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

BEFORE SHRI B.C. MEENA, ACCOUNTANT MEMBER
and
SHRI C.M. GARG, JUDICIAL MEMBER

ITA No.5748/Del./2011
(Assessment Year : 2007-08)

M/s. Yamaha Motor India Pvt. Ltd., First Floor, The Great Eastern Centre, 70, Nehru Place, Behind IFCI Tower, New Delhi -1 10 019. **(PAN : AAACE1647C)**	vs.	ACIT, Circle 18 (1), New Delhi.

ITA No.6434/Del./2012
(Assessment Year : 2008-09)

M/s. Yamaha Motor India Pvt. Ltd., First Floor, The Great Eastern Centre, 70, Nehru Place, Behind IFCI Tower, New Delhi -1 10 019. **(PAN : AAACE1647C)**	vs.	ACIT, Circle 18 (1), New Delhi.
(Appellant)		(Respondent)

Assessee by : Shri Ved Jain, FCA, Smt. Rano Jain, CA and
Shri V. Mohan, CA
Revenue by : Shri Piyush Jain, CIT DR

O R D E R

PER B.C. MEENA, ACCOUNTANT MEMBER :

ITA No. 5748/Del/2011, Assessment Year 2007-08

This is an appeal filed by the assessee challenging the various additions made by the Assessing Officer under section 143(3) read with section 144C of the Income-tax Act, 1961 consequent to the order of the Dispute Resolution

Panel dated 08.09.2011. Assessee's shares are owned 100% by Yamaha Motors Company, Japan. Assessee is engaged in manufacturing of Motorcycle and spare parts under "Yamaha" brand name. Assessee had undertaken international transaction with its Associated Enterprises (AE). These transactions were referred to TPO u/s 92CA (1) of the Act. The grounds raised by the assessee are as under :-

> "1. On the facts and circumstances of the case, the order passed by the learned AO under Section 143(3) read with Section 144C of the Act is bad, both in the eyes of law and on facts.
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> 2. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in assessing the income of the assessee at Rs.25,30,50,980/- as against loss of Rs.133,85,69,659/- declared by the assessee.
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> 3. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in rejecting the books of accounts of the assessee despite the same being maintained properly and duly audited.
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> 4.i. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in making an addition to the profits of the assessee at an amount of Rs.86,58,81,600/-.
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> ii. That the above said amount has been arrived at most arbitrarily taking an ad-hoc profit of Rs.3,200/- per bike, without there being any basis for the same, indulging in conjecture & surmises.
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> iii. That without prejudice to the above and in the alternative, the learned AO has erred both on facts and in law in making various additions and disallowances in addition to the adhoc addition made on account of profits as above. Once such addition is made, no further addition and disallowances are called for.

5.i. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in making disallowance of an amount of Rs.20,99,39,042/- on account of royalty payment.

ii. That the learned AO has erred in holding the above said expenditure to be of personal in nature ignoring the fact that in case of a company there cannot be an element of personal nature to any expense incurred.

iii. That the learned AO has erred both on facts and in law in holding the above said amount to be a deemed dividend under Section 2(22)(e) ignoring the fact that the same is a payment made by the assessee and not a receipt, to be taxable.

iv. That the learned AO has erred both on facts and in law in disallowing the above said amount under Section 40(a)(i) of the Act.

6.i. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in making an addition of Rs.51,58,00,000 as difference in arm's length price determined by Transfer Pricing Officer (TPO) and the appellant.

ii. On the facts and circumstances of the case, the learned TPO has erred, both on facts and in law in arbitrarily computing the arm's length cost of total transactions including both domestic as well as international by applying the operating profit margin earned by a comparable like Bajaj Auto Ltd.

iii. That the above addition has been made ignoring the detailed transfer pricing study made by the appellant for determining the arm's length price.

7.i. On the facts and circumstances of the case, TPO has erred in rejecting the CPM method applied by the assessee in respect of spare parts purchased from Associated Enterprise's and applying TNMM method.

ii. On the facts and circumstances of the case, TPO has erred in rejecting RPM method for transaction pertaining to exports to AEs and applying TNMM method.

iii. On the facts and circumstances of the case, TPO has erred in rejecting RPM method for transaction pertaining to exports to AEs and applying TNMM method.

8.i. On the facts and circumstances of the case, TPO has erred in applying a rate of 27.20% as the cost difference and accordingly recommending proportionate adjustment of 18.93% amounting to Rs.51.58 Crores.

ii. That the above adjustment has been made arbitrarily ignoring all the norms and computing the ALP.

iii. That the order of the TPO having failed to determine the ALP for different nature of transaction is bad and liable to be ignored.

9. Without prejudice to the above and in the alternative the comparables used by the TPO are wrong and unreasonable.

10. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in not allowing set off of the brought forward losses pertaining to the assessment years 2001-02 to 2006-07 and unabsorbed depreciation pertaining to assessment years 1997-98 to 2006-07.

11. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in charge interest under Section 234B of the Act.

12. The appellant craves leave to add, amend or alter any of the grounds of appeal."

2. Grounds No. 1, 2 and 12 are general in nature and do not require any adjudication.

3. It was submitted by the learned AR that grounds no. 3, 4, 5 and 10 are covered in favour of the assessee by the decision of ITAT in assessee's own

case for assessment year 2006-07 which has been followed also by the ITAT in assessment year 2003-04 and 2004-05.

3.1 The learned DR was not having any contrary view and agreed with the contention of the learned AR.

3.2 Grounds no.3 and 4 are regarding rejection of books of account and estimation of income by applying a profit of Rs.3200 per bike. This issue has been discussed by the Assessing Officer in Paras 4.1 to 4.4 of the assessment order. It has been stated that in the scrutiny assessment in assessment year 2006-07 this issue has been discussed in great length and a finding has been given therein that assessee's books of account do not reveal the correct profit of the assessee company. Thereafter profit has been estimated at an average profit per bike on the basis of the declared figures of M/s Hero Honda Motors Ltd. which company is also in the same business activity as that of the assessee manufacturing and trading of motorcycles.

3.3 The AO on the basis of the finding in the assessment year 2006-07 issued a show cause notice to the assessee why findings given in assessment year 2006-07 be not adopted for this year also. The assessee objected to the AO's proposal. However, the AO rejected assessee's objection and relying upon his own finding for assessment year 2006-07 made an addition of Rs.86,58,81,600/- in the draft assessment order. The conclusion of the AO is recorded in paragraph 3.4 of the draft assessment order as under :-

> "3.4 On a careful consideration of the facts and circumstances of the case and also in view of lack of effective rebuttal to the findings as detailed in the assessment order of A.Y. 2006-07, I am convinced that the Books of A/cs and the details submitted does not reveal the correct position of profit earned by the assessee company. Therefore, I am constrained to estimate the suppression of profits for the current year at Rs.86,58,81,600/- being average profit of Rs.3,200/- (based on average profits per Bike of Hero Honda Motors Ltd.) on the total no. of Motorcycles sold by the assessee company. While arriving at the average profit per bike of the assessee company, an allowance @ 14% has been given to the assessee company considering the difference in the level of activity and market share of the assessee company vis-à-vis M/s Hero Honda Motors Ltd."

3.4 Aggrieved by the draft assessment order the assessee filed an application before the Dispute Resolution Panel which vide order dated 9.9.2011 confirmed the action of the AO. The finding of the DRP is recorded in Paras 6 to 8 of its order as under:-

> "6. The Assessing Officer rejected the books of account of the assessee and estimated the profit per bike at Rs.3,200/-. He multiplied it by no. of bike sold (2,70,588) and thus added a sum of Rs.86,88,81,600/-.
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> 7. The profit on sale of a bike was taken at Rs.3,200/- because it was the average profit per bike of Hero Honda Motors. Books of account were rejected because the similar rejection was made in AY 2006-07. In nutshell, the AO followed the order of his predecessor in this respect.
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> 8. CIT(A) has deleted the addition under this head for the AY 2006-07, which is contested before the ITAT. The appeal before ITAT is pending. Under these circumstances, we prefer not to interfere with the order of the AO."

3.5 Thereafter the AO passed the final assessment order dated 31.10.2011 reiterating the same observation in Para 4 which he made earlier in the draft assessment order in Para 3.4.

3.6 We find that in assessment year 2006-07, the Revenue aggrieved with the order of the CIT(A) had filed the appeal. However, the ITAT approved the order of the CIT(A). The relevant finding of the ITAT reads as under :-

> "10. Thus, it is seen that apropos the first ground for rejection of assessee's books of account, i.e., the alleged difference in the quantity shown in Form No.3CEB and the quantitative details furnished by the assessee, as per the Assessing Officer, during the quarter April-June, 2005, as per the 3 CEB report, the figure was of 3138 motorcycles, whereas the quantitative details of 07.12.2009 showed a figure of ₹ 1025 motorcycles, giving a discrepancy of 2113 motorcycles and there was a similar discrepancy for July-December, 2005 and January-March, 2006. The assessee, in its letter dated 17.12.2009, had stated that the details contained in Form 3 CEB were with reference to the royalty paid/payable by the assessee company and they were not the details of production, i.e., not the number of motorcycles produced by the assessee company. A reconciliation had been filed by the assessee regarding the sale on which royalty had been paid and the sales during the year. The Assessing Officer did not meet this explanation of the assessee and rather concluded, without any basis, that the assessee was maintaining different sets of books of account. Before the ld.CIT(A), Annexure V to the Form 3CEB was pointed out to show that in the Form 3CEB, the number of motorcycles produced had nowhere been stated. In its written submissions filed before the ld.CIT(A), the assessee requested for calling for a specific comment by the Assessing Officer in this regard. The CIT(A) called for a remand report from the Assessing Officer. The Assessing Officer submitted not one, but two remand reports. However, the contention of the assessee was nowhere rebutted in either of these remand reports. In the first remand report, as noted by the ld.CIT(A), the assessee's contention was not even dealt with and even in the second one, it was not rebutted. In response thereof, the ld.CIT(A)

found the stand taken by the assessee to be correct. The Form 3CEB filed before the Assessing Officer was found to be not about the number of motorcycles produced by the assessee during the period, rather, it was found to be concerning the royalty paid by the assessee company during the relevant quarter. The ld.CIT(A) noted that besides, the assessee had furnished a complete reconciliation before the Assessing Officer, as also incorporated in the assessment order. This reconciliation had, however, been arbitrarily rejected by the Assessing Officer. It was in these circumstances, that the ld.CIT(A) held and, in our considered opinion, for the aforegoing discussions, correctly so, that the Assessing Officer had erred in concluding that there had been a difference in the sales and quantitative details of the assessee.

11. Coming to the second ground for rejection of the books of account, the Assessing Officer had observed that the average sales of motorcycles by the assessee during the year was low, as compared to the preceding assessment year. The Assessing Officer, on figures discussed, had computed a suppression of sale value by ₹ 1,461 per motorcycle. This amounted to a total alleged suppression of ₹ 33,77,32,063/-. The ld.CIT(A) noticed that in response to this query by the Assessing Officer, the assessee had replied vide letter dated 23.11.2009, whereafter, no further query was raised by the Assessing Officer in the show cause notice dated 11.12.2009, but in the assessment order, the said reply of the assessee had been totally ignored and the Assessing Officer had, referring to other non-relevant replies of the assessee company, drawn an adverse inference against the assessee. This fact of reference to a wrong reply of the assessee was nowhere rebutted in the remand report dated 22.09.2010 by the Assessing Officer. Pertinently, in the said reply dated 23.11.2009, the assessee had maintained that there had been a change in the product mix during the year; that in the preceding year, the motorcycle 'Enticer' had been sold, which was not so in the year under consideration; that there had been a decrease in the sale price to meet the competition in the market; that the figures were based on the books of account, in which, no discrepancy had been found; that the assessee had not been shown to have charged from its dealers any price more than that stated in the sale invoice and the books of account; and that the Assessing Officer had not pointed out any error in respect of any sale. It was on the basis of this, that the ld.CIT(A) observed that there was no

justification for the Assessing Officer to make an assumption that the sale price charged by the assessee during the year was lower than that in the preceding year. Now, when the Assessing Officer has, neither in the assessment order, nor in either of the remand reports, been able to rebut the categorical assertions of the assessee in this regard, as to how the ld.CIT(A) has erred in accepting the assessee's contention, has not been made out before us. Obviously, merely since the realization per motor cycle for the year under consideration was low as compared to that in the preceding year, this by itself cannot lead the Assessing Officer to assume that the sale price charged by the assessee company was under-stated and the Assessing Officer evidently erred in making such assumption. As correctly noted by the ld.CIT(A), unless there is material evidence to disprove the contention of the assessee, the sale stated in the books of account needs must be accepted. Therefore, the ld.CIT(A) has rightly held that on this score, the books were rejected by the Assessing Officer merely by indulging in surmises.

12. Coming to the next reason adopted by the Assessing Officer for rejecting the books of account, according to the Assessing Officer, the assessee's explanation regarding the losses incurred by it as compared to the profits earned by other competitors, was not acceptable. Here, the CIT(A) has noted that the Assessing Officer downloaded the balance sheets of Hero Honda Motors Ltd. and Bajaj Auto Ltd., and by taking Hero Honda Motors as an example, worked out the profit at ₹ 470 per motorcycle, where, on applying a rate of ₹ 4,000/- to 2,65,212 motorcycles sold by the assessee during the year, estimated a profit of ₹ 106,08,48,000/-. The reasons for the loss suffered by the assessee company, as contended, were low market share, low capacity utilization, very high debtors' turnover ratio, high inventory ratio, shift in technology, higher personnel cost due to VRS and labour unions problem, advertisement and publicity cost, high material cost due to low volumes and high overhead cost because of dealer network and after sales service, etc. The Assessing Officer, it was taken note of by the ld.CIT(A), had totally ignored all these contentions of the assessee and in the remand reports, he had not been able to rebut any of such contentions. These contentions were dubbed by the Assessing Officer as being general in nature. No other comment was made. The ld.CIT(A) held such an approach to be no correct. Before us, nothing has been brought to support this action of the

Assessing Officer. Obviously, profit can only be made when there is ability to do so. The factors pointed out by the assessee for not being able to make sales, have not been refuted. Therefore, in the presence of the said factors, without a doubt, the losses suffered by the assessee cannot be said to be either bogus, or inflated. The Assessing Officer did not prove otherwise. No discrepancy was pointed out in the books of account of the assessee company concerning the expenditure incurred and claimed by the assessee. Nothing was brought to establish that the assessee had been charging a sale price higher than that noted in the books of account. Rather, the Assessing Officer arbitrarily compared the case of the assessee with other successful companies, which can never lead to appropriate estimation of profit of a loss bearing company like the assessee.

13. In view of the above, on this issue also, the ld.CIT(A) has correctly held the rejection of the books of the assessee by the Assessing Officer to be incorrect. About the last ground raised by the Assessing Officer for rejecting the assessee's books of account, it was held that the assessee had been selling motorcycles at a lower price to its holding and subsidiary companies as compared to its domestic sales. The ld.CIT(A) has noted that the assessee, in its reply dated 17.12.2009, had pointed out that the export price was more than the domestic price, even in spite of the fact that the domestic sale price was inclusive of excise duty. A comparative chart, as follows, had been submitted :-

Name of the motorcycle model	Average domestic sale price (Rs.)	Average Export price (Rs.)
Fazer STD 5(YY5)	35,296/-	36,690/-
Fazer STD (5YY9)	35,339/-	42,230/-
Crux (5KA3)	27,869/-	38,456/-
Libero (5TS3)	32,234/-	38,456/-
Crux FBD(5KA3)	27,283/-	38,456/-
Crux SJP (5KA3)	27,284/-	38,456/-

14. The assessee had stated that it was entitled to DEPB benefits in respect of its export sales and if the total DEPB benefits were added

to the export sale price, the effective export price would be substantially higher in comparison to the domestic sale price. The TPO's order dated 13.11.2009 was also brought forth, wherein, on considering the export sales made by the assessee company to its holding company and subsidiary companies, the TPO had accepted the price of export shown by the assessee as being at arm's length. These contentions of the assessee as well as the TPO's order were found by the ld.CIT(A) to have been ignored by the Assessing Officer. The comparative charge submitted by the assessee had also not been found by the Assessing Officer to contain any discrepancy. In the remand report dated 22.09.2010 also, the Assessing Officer was not found to have entered any rebuttal to the assessee's contentions. After rejoinder to the remand report even in the second remand report, the Assessing Officer was found to have passed only peripheral orders of estimation of profit without answering the assessee's submission. It was on this that the ld.CIT(A) correctly held that in absence of material, the Assessing Officer could not tinker with the price determined by the TPO.

15. It has gone unrebutted before us also, that if the contention of the Assessing Officer were to be accepted, the whole purpose of determination of arm's length price by the TPO would get defeated. To reiterate, the TPO has accepted, vide order dated 13.11.2009 (supra), the prices of export shown by the assessee to be at arm's length.

16. In view of the above, even on this score, the rejection of books of account of the assessee by the Assessing Officer does not hold good and such action of the Assessing Officer has correctly been cancelled by the ld.CIT(A).

17. For the above discussion, finding no merit therein, Ground Nos.1 and 2 raised by the Department are rejected."

3.7 Admittedly, the facts of the year under consideration are identical to the facts in AY 2006-07, the Assessing Officer himself has relied upon the finding recorded in the assessment order for AY 2006- 07 for rejecting the books of account and for estimating the profit. The DRP has refused to interfere with

the order of the Assessing Officer only on the ground that appeal for the assessment year 2006-07 was pending before the ITAT.

3.8 Respectfully following the order of the ITAT for assessment year 2006-07, we direct the Assessing Officer to delete the addition of Rs.86,58,81,600/- in this regard and accordingly, we allow grounds no.3 and 4 of assessee's appeal.

4. Ground no.5 is against the addition of Rs.20,99,39,042/- made on account of royalty payment by the assessee company to its 100% holding company viz. Yamaha Motor Co. Ltd., Japan.

4.1 Facts of this case are identical to the facts of the assessment year 2006-07. The Assessing Officer himself in paragraph 4.1 of the draft assessment order recorded the following findings :-

> "4.1 For the detailed reasoning given in the assessment year 2006-07, the royalty paid, was disallowed and added back to the returned income, by holding that the same was paid to the holding company of the assessee, which was owning the entire 100% of the assessee's shares, thereby indicating that the said royalty was nothing but a colourable device to reduce profits by making a payment to own-self."

4.2 The DRP confirmed the action of the Assessing Officer by recording the following findings:-

> "10. Similar disallowance was made in the AY 2006-07. The CIT(A) has deleted the additions under this head, which is contested before the ITAT. We also note that the assessee's entire sale is to its sister concern in India i.e. Yamaha Motor India Sales Pvt. Ltd. and to its AE outside India. Payment of royalty on sales to

> AEs and sister concerns is not a normal transaction because these transactions are between related parties and price of goods sold or purchased may or may not include royalty amount. Since this issue is pending before the ITAT, we prefer not to interfere with the order of the Assessing Officer."

4.3 Thereafter the Assessing Officer in the final assessment order dated 31.10.2011 made the disallowance by making the same observation in paragraph 5.1 as he has made in paragraph 4.1 of the assessment order. The relevant para of Assessing Officer's order on this issue are 5.1 to 5.4.

4.4 Thus it is evident from the above that the addition has been made relying upon the finding in the assessment order for the assessment year 2006-07. The Revenue's appeal for assessment year 2006-07 on this ground was rejected by the ITAT with the following observations :-

> "24. We do not find any error, as seen above, in the order of the ld.CIT(A) in this regard. It cannot be gainsaid that any expenditure incurred wholly and exclusively for the purposes of business is an allowable expenditure, even though, as in the present case, the payment is made to a 100% shareholding company of the payer. That apart, u/s 40A(2) of the Act, it is only the fair value of such expenditure, which is allowable. Besides, the arm's length price provisions take care of the payment in such transactions being at arm's length, as has been done in the present case by the TPO. The Assessing Officer proceeded merely on assumptions, surmises and conjectures which, undeniably, can never substitute hard evidence, which is entirely absent here. Neither Section 40(a)(i) nor Section 2(22)(e) of the Act are applicable, as observed. Therefore, finding no merit therein, Ground No.4 taken by the department stands rejected."

4.5 We, therefore, respectfully following the above finding of the ITAT in assessee's own case direct the AO to delete the addition of Rs.20,99,39,042/- and accordingly this ground no.5 is allowed in favour of assessee.

5. Ground No.10 of the assessee's appeal is against the set off of brought forward business losses from AY 2001-02 onwards and unabsorbed depreciation from AY 1997-98 onwards. On this point also, the Assessing Officer relied upon the finding of the Assessing Officer for AY 2006-07. On appeal in the said assessment year, the learned Judicial Member decided the issue in favour of the assessee by rejecting the Revenue's ground of appeal. However, the learned Accountant Member did not agree with the same and proposed that this issue needs to be set aside to the file of the Assessing Officer because examination of relevant facts is required. The matter was referred to the Third Member to give his opinion on the following question:-

> "1. Whether the issue challenging the CIT(A)'s action in allowing the assessee's claim of carried forward and set off brought forward losses and unabsorbed depreciation (Ground No.5 in the Department's Appeal in ITA No.3166/Del/2011) requires to be remitted to the Assessing Officer to examine the record maintained under the Companies Act and record a finding as to the percentage of shares held by M/s Yamaha Motor Co., Japan in the year of occurrence of loss and in the year of setting off of loss."

5.1 The Third Member, vide his order dated 29th April, 2014, agreed with the learned Judicial Member with the following finding:-

"2.5. Now I espouse the issue for my opinion on merits. From the above conflicting opinions of my ld. Brothers, one thing is vivid that both of them have agreed on the legal prescription of sec. 79 of the Act by holding that the benefit of set off of the brought forward loss from assessment year 2001-02 be allowed if the claim of the assessee about YMC holding 74% of the share capital on 26.5.2000 turns out to be correct. Whereas the ld. JM upheld the order of the CIT(A) by accepting that, in fact, YMC held 24% of the shares of the assessee's company on 26.5.2000, the ld. AM remitted the matter to the file of the A.O for necessary verification in this regard with suitable direction. The question which looms large before me is as to whether the contention of the assessee about YMC holding 74% shares on 26.5.2000 should be accepted without any further verification or the matter should be sent back to the Assessing Officer for a de novo examination. In this regard, it is relevant to note that when the A.O raised query as to why brought forward loss should not be disallowed, the assessee submitted its reply, the relevant part of which is on page 536 of the paper book. The following is the extract of the reply advanced by the assessee before the Assessing Officer:

"In this regard, we would like to mention that initially the Assessee Company was incorporated as a 50:50 joint venture between Escorts Ltd. and Yamaha Motor Co., Ltd, Japan (YMC) in 1995. On may 26, 2000, 64,80,000 equity shares of the Assessee Company representing 24% of its total issued and paid up equity share capital were transferred by Escorts Ltd. in favour of YMC. Accordingly, with effect from May 26, 2000, the equity shares of the Assessee Company were held by 70,20,000 equity shares representing balance 26% of the total issued and paid up equity share capital of the Assessee Company, and the Assessee Company became a wholly owned subsidiary of YMC. Accordingly, from the assessment year 2001-2002 onwards, the Assessee Company is entitled to claim accumulated losses, since with effect from May 26, 2000, (at all times) more than 51% of the total issued and paid up equity share capital of the Assessee Company is being held by YMC."

2.6. It can be clearly seen from the above reply that the assessee made it unequivocal that 64,80,000/- equity shares of the assessee company, representing 24% of its total paid up capital, were transferred by M/s Escorts Ltd. in favour of YMC Japan on 26.5.2000 and as such the total shareholding of YMC Japan swell to

74% on that date. Remaining 26% were claimed to have been acquired by YMC on 15.6.2001. Despite this categorical submission, the Assessing Officer chose to brand the assessee's explanation as a 'cooked up story' without showing as to how the same was incorrect. There is no semblance of any verification having been carried out by the AO to examine the correctness of the assessee's version. The assessee reiterated its stand before the ld. CIT(A) through written submissions, the relevant part of which is available on page 775 of the paper book. It was again stated that on26.5.2000, 24% of the shareholding of the assessee company was transferred by M/s Escorts Ltd. in favour of YMC Japan. The ld. CIT(A), instead of directly acting on the same, chose to seek remand report from the Assessing Officer by sending such written submissions to him. The Assessing Officer dealt with this issue in his first remand report with the following observations as are extracted below from page 823 of the paper book:

"No further comment is being made now on this issue, as all contentions of assessee need an independent adjudication by the ld. CIT(A)."

2.7. It can be seen that when the position about YMC acquiring 24% of shares from M/s Escorts Ltd. on 26.5.2000 was restated in remand proceedings, the AO did not make any adverse comment on the same. When the assessee submitted its rejoinder to the AO's remand report, the ld. CIT(A) once again sent such rejoinder to the AO for a second remand report. The Assessing Officer made the following comments in the second remand report, as are available on page 836 of the paper book :

"VIII. Set-off of accumulated losses/unabsorbed depreciation (Ground No. 11)

No further comments is required on this issue, as the assessee has only reiterated its earlier contentions, which has been duly answered to in the Assessment Order."

2.8. There is no dispute on the legal position that on YMC holding 74% shares of the assessee company on 31.3.2001 and continuing to hold so up to 31.3.2006, there can be no bar on the claim of set off of brought forward loss for the assessment year 2001-02 against the income for the assessment year 2006-07. From the above narration of facts, it is palpable that the Assessing Officer got three opportunities to examine the assessee's contention about YMC

acquiring further 24% shares on 26.5.2000 apart from its original holding of 50%., firstly during the course of assessment proceedings and then during two remand proceedings. The assessee's pointed submission in this regard came to be rejected by the Assessing Officer during the original assessment proceedings without any reason worth the name and the same position continued during the two remand proceedings as well. It is trite that when an assessee furnishes an explanation on a specific query, the same is treated as accepted unless some inconsistencies are found by the AO on its vetting or the assessee fails to substantiate the same on being called upon to do so. If the Officer does not dispute the correctness of the specific explanation tendered by the assessee, the same is considered as correct and binding of the AO. It is totally impermissible to dub the explanation given by the assessee as a cooked up story without any evidence to the contrary. Here is a case in which the Assessing Officer got three opportunities of examining the assessee's contention in this regard. If he was not satisfied with the same, he was duty bound to bring the investigation to a higher level and call for further corroboration. Having not done so, he could not have characterized the assessee's explanation as false. Even if it is presumed without agreeing that the AO was under some misconception qua the assessee's explanation during the assessment proceedings, he could have verified the same when remand reports were called for. Restoration to the A.O. would have been justified if despite his requiring the assessee to lead further evidence in support of its explanation, the assessee had failed to do so and the ld. CIT(A) had accepted the assessee's contention without getting comments from the AO. But in the facts of the instant case, the Assessing Officer did not raise any further query on the submissions repeatedly made before him in this regard. Even the ld. DR has brought no material on record to demonstrate any fallacy in the explanation tendered on behalf of the assessee. Since the ld. CIT(A) has accepted the same explanation as was given to the AO and both the ld. Members agree that the claim of the assessee is acceptable if such explanation is correct, I am of the considered opinion that no useful purpose will be served in once again sending the matter back to the AO for carrying out the examination of the claim for the fourth time. I, therefore, agree with the opinion expressed by the ld. JM on the first question."

5.2 In view of the above, the issue raised by the assessee in the ground No.10 is also covered in favour of the assessee by the decision of Hon'ble Third Member of ITAT.

5.3 Respectfully following the same we direct the Assessing Officer to allow set off of the brought forward losses pertaining to assessment year 2001-02 to 2006-07 and unabsorbed depreciation pertaining to the assessment year 1997-98 to 2006-07. Accordingly this ground no.10 is allowed.

6. Ground no.6 to 9 are regarding adjustment of Rs.51,58,00,000/- made by the AO by adjustment to arm's length price in respect of the motor bike exported by the assessee company to its associated enterprises. During the year under consideration the assessee has entered into following international transactions with its associated enterprises:-

S. No.	International Transaction	Method used by the assessee	Amount (in Rs.)
1.	Import of components/ spare parts from AEs	CPM	21,80,38,285
2.	Import of capital goods from AEs	CPM	4,92,82,900
3.	Export of spare parts	CPM	5,86,41,575
4.	Export Motorcycles	RPM	147,11,88,466
5.	Royalty to AEs	CUP	20,99,39,042
6.	Payment of interest on advance received for financing exports	CUP	81,60,357
7.	Reimbursement of warranty claims to AEs	-	44,56,259
8.	Reimbursement from AEs	-	9,32,71,033
	Total		208,71,97,173/-

6.1 The Assessing Officer referred the matter to the TPO for determination of the arm's length price. The TPO proposed an addition of Rs.51,58,00,000/- as

adjustment in respect of international transactions of sale of motor cycle and the spare parts by the assessee company to its associated enterprises. For this purpose the TPO rejected the TP study carried out by the assessee and the arm's length price determined by it by applying Resale Price Method for export of motorcycles and Cost Plus Method applied for export of spare parts. The TPO was of the view that the method adopted by the assessee is not correct and the correct method to be applied is TNMM method. For this purpose he carried out an analysis and identified the three comparable as under:-

S. No.	Name of the Company	Op/Sales
1.	Hero Honda Motors Ltd.	12.31%
2.	Bajaj Auto Ltd.	17.15%
3.	TVS Motor Co Ltd.	2.31%
	Mean	12.70%

6.2 After considering the objection filed by the assessee in respect of comparables, TPO deleted Hero Honda Motors Ltd. as a comparable on the ground of related parties' transactions being more than 25% and taking the remaining two comparables, determined arm's length price and proposed an adjustment of Rs.51,58,00,000/-. Based on this, the final set of comparables adopted for the case is as under:-

"

S. No.	Name of the Company	Op/Sales
1.	Bajaj Auto Ltd.	17.15%
2.	TVS Motor Co Ltd.	2.31%
	Mean	9.73%

7. Determination of ALP

7.1 As discussed in Para 6. to 6.9 above the arm's length price of the international transactions from manufacturing and sale of motorcycles is computed as under: (Rs in crores)

Operating Revenue	808.10
OP/Sales	9.73%
Margin	78.63
Arm's Length Cost	729.47
Cost Shown by the assessee	1001.96
Difference	272.49
% of difference with ALC	27.20%

7.2 Since the margin has been calculated using OP/Sales and the operating revenue of Rs.808.10 crs includes international transaction relating to export sale of motorcycles and spares of Rs. 152.98 crs, the percentage of international transaction of sales to the total sales is 18.93% (152.98 / 808.10). The Arm's Length Cost shall be accordingly worked out proportionately at 18.93% and the adjustment is computed as below:

Arm's Length Cost Difference	272.49 crs
18.93% of the same	51.58 crs

7.3 In view of the above, an adjustment of Rs.51.58 crs is to be made to the income of the assessee, being the amount relating to international transaction in the total difference between the arm's length cost and the cost charged by the assessee from its AEs for manufacturing and sale of motorcycles on proportionate basis. The Assessing Officer shall enhance the income of the assessee by an amount of Rs.51.58 crs while computing its total income."

6.3 Aggrieved by the order of the TPO assessee filed objection before the DRP. The order of the TPO was confirmed by the DRP by making the following observations:-

> "4. We have carefully considered the facts of the case and the objections of the taxpayer. We are in agreement with the TPO that the TP study done by the taxpayer has to be rejected. We agree with the reasoning of the TPO that the taxpayer has not followed proper method(s)while benchmarking different international transactions. The TPO has rightly observed that for applying CPM/RPM accurate and reliable information is needed while working out the gross profit. The details of direct and indirect expenses related to manufacturing / provision of services/ selling of goods are required. Moreover, taking the AEs as tested party is also not correct in the absence of reliable and complete data about the foreign comparables. This has also been held in ITAT, Delhi's decision in the case of Ranbaxy Laboratories. The TPO thus rightly selected the taxpayer as the tested party as reliable and correct information about the Indian comparables is available. She also correctly selected TNMM considering the facts and circumstances of the case. The TPO has pointed out the advantages of this method in her order with which we agree. The various adjustments claimed by the taxpayer while working out the adjusted net profit margin is also not acceptable considering the fact that under TNMM such differences are taken care of. No special or extra ordinary circumstance could be pointed out by the taxpayer so as to warrant any such adjustments to its profits. The TPO has also rightly selected the comparables. In fact, these comparables were given by the taxpayer itself as seen from the TPO's order. The TPO has also been quite reasonable in liming the adjustment to the international transactions only. Considering these facts no interference is made in the adjustment proposed by the AO/TPO."

6.4 The assessee is in appeal before us against the confirmation of T.P. adjustment so made and confirmed by DRP. It has been contended that the DRP was not justified in confirming the addition proposed by Assessing Officer as suggested by the TPO. The learned AR submitted that the assessee is engaged in the manufacturing of motorcycles under 'Yamaha' brand name and also spare parts for Yamaha motorcycles. During the year it has entered into international transactions in the form of export of motorcycles and spare parts to

Yamaha, Japan. The total value of such transactions was of Rs.152.96 crs. The assessee has submitted a detailed transfer pricing study and has used Resale Price Method in relation to transaction of export of motorcycles to Yamaha, Japan. This was the method being used in the preceding year i.e. A.Y. 2006-07 also and the TPO has accepted the same. Same method was also used in the assessment year 2005-06 and the same was accepted by the TPO as is evident from the orders passed by the TPO placed in the paper book at pages 446-447 and 444-445. It was the contention of the learned AR that the facts being identical and there being no change there was no reason for the TPO to take a different view than the view taken in the earlier years.

6.5 The learned AR also submitted that the TPO was not justified in using TNMM method ignoring the facts of the case. In this regard attention was invited to letter dated 22nd February, 2010 placed at paper book page 320 whereby it was pointed out that assessee company has earned overall gross margin of negative 9%. However, the company has earned a gross profit margin of positive 15.22% from export of motorcycles. Attention was also invited to the annexures attached in support thereof placed at paper book pages 328 to 330. As per these annexures, on the total international transactions assessee company has earned a profit of Rs.23,28,18,613 giving a margin of 15.83%.

It was also submitted that as per Annexure A-2 the assessee has made export of motorcycles to unrelated parties and the profit margin earned in respect of export to unrelated parties was 10.75%. Since the profit margin earned on international transaction of 15.83% was better than 10.75% in relation to unrelated parties, there was no justification for the TPO to make a further adjustment.

6.6 It was further submitted that the assessee company has submitted necessary details in respect of resale of the motorcycles exported by it to its associated enterprises. In this regard attention was invited to paper book pages 369 to 383 which give billwise details of export of motorcycles to Yamaha Motor Co. Ltd., Japan and resale price charged thereof by the Yamaha Motor Co. Ltd., Japan. As per this chart resale price charged by the Yamaha Motor Co. Ltd., Japan in respect of sale made to unrelated parties was US$ 27523850 on the export value of the assessee company to Japan of US$ 26383249 which mean that the gross profit earned on resale by the Yamaha, Japan was only US$ 1422236 i.e. 5.16%. The above details were supported by all materials and evidences including the financial statements and the TPO has rejected the same arbitrarily as can be seen from the TPO's order.

6.7 It was further submitted that the objective of the TP study is to find out the arm's length price of the product old or purchased. In the present case the assessee company has sold motorcycles to its associated enterprises. The sale

price realized by it per motor cycle is better than the sale price realized by any of the comparables used by the TPO as can be seen from the following table:-

Name of Co.	Cubic Capacity	Volume	Value of Transaction	Average price per unit
TVS Motor Co. Ltd.	100/110/125/150/160	6,066	12,44,66,323	20,519
Bajaj Auto Ltd.	100/125/150	32,518	66,97,98,246	20,598
Hero Honda Motors Ltd.	100/125/150	7,227	17,15,06,492	23,731
Yamaha Motor India Pvt. Ltd.	100/106/125/150/153	55,373	1,55,25,67,975	28,038

On the basis of the above, it was argued that all exercises carried out by the TPO for determination of the arm's length price by using TNMM method is totally incorrect.

6.8 The further contention of the learned AR was that as per section 92C, the arm's length price in relation to international transaction is to be determined by any of the five methods being the most appropriate method having regard to the nature of the transaction or class of transaction or such other relevant factors as may be prescribed. In this regard Rule 10C provides that the most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction and which provide the most reliable measure of an arm's length price in relation to the international transaction. The TPO while invoking TNMM method has ignored the fact that it is not best

suited to the facts and circumstances keeping in view the fact that the assessee company is consistently in losses for the last many years and it cannot be expected to make a sale to an associated enterprise at a price much higher than the price of that product in the market simply because it is in losses. Our attention was drawn to the fact that the company has incurred cost of Rs.1001.96 Crores as against operating revenue of Rs.808.10 Crores. Thus there have been losses in the operation of the company and such losses cannot be recovered by enhancing the selling price to the AE by applying TNMM. The TNMM presupposes margin in sales and is not an appropriate method in a loss making company like the assessee company. The TPO in the present case has worked out the margin of highly successful companies and applied the same to the assessee company ignoring the fact that this company is not successful and that is why making persistent losses in respect of transactions with non-AE's as well.

6.9 It was further submitted that assessee company had submitted necessary data regarding the resale of the motorcycles export by it to unrelated parties and also have given data of average prices of the motorcycles being realized by the other companies in the same field. Therefore, there was no reason for the TPO to embark upon and use such method which will give unrealistic results and these shall be totally against the facts and circumstances of the international transaction entered into by the assessee company. In this regard it was also

submitted that to what extent this use of such method can lead to the absurdity can be seen from the fact that the total value of the international transaction entered into by the assessee was of Rs.152.98 crores and a further adjustment of Rs.51.58 crores had been proposed and with the result the selling price of this international transaction had been determined at Rs.204.56 crores which gave an average price of Rs.36942 per motor cycle as against price of Rs.20519 being charged by the TVS, Rs.20598 being charged by Bajaj Auto Ltd. and Rs.23,731 charged by the Hero Honda Motors Ltd. being the comparables considered by the TPO himself.

6.10 It was further submitted that without prejudice to the above contention there are factual errors in the use of the TNMM method. The TNMM worked out is not of the export of motor bike but an entity level which is mainly of domestic transaction, not on export. This very basis adopted for computation of TNMM is not correct. The TPO has not taken into account the value of export of the motor bikes for working out the TNMM in respect of the comparables used by him. The fact that assessee is making substantial losses per motor bike in uncontrolled transactions in domestic sale has been totally ignored as against the substantial profit being made per motor bike of Rs.3200 by the comparables. The domestic transaction loss has been accepted in the case of the assessee company. There was no reason to ignore these facts and use these

internal comparables while computing arm's length price in respect of export of motor cycles to associated enterprise.

It was further submitted that the assessee has not been able to utilize its capacity and the same has been totally ignored. The assessee has just sold 270588 units during the year as against 3336756 units by Bajaj Auto. Further it is not only a case of under utilization of capacity but also assessee has been suffering losses year after year because of its performance being below par due to various commercial factors as is evident from its profit and loss account. Thus the TPO was not justified in adding profit to the average cost per unit worked out by him by applying TNMM method. This has resulted into adding further value to cost which is otherwise very high due to inefficient working of the assessee company. In this regard the assessee has made detailed submissions before the TPO vide letter dated 22nd February, 2010 placed at Paper Book Page 320 onwards.

6.11 As regards to the taking of the Bajaj Auto Ltd. as a comparable it was submitted that it is one of the leaders in the market having a very huge production capacity as compared to the assessee company. Further the capacity utilization by the assessee company was too low and that is why there was overall losses. Low capacity utilization cannot lead to enhanced price to be charged from its associated enterprise. In any case it was further submitted that the related party transactions in the case of Bajaj Auto Ltd. exceeds 25% and as

such the same cannot be compared. It was also pointed out an ideal of the variation in the margin can be had from the fact of the comparable used by the TPO itself where TVS Motor Co. Ltd. is having a margin of 3.21%and the other comparable Bajaj Auto Ltd. 17.15% i.e. more than 7 times the margin earned by TVS Motor Co. Ltd.

On the basis of the above it was argued that the whole approach of the TPO is faulty and the arm's length price determined by the assessee is duly supported by the facts and figures and the same need to be accepted.

7. The learned DR on the other hand supported the order of the TPO. In this regard it was submitted that the principle of res judicata do not apply to the tax laws and as such assessee company cannot contend that the method used in the earlier years for determination of the arm' length price need to be applied in the present case.

7.1 As regards the Resale Price method used by the assessee for determination of the arm's length price the learned DR submitted that the TPO was right in rejecting the same in the absence of any reliable data. On the issue of price charged per motorbike, the learned DR submitted that having rejected the method used by the assessee for determination of the arm's length price, the TPO was correct in applying the TNMM method as it has many practical advantages. In this regard he invited attention to the order of the TPO where on page 9 he has given the justification for using the TNMM method. In regard to

the contention of the assessee company that the price charged by the assessee company per motorbike is better than the per motor bike price charged by the other companies in the same field, it was submitted by the learned DR that once TNMM method is invoked then these facts and figures become irrelevant so far determination of arm's length price is concerned.

7.2 As regards the contention of the learned AR that Bajaj Auto Ltd. cannot be used as a comparable the learned DR submitted that assessee company can claim low capacity utilization adjustment. In support of the various contention, the learned DR relied upon the judgment of the Delhi ITAT in the case of Interra Information Technologies (India) Pvt. Ltd. vs. DCIT and also in the case of Ranbaxy Laboratories Ltd. vs. DCIT.

8. We have heard both the parties and has perused the material on record. The main dispute between assessee and revenue authorities is regarding adjustment of Rs.51,58,00,000/- made by the TPO/AO and sustained by DRP in respect of the export of motorcycle/spare parts to the AE. The assessee has benchmarked these transactions by using Resale Price Method. The Resale Price Method has been accepted by TPO in the immediate preceding two years. The contention of the learned DR in this regard is that principle of res judicata is not applicable in the tax laws and assessee cannot take the help of this principle for setting any benefit. We are in full agreement with Ld. DR for the proposition that principle of res judicata is not applicable in tax laws. However,

on the facts of the case, we are of the view that in this case, the rejection of the resale price method by the TPO was not justified. There has to be continuity and uniformity in the approach of the Revenue towards an issue and particularly in the case of the same assessee. From the facts it is evident that for similar transaction on the same set of facts the arm's length determined by the assessee company in the preceding years applying this method, has been accepted and without there being any change of facts and circumstances this method has been rejected in the year under consideration. When the facts and circumstances are same it will not be appropriate to take a different approach in two different assessment years.

8.1 Further we note that the approach and the reasoning adopted by the TPO for rejecting the arm's length price determined by the assessee company is not justified. The assessee has carried out the TP study. The TPO vide letter dated 6th November, 2009 called for the details including copy of the TP study. Thereafter the TPO called for the further details regarding bifurcation of domestic and international along with profitability. The reply to the same was submitted vide letter dated 22nd February, 2010. In this letter bifurcated account of domestic and export operation along with profitability of last three years was submitted. It was also pointed out that the gross profit margin in respect of export of motorcycles to associated enterprises is positive 15.22% as against negative 9% in respect of the domestic transactions. Necessary details in

support thereof were also filed. A detailed chart of bill-wise resale price charged by the Yamaha Motor Co. Ltd., Japan on resale of motorcycles exported by the company was also submitted by assessee. Thereafter vide letter dated 27th September, 2010 (placed at paper book page 469) the TPO asked for further details in respect of the export of the motorcycles. In this letter it was stated that the transactions have been benchmarked at Resale Price Method and it is shown that during the financial year Yamaha, Japan has earned a gross profit margin of 5.17% on resale of motor cycles exported by the assessee. On this basis the details of the gross profit margin of 5.17% and the financials of Yamaha, Japan were called for. The assessee vide letter dated 8th October, 2010 submitted a reply which is placed at paper book page 476 onwards. In Para 9 of this letter it was clarified that the invoice-wise details of the gross profit earned by Yamaha Motor Co. Ltd., Japan have been submitted vide letter dated 22nd February, 2010 and copy of the same was again enclosed for ready reference. In the transfer pricing analysis report, copy of the invoices raised by Yamaha Motor Co. Ltd., Japan for resale of the motorcycles exported by the company were enclosed as evidence in support of the resale price charged by the Yamaha Motor Co. Ltd., Japan. The basis of computation of the gross profit margin in respect of the export operation and domestic operation was explained along with calculations. The annual financial statements of Yamaha Motor Co. Ltd., Japan were also submitted to the TPO. Computation of the profit margin earned

by associated enterprises was also submitted along with copy of the invoice in support thereof. The calculation of the gross profit margin by Yamaha Motor Co. Ltd., Japan was submitted along with item-wise breakup of the gross profit margin.

8.2 In our considered view, assessee company submitted all relevant details to the TPO and he had simply made an observation in para 6.6 to the effect that after considering the reply of the assessee it is found that assessee has nothing substantial to corroborate its analysis made in the TP report. In the same paragraph it has also been further stated that the economic analysis carried out by the assessee are not reliable and it is therefore liable to be rejected and thereafter TNMM method has been invoked by the TPO. From the above analysis of the documents filed by the assessee company, we find that the TPO was not correct in recording this finding that the assessee has not been able to corroborate its analysis. It is evident from the various letters and the evidences placed in the paper book that the assessee company has submitted all relevant details in support of its analysis. The TPO has not been able to point out any error or defect in this analysis except saying that it is not reliable or not accepted. There is no basis to hold that the assessee has not been able to corroborate its analysis. We hold that the assessee has submitted a comparison of the margin whereby the margin in respect of export was 15.22% positive and overall margin was 9% negative. The assessee has submitted the details

thereof giving unit sold of each of the model, FOB value in US Dollar, FOB value in Rupees and the margin earned thereof. The assessee company has also submitted details of the export of motor cycles to unrelated parties and the margin earned thereon of 10.75% which is definitely less than the margin earned on export of motorcycles to AE that is 15.83%. TPO is not justified in ignoring these facts. The assessee has also submitted the details of the export of motorcycles invoice-wise to its associated enterprises and also details of the resale of the same by the associated enterprises. No reason has been given for ignoring all these facts so as to justify the rejection of the method adopted by the assessee company. Accordingly we hold that the TPO was not justified in rejecting the method used by the assessee company.

8.3 As regards the contention of the learned DR that the Resale Price Method would be a wrong choice of method, it is argued that the basic necessity of RPM as per Rule 10B(1)(b) is that the price should be that at which property or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated party. On this basis it was contended that the assessee should be buying from an associated enterprise and selling to a non-associated enterprise only then Resale Price Method can be applied. Since in the case of the assessee, it is selling to an associated enterprise and the associated enterprise will be reselling and hence resale price method cannot be applied. In support of this contention a reference was made to Rule 10B(1)(b) to demonstrate that the

conditions for applicability of RPM allows the use of this method where the associated enterprise sells to a non-associated enterprise. The assessee cannot choose associated enterprise as a tested party. To further support this contention reliance was placed on the judgment of the ITAT Delhi 'C' Bench in Global Vantedge P. Ltd. vs DCIT Circle 12(1) New Delhi (ITA No. 1432 & 2321/Del/2009) and the judgment of the Ranbaxy Laboratories Ltd. vs. DCIT 299 ITR (AT) 175.

8.4 We have gone through Rule 10B(1)(b) and provisions of section 92C. It may be relevant to refer to the provisions of section 92C which reads as under:-

> "92C.(1) The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—
>
> (a) comparable uncontrolled price method;
>
> (b) resale price method;
>
> (c) cost plus method;
>
> (d) profit split method;
>
> (e) transactional net margin method;
>
> (f) such other method as may be prescribed by the Board.
>
> (2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed :

> Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:"

As per this above section arm's length price is to be determined by any of these methods prescribed therein. Further in terms of sub-section (2), the most appropriate method referred to in sub-clause (1) is to be applied. There is no condition that which method will have priority and which of the method will not be applicable in particular circumstances. Further in terms of Rule 10B(1), the resale price method is to be applied in the following manner:-

> "(b) resale price method, by which,-
>
> (i) the price at which property purchased or services obtained by the enterprise from an associated enterprise is resold or are provided to an unrelated enterprise, is identified;
>
> (ii) such resale price is reduced by the amount of a normal gross profit margin accruing to the enterprise or to an unrelated enterprise from the purchase and resale of the same or similar property or from obtaining and providing the same or similar services, in a comparable uncontrolled transaction, or a number of such transactions;
>
> (iii) the price so arrived at is further reduced by the expenses incurred by the enterprise in connection with the purchase of property or obtaining of services;
>
> (iv) the price so arrived at is adjusted to take into account the functional and other differences, including differences in accounting practices, if any, between [3][the international transaction or the specified domestic transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of gross profit margin in the open market;

> (v) the adjusted price arrived at under sub-clause (iv) is taken to be an arm's length price in respect of the purchase of the property or obtaining of the services by the enterprise from the associated enterprise;"

On going through the above method we note that this is one of the method applicable. As per this method the price at which property purchased or services obtained is sold to an unrelated enterprise, the price at which this property is sold less margin of the associated enterprise is to be reduced for determination of the resale arm's length price. There is no condition that this method cannot be used when the tested party is an associated enterprise. The contention of the learned DR that the basic condition of resale price method is that "the property has to be obtained by the enterprise i.e. the assessee from an associated enterprise is incorrect." In the Act as well as Rules the words 'enterprise' and 'associated enterprise' have been used interchangeably. Thus the argument that enterprise will mean 'the assessee' and associated enterprise will mean' the other party' to whom the assessee has sold or purchased the goods is incorrect. The above interpretation gets supported by the definition of 'enterprise' given in section 92F(iii) which reads as under :-

> "92F(iii) "enterprise" means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other

> enterprise has exclusive rights, or the provision of services of any kind, or in carrying out any work in pursuance of a contract**,** or in investment, or providing loan or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries, or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places;"

Similarly 'associated enterprise' has been defined in section 92A as under:-

> "92A.(1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—
>
> (a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or
>
> (b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise."

8.5 The above definition of 'enterprise' and 'associated enterprise' in the Act nowhere indicates that the 'enterprise' shall mean the assessee and the 'associated enterprise' will mean other than the assessee. Thus the contention of the learned DR that resale price method cannot be used in the case of the assessee company is devoid of any merit. This view gets further supported by the fact that there is no such condition or prohibition provided in Section 92C as well as Rule 10B. In the absence of any such condition or prohibition it cannot

be read into the Rule to mean that resale price method shall not be applicable in case the assessee company is selling its product to an associated enterprise.

8.6 We have also gone through the OECD guidelines in respect of resale price method. On going through the same we note that Rule 10B(1)(b) in respect of resale price method is para materia with OECD guidelines. Further in the OECD guidelines there is no such restriction as is being argued by the learned DR. On the contrary it has been stated in the OECD guidelines that resale price method is more accurate where the sale by the associated enterprises is realized within a short time of the purchase since with the elapse of time there may be change in the market conditions. Some of the examples of application of the resale price method stated in the OECD guidelines also shows that the Resale Price method can be applied when sales are made to the AE which in turn sells the same to an uncontrolled party and thus support the contention of the assessee.

8.7 According to the provisions of section 92C and Rule 10B, the arm's length price in relation to an international transaction has to be determined by following any of the appropriate method. The resale price method and the cost plus method operate at gross profit margin level requiring functional rather than product comparability. The profit split method and the TNMM operate at operating margin level used for a complex and integrated enterprise. The method which provides most reliable way of arriving at arm's length price is

considered as most appropriate method. A comparative analysis is done for comparison of the controlled transaction with an uncontrolled transaction and controlled and uncontrolled transactions are comparable if none of the difference between the transactions can materially affect the factor being examined by adopting any of the methodology as mentioned in Section 92C.

8.8 We are of the view that where an assessee has followed one of the standard method for determining the arm's length price, such a method cannot discarded in preference over other method. In fact the transactional net margin method i.e. TNMM should be applied only when standard or traditional methods are incapable of being applied in the facts of the case because while traditional method seeks to compute the price at which international transactions would normally be entered into by the associated enterprise but for their inter-dependence and relationship, transactional profit method seeks to compute the profit that the tested party would normally earn on such transaction with unrelated parties. In the facts and circumstances of the case, we are of the view that TNMM method applied by the TPO for determining the arm's length price is not the most appropriate method.

8.9 The above view is also supported by the OECD guidelines regarding selection of the most appropriate transfer pricing method. As per the OECD guidelines the selection of a transfer pricing method always aims at having the most appropriate method for a particular case. For this purpose the selection

process should take into account the respective strengths and the weakness of the recognized methods. As per OECD guidelines, Comparable Uncontrolled Price Method (CUP method), Resale Price Method (RPM) and the Cost Plus Method (CPM) are considered to be traditional transactions method. The Profit Split Method and the Transactional Net Margin Method (TNMM) are considered to be transactional profit methods. The traditional transaction methods are regarded as the most direct means of establishing whether conditions in the commercial and financial relations between associated enterprises are arm's length. This is because any difference in the price of a controlled transaction from the price in a comparable uncontrolled transaction can normally be traced directly to the commercial and financial relations made or imposed between the enterprises and the arm's length conditions can be established by directly substituting price in the comparable uncontrolled transaction in the price of the controlled transaction. Thus where a traditional transaction method and a transactional profit method can be applied in an equally reliable manner, the traditional transaction method is preferable to the transactional profit method. It is not appropriate to apply a transactional profit method merely because data concerning uncontrolled transaction are difficult to obtain or incomplete in one or more respects. The OECD guidelines further provides that in no case should transaction profit method be used on enterprises that are less successful than average or conversely more successful than

average, when the reason for their success or lack thereof is attributable to commercial factors. In the present case, as emerges from the facts, the assessee company is less successful than average and the reasons thereof is the commercial factors.

8.10 As regards the case law relied upon by the learned DR, we note that in none of these case laws it has been held that the resale price method cannot be applied on the reasoning as being put forth by the learned DR. In the case of Global Vantage Pvt. Ltd. (Supra) it has been held that it is the least complex party which needs to be selected as the tested party for the purpose of carrying out Arm's Length analysis. The reasons for testing the margins of a less complex party is that the simpler party requires a fewer and more reliable adjustments to be made to its operating profit margins. Further it has been held that it is difficult to select a foreign party as a tested party because it is difficult to obtain all relevant facts that could lead to a proper FAR analysis. Further the relevant data which may be required to make the requisite adjustments is also very difficult to obtain in relation to the foreign comparable. Thus the reasoning given for ignoring foreign entity as a tested party was not because of interpretation of Rule 10B(1)(b) but the difficulty in obtaining the data in relation to foreign comparable.

8.11 Similarly we note that in the case of Ranbaxy Laboratories Ltd. (Supra) relied upon by the learned DR, it was held that that the tested party should be

the party for which reliable data is easy and readily available and fewest adjustments are needed. It has been further held that if taxpayer takes foreign entity as tested party, he should furnish relevant data for comparable and he cannot take a stand that such data cannot be called for from him. Thus in this case also it has not been held that foreign entity cannot be used as a tested party in view of Rule 10B(1)(b). On the contrary this case law supports the view that foreign party can be used as a tested party if relevant data is available.

8.12 In the present case, as noted above, the assessee company has furnished all the relevant data of the foreign party and it is not the case of the TPO that information as called for about the foreign party has not been furnished by the assessee company. Thus this contention of the learned DR is not justified and cannot be accepted.

8.13 The approach adopted by the TPO in applying TNMM method is also not justified in the facts and circumstances of this case. It is noted that the export price realized per motor bike in the case of the assessee company is much better as compared to the export price per motor bike in respect of the others in the same line of business.

8.14 In the present case the assessee company has submitted the details and information that it has earned a gross profit margin (+) 15.83% in respect of export of motorcycles to associated enterprise as against 10.75% in respect of export of motor cycles to unrelated parties. The necessary details in respect

thereof were also before the TPO. Even for the sake of argument it is considered that resale price method is not the correct method, then this material was sufficient enough to hold that the margin earned by the assessee company from an associated enterprise was better than the margin earned from the non-associated enterprises. No reasons have been given by the TPO for ignoring the same and applying the TNMM method.

8.15 As regards TNMM, we further note that the margin has been computed of the two entities i.e. Bajaj Auto Ltd. and TVS Motor Co. Ltd. operating in India on an enterprise level and not in respect of the export of motorcycles. If the comparison has to be made on the basis of the enterprise level as has been done by the TPO, then the assessee company has also entered into transactions with non-associated enterprises which as per TPO's report itself were 81.07% (100 – 18.93 of associated enterprise) of the total value of the transactions. TPO in its report has taken the cost at Rs.1001.96 crores for the total operating revenue of Rs.808.10 crores. He has appropriated cost of Rs.189.67 crores to the sale of Rs.152.98 crores to AE on proportionate basis. Thus the balance cost of Rs.812.29 crores (Rs.1001.96 – Rs.189.67 crores) is toward sale of Rs.655.12 crores (808.10 – Rs.152.98 crores) to non-AE. These being transactions with non-AE were the best internal comparable in case TNMM was to be applied in the manner in which TPO has applied the TNMM. These being internal comparable should have got preference over the external comparables used by

the TPO even as per the judgment relied upon by the learned DR in the case of Interra Information Technology India Pvt. Ltd. (Supra). Thus the application of TNMM, the way the TPO has done, per se is faulty.

8.16 During the course of the argument the learned DR also suggested that the assessee company's case is of low capacity utilization and in such a case adjustment on account of low capacity utilization should have been allowed by the TPO while applying the TNMM method. We are not convinced with this argument of the learned DR that in a particular case, if the facts so supports, appropriate adjustment needs to be allowed for low capacity utilization while applying TNMM. But in the present case TNMM cannot be considered to be an appropriate method. The transfer pricing mechanism is a method to determine the arm's length price. It is not a mechanical way of determination of arm's length price by applying a set of rules ignoring the facts and circumstances of the case. The statute provides for five methods and further puts an obligation that the most appropriate method best suited to the facts and circumstances of the case has to be applied. In this regard we further note that as per OECD guidelines following aspects are important while applying Resale Price method:-

i) Where applicable resale price is available and resale transaction is made within a reasonable time after the controlled sale;

ii) Where the distributor or reseller does not add significant amount to the value of the property by altering the product before resale;

iii) Where the time gap between the purchase of goods and its sale by the reseller is small.

In the present case considering the facts of the assessee company we are of the view that the TPO was not correct in ignoring all these facts and applying TNMM method. From the facts and figures and as explained by learned AR it is apparent that by application of the TNMM method in the case of the assessee company, the price worked out is not a realistic price. The whole objective of the transfer pricing study is to find out an arm's length price of the product purchased or sold by the assessee company. TP is an economic function and it has to take into consideration all the facts and circumstances.

8.17 In view of the above analysis and the findings we hold that addition made by TPO and as confirmed by the DRP are unjustified and the same is directed to be deleted.

8.18 As we have deleted the addition on the issue of the applicability of the method, we do not adjudicate the other issues raised by the assessee company in respect of this addition. This would be an academic exercise. Therefore these grounds are allowed

9. Ground no.11 is regarding charging of interest under section 234B which is consequential in nature and hence need no adjudication.

10. In the result, the appeal filed by the assessee (ITA No.5748/Del/2011) is allowed.

ITA No. 6434/Del/2012 Assessment Year 2008-09

11. In this appeal the assessee company has raised the following grounds:-

"1. On the facts and circumstances of the case, the order passed by the learned Assessing Officer (AO) under Section 143(3) read with Section 144C of the Act is bad, both in the eyes of law and on facts.

2. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in assessing the income of the assessee at Rs. 58,22,840/-as against loss of Rs. 78,61,25,670/- declared by the assessee.

3. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law, in rejecting the books of accounts of the assessee and without pointing out any error or discrepancy in the same.

4(i) On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in making an addition of Rs. 34,27,38,000/- by taking an ad-hoc profit of Rs. 3,000/- per motorcycle ignoring the explanation and evidences brought on record by the assessee.

(ii) On the facts and circumstances of the case, the learned AO has erred both on facts and in law in making the above addition by comparing the profit per motor bike of Hero Honda Motors Ltd. whose product profile/volume is different and particularly ignoring the fact that the Hero Honda Motors Ltd. has been held to be non-comparable by the TPO itself in view of the related party transactions exceeding 25%.

(iii) On the facts and circumstances of the case, the learned AO has erred both on facts and in law in ignoring the contention of the appellant that the Transfer Pricing provisions are not applicable to domestic sales and even under provisions of Section 40A(2)

disallowance if any can be made only in respect of the expenditure incurred in relation to related parties.

5(i) On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in disallowing an amount of Rs. 9,40,16,621/- on account of royalty expenses.

(ii) On the facts and circumstances of the case, the learned AO has erred both on facts and in law in disallowing the royalty expenses ignoring the contention of the appellant that the losses cannot be a ground for disallowance of the royalty expenses.

(iii) That the above disallowance has been made ignoring the explanation and submissions made by assessee in this regard and also ignoring the fact that Royalty expenses have been allowed consistently in scrutiny assessment in preceding years except in the immediate preceding year.

6. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in making an addition of Rs. 35,21,93,888/- as difference in arm's length price in respect of the international transactions with the associated enterprises.

7. On the facts and the circumstances of the case, the DRP has erred in rejecting the Resale Price Method (RPM) for determination of Arm's Length Price and substituting the same with Transaction Net Margin Method (TNMM) ignoring the fact that associated enterprise having further sold the product to an uncontrolled entity, the Resale Price Method is the best and most suited method.

8(i) On the facts and circumstances of the case, the DRP has erred, both on facts and in law in rejecting the comparable selected by assessee in its detailed Transfer Pricing Study and substituting with its own comparables.

(ii) On the facts and circumstances of the case, the DRP has erred both on facts and in law in ignoring the contention of the appellant that the selection of Bajaj Auto Ltd. as comparable is wrong in view of the fact that the Bajaj Auto Ltd. is a market leader for 3 wheelers and the related party transactions in the case of Bajaj Auto Ltd. exceed 25%.

9(i) On the facts and circumstances of the case, the DRP has erred, both on facts and in law, in ignoring the various objections raised by the appellant regarding the computation of the Arm's

Length Price and the errors committed in determination of the same by the learned TPO.

(ii) On the facts and circumstances of the case, the DRP has erred both on facts and in law in holding that the appellant company has not contested the segmental accounts prepared by the learned TPO during the hearing before the Panel.

(iii) That the above observation of the DRP is against the facts on record.

(iv) On the facts and circumstances of the case, the DRP has erred in directing the AO to ignore the foreign exchange gain while computing the TNMM.

(v) On the facts and circumstances of the case, the DRP has erred in giving a direction to the AO that no adjustment is required to be made on account of working capital and for difference in the risk profile of the appellant company and that of the comparables.

(vi) On the facts and circumstances of the case, the DRP has erred both on facts and in law in ignoring the contention of the appellant that the comparison with the operating margin of the comparables as a whole enterprise instead of international export transactions per se is wrong.

10(i) On the facts and the circumstances of the case, the DRP has erred in allocation of operating expenses to export of motorcycles made by the assessee to AEs on pro- rata basis.

(ii) On the facts and the circumstances of the case, the DRP has erred in arbitrarily rejecting the basis on which expenses have been allocated by assessee to its domestic and export operations despite the fact the assessee has given complete details of cost incurred by the assessee for manufacture of various models of motorcycles.

11. Without prejudice to the above, even if the assessee accepts the contention of the learned TPO, the learned TPO has failed to appreciate that the motorcycles exported by the assessee to its AEs have been resold to unassociated persons/entities at a very low gross profit margin of 2.80%.

12. On the facts and circumstances of the case, the learned AO has erred in disallowing the stamp duty of Rs. 30,00,000/- paid on

issue of share certificates to the shareholders treating them as the capital expenditure.

13. On the facts and circumstances of the case, the learned AO has erred, both on facts and in law in not allowing set off of the brought forward losses pertaining to assessment years 2001-02 to 2007-08 and unabsorbed depreciation pertaining to assessment years 1997-98 to 2007-08.

14. The appellant craves leave to add, amend or alter any of the grounds of appeal."

12. Grounds no.1, 2 and 14 are general in nature and need no adjudication.

13. Grounds no.3 and 4 are identical to the grounds no.3 and 4 for assessment year 2007-08 and for the detailed discussion in paragraphs no.3.2 to 3.8, these grounds are allowed.

14. Ground no.5 is identical to the ground no.5 for assessment year 2007-08 and for the detailed discussion in paragraphs no.4 to 4.5 above, this ground of appeal is allowed.

15. The issue involved in grounds no.6 to 11 is similar to the issue involved in ground no.6 to 9 of assessment year 2007-08. The facts and reasoning for making the addition being the same and for the detailed discussion paragraph No.6 to 8.18, the addition made of Rs.35,21,93,888/- by way of adjustment to arm's length price is hereby directed to be deleted.

16. Ground no.12 is regarding disallowance of stamp duty of Rs.30,00,000/- paid on issue of share certificates to the shareholders. It was submitted by the

learned AR that the same needs to be allowed as per the provisions of section 35D of the Act. The learned DR, however, relied upon the order of the DRP. On going through the order of the DRP we notice that this disallowance has been upheld by giving a detailed reasoning as under:-

> "7.2 The assessee's submissions have been considered. The assessee has itself admitted that the expenditure on stamp duty is capital expenditure. However, the assessee has claimed that the same is allowable u/s 35D as amortization of certain preliminary expenses. A perusal of the provisions of section 35D shows that the expenditure specified in section 35D(2) is allowed to a company before the commencement of its business or in connection with the extension of undertaking or setting up of a unit. Since it is the existing unit and is already in business, it cannot be said that the expenditure was incurred before the commencement of the assessee's business. The assessee has not placed any evidence on record to prove that the expenditure incurred was in connection with extension of its undertaking or setting up of its unit. Therefore, the assessee's case is not covered u/s 35D(1) in the first place. Without prejudice to this, even the expenditure does not fall in any of the clauses of sub-section (2) of section 35D. The assessee has stated that its case falls in section 35D(2)(c). For ready reference this section, sub-section and clause, and sub-clause is reproduced below:
>
> > "(c) where the assessee is a company, also expenditure—
> >
> > (i) by way of legal charges for drafting the Memorandum and Articles of Association of the company;
> >
> > (ii) on printing of the Memorandum and Articles of Association;
> >
> > (iii) by way of fees for registering the company under the provisions of the Companies Act, 1956 (1 of 1956);
> >
> > (iv) in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for

> drafting, typing, printing and advertisement of the prospectus;"
>
> A perusal of the above shows that the assessee's case does not fall even in section 35D(1)(c)(iv) because to qualify for deduction, the expenditure has to be in connection with public issue of shares or debentures of the company being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus. The stamp duty paid on the issue of shares is not covered in any of these items. Therefore, the assessee's contention cannot be accepted and the expenditure in question is not allowable u/s 35D. Therefore, the AO's action of proposing disallowance of Rs.30,00,000/- is upheld."

The stamp duty paid on the issue of shares is not covered by the items provided in section 35D, therefore, we do not find any reason to differ with the view taken by the DRP and accordingly this ground of appeal is dismissed.

17. Ground no.13 is identical to the ground no.10 for assessment year 2007-08. For the detailed discussion in paragraphs no.5 to 5.3, this ground of appeal is allowed.

18. In the result, the appeal filed by the assessee (ITA No.6434/Del/2012) is partly allowed.

Order pronounced in the open court on this 29th day of October, 2014.

Sd/-	**sd/-**
(C.M. GARG)	**(B.C. MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 29th day of October, 2014
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)
5.CIT(ITAT), New Delhi. AR/ITAT