72,24,22,000/-. The total expenses for the said period amounted to Rs.68,00,88,000/-. Admittedly, the international transactions in question amounted to Rs.15,90,66,935/- which were only 23.38% in value of the total expenses. The TPO had determined the PLI (Operating Profit over Total Cost) of comparable cases at 8.29% against 6.22% as declared by the Assessee. Applying the PLI of comparable cases, the adjusted total expenses were computed at Rs.66,71,17,924/-, thus, indicating an adjustment of Rs.1,29,70,076/-. As is apparent from the above, the said adjustment related to entire expenses and not just the international transactions alone. Since the international transactions only constituted 23.38%, a TP Adjustment proportionate to that extent could be made in respect of such international transactions. Thus, only an adjustment of Rs.30,33,593/- could be attributed to the international transactions in question. The same was accepted by the CIT(A) as

well as the Tribunal. We do not find any infirmity with their decision."

20. Respectfully following the findings of the Hon'ble Jurisdictional High Court of Delhi [supra], we direct the Assessing Officer to accept the computation of proportionate TP adjustment as computed by the assessee and as exhibited elsewhere in this order. Ground No. 5 is accordingly allowed.

21. Ground No. 6 is premature and is dismissed.

22. In the result, the appeal filed by the assessee in ITA No. 5189/DEL/2018 is partly allowed.

The order is pronounced in the open court on 24.08.2021 in the presence of both the rival representatives.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 24th August, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

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ITAT, New Delhi

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