

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 1759/Del/2015
Asstt. Year 2010-11

DCIT, Circle 16(2), Room No. 318, C.R. Building, I.P. Estate New Delhi – 110 002	Vs.	Minda Acoustic Ltd. (Now Minda Industries Ltd.) B-64/1, Wazirpur Industrial Area New Delhi - 100 052 PAN AAACF8168 K
(Appellant)		(Respondent)

Co. No. 216/Del/2018
(In ITA No.1759/Del/2015)

Minda Acoustic Ltd. (Now Minda Industries Ltd.) B-64/1, Wazirpur Industrial Area New Delhi - 100 052 PAN AAACF8168 K	Vs.	DCIT Circle-16(2), Room No.318, C.R. Building, I.P. Estate New Delhi-110 002
(Appellant)		(Respondent)

Department by:	Shri H.K. Choudhary, CIT(DR) Shri Pankaj Jindal, Sr. DR
Assessee by :	Shri Pradeep Dinodia, Adv.
Date of Hearing	13/02/2019
Date of pronouncement	10/05/2019

ORDER

PER AMIT SHUKLA, J.M:

The aforesaid appeals have been filed by the Revenue and Cross objections by the assessee against direction dated 28.11.2014 of the Dispute Resolution Panel-III (DRP) New Delhi, for the Assessment Year 2010-11 u/s 144C (5). In the grounds of appeal, the revenue has raised following grounds:-

1. *“Whether on the facts and circumstances of the case and in law, the DRP erred in rejecting some of the comparables which have been taken by the TPO on the ground that these companies are*

engaged in manufacture of core products whereas the TPO had, as per safe harbor guidelines, already selected such comparable companies that were into non-core activities.

- 2. Whether on the facts and circumstances of the case and in law, the DRP erred in directing the TPO/ AO to recomputed the profit margin of the assessee after treating forex gain/loss as non-operating in nature when the assessee itself has treated the forex fluctuation as operating in nature in its TP study.*
- 3. That the order of the DRP is erroneous and is not tenable on facts and in law.”*

2. In the cross objection assessee has raised grounds pertaining to rejection of internal CUP Method in respect of the international transactions.

3. The facts in brief are that the assessee company was incorporated as Fiamm Minda Automotive Ltd. as a joint venture between Fiamm SPA Italy and N.K. Minda Group in July, 2004. However, in the Financial Year 2009-10, i.e., the year under consideration, the Joint Venture Agreement between the parties was terminated w.e.f. 4th August, 2009 and all the shares held by Fiamm SPA were transferred to the Indian Partners i.e. N. K. Minda Group. There is no dispute on these primary facts. The assessee is engaged in the business of manufacturing, assembly and sale of non-core automotive products, i.e., horns such as, trumpet horns, air horns and disc horns, etc. The fact that assessee is engaged in manufacture of non-core auto components is not disputed either by the TPO or by the DRP. The assessee during the year under consideration has entered into various international transactions and the nature of international transactions entered into is reproduced by the TPO in Para-3 of his Order. The TPO in the show-cause notice issued to the

assessee accepted the fact that, since the assessee was a manufacturer of non-core auto components, therefore, only such comparables should be chosen as indicated in the non-core automotive manufacturing. However, as pointed out by the Ld. Counsel on behalf of the assessee that, TPO while retaining the comparables in the final set of comparables, he had omitted to apply such self accepted guidelines and picked up large number of comparables which were manufacturing auto components without bifurcating the same into core or non-core items, on the ground that slight difference in products cannot be criteria for acceptance or rejection of a comparable. The TPO was of the view that, if TNMM method is being used to benchmark the international transactions then product difference is evened out. The TPO picked up 18 comparables in the final list of comparables and worked out an average PLI of all the comparables at 8.46% based on operating profit by total cost. He worked out on ALP adjustment of Rs.3.03 Crores on the sales transactions and about 77 lakhs in the purchases transactions and suggested total ALP adjustment of Rs.3.81 Crores at an entity level.

4. The matter was taken up by the assessee before the DRP and the DRP after considering various submissions made by the assessee, rejected the plea of the assessee on the internal CUP on the ground that transactions with the same party during the same year cannot be compared under CUP Method based on pre- AE and post-AE period. According to DRP, once there is a relationship of an ASSESSEE, then it always remains an AE for the whole year. As regards the comparables selected by the TPO, the DRP accepted the contentions of the assessee that those comparables which are in the core segment of auto parts manufacturing are required to be excluded, because assessee was admittedly into non-core segment of auto parts

manufacturer. The DRP on the basis of examination of the profile of all the comparables which were challenged by the assessee before the DRP directed the TPO to exclude 11 comparables out of 12 comparables challenged by the assessee on the reasoning that the FAR analysis was different because such comparables were core auto manufacturers. The DRP further directed that only proportionate adjustments need to be made in relation to AE transactions, that is, international transactions with the AE and not at the entity level. The DRP also upheld the contentions of the assessee that under the TNMM method adjustment cannot be made for both sale and purchase transactions. Since sales transactions with the AE were higher, therefore, adjustments if any were directed to be restricted only to sales transactions that too to be on proportionate basis. The DRP also directed to treat the forex-loss gain as non-operating both for assessee (tested partly) and comparables.

5. The issue of proportionate adjustment only on AE transactions is not in dispute before us. Similarly, revenue has accepted the order of DRP pertaining to the issue that double adjustment on sales as well as purchases cannot be made when TNMM is applied.

6. Before us, Ld. CIT (DR) submitted that the DRP has grossly erred in excluding the comparables merely on the basis of safe harbour rules as the same can be applied only if an assessee opts to invoke the same and moreover the same are not applicable for the year under consideration i.e., AY 2010-11. Further, safe harbour rules do not have universal application in each and every situation. Although TPO has accepted that assessee is into non-core auto manufacturing yet he has chosen all such comparables which are in the business of auto parts manufacture. Under TNMM, broad functions of the auto parts manufacturers can be taken for comparability analysis and

therefore, TPO was justified in picking up the comparables and the DRP was not justified in rejecting of such comparables by making distinction of core and non core activities.

7. He further pointed out that even if the comparables which have been rejected by the DRP, then same can be seen that some of them can be held to be engaged in non-core manufacturing. He further highlighted the various functions of the comparables vis-a-vis the assessee and pointed out that by and large there are the same and therefore, under TNMM they could not be rejected.

8. Further as regards treating the forex loss as non-operating, the Ld. DR submitted that at the first stage itself, assessee had treated the same as operating in nature. It was only at the DRP stage that assessee claimed the same to be non-operating which according to him is not permissible. He strongly contended that reliance of DRP on safe harbour rules for deciding this issue also is erroneous as safe harbour rules are not applicable to the year under consideration.

9. On the other hand, Ld. Counsel for the assessee Ms. Pallavi Dinodia submitted that the TPO himself has appreciated and accepted the difference between core and non-core auto parts manufacturers. She submitted that it is only while analyzing the profile of manufacturers that the TPO committed an error in selecting such comparables which were mainly into core segment. She submitted that assessee or for that matter DRP has not actually applied safe harbour rules. The reference to the safe harbour rules was only for the purposes of drawing an inference that even the statute has now recognized the difference between auto core and non-core items manufacturers. It is only for understanding the difference between core and non-core activities that reference to safe-harbour rules has been made. So it is not a case where DRP has allowed relief by

following safe-harbour rules. The Ld. Counsel relied upon the judgement of Hon'ble Delhi High Court in the case of **Rampgreen Solutions (P) Ltd. Vs. CIT 377 ITR 533 (Delhi)** to submit that differences in high end services and low-end services leads to substantial differences in FAR and the same is true about core and non-core which is akin to high end and low-end services. Explaining the difference between core and non-core activities in auto industries, the Ld. Counsel comparing the car with human body, submitted that brain and heart can be compared with core body parts whereas the eyes and ears can be compared with non-core body parts. If a man is brain dead or heart dead it is of no value whereas a man without eyes or no hearing system can still survive. Same is true about core parts and non-core parts in automotive sector. Core parts are such that without which an automobile cannot run or function but a non-core part, even if it is an essential part, cannot bring a vehicle to standstill.

10. As regards the treatment of foreign exchange gain/loss, the AR of the assessee submitted that no doubt the assessee has treated the same as operating in nature, but on realizing that the foreign exchange loss did not sprung from international transactions directly, the same was prayed to be treated as non-operating before the Hon'ble DRP. The Ld. Counsel of the assessee submitted that there is no bar in changing a comparable or for that matter making any other relevant claim in law for which facts on which a treatment is given to an item at the initial stage, turnout to be different on a later stage. The AR In support she relied upon the judgement of Hon'ble Punjab & Haryana High Court in the case of **Quark Systems P. Ltd. 244 CTR 542 Punjab & Haryana High Court**. She submitted that unless the foreign exchange loss has been incurred due to any international transactions, the same cannot be treated as operating in nature. She further rrelied upon the judgement of Delhi ITAT in the case of

Panasonic Consumer India Pvt. Ltd. 2010 TIOL 47 ITAT (Delhi) TP and Hon'ble Mumbai ITAT in the case of DHL Express (India) Pvt. Ltd., Tax Sutra 353. It was also the claim of the Ld. Counsel that the foreign currency had abnormal movement during this period and Indian Rupee vis-a-vis Dollar as INR unexpectedly appreciated during the period under consideration. It was explained that whereas exchange rates of 1USD was equivalent to about 52 Indian Rupees during January to May, 2009, the same during the period August to October 2009 went down to about 46 Indian Rupees. This abnormal and substantial fluctuation caused major foreign exchange loss to the assessee against its sales realization. The AR further relied upon the safe harbour rules to submit that considering all such factors only, the statutes in its wisdom has treated the foreign exchange fluctuation loss as non-operating and the same should be treated as non-operating due to aforesaid reasons as well.

11. The learned CIT DR in the rejoinder submitted that there is no dispute on the fact that the assessee is a manufacture of non-core automotive parts and this fact has been acknowledged by TPO himself. However, referring to certain comparables like, Saks Ancillaries Limited, Motherson Sumi Systems Limited and Indication Instruments Limited, he submitted that these comparables are manufacturing wiring harnesses, cable connect which items according to him cannot be categorized as core items based on the example given by the AR of the assessee. According to the learned DR, the DRP has erroneously treated these 3 comparables as manufacturer of core items and exclusion of 3 comparables is not as per the prescribed rules and law. As regards treatment to the forex loss, the learned CIT DR submitted that there are various judgments which are being rendered by various judicial bodies treating the FOREX gain or loss as operating income or

loss although undoubtedly the safe harbour rules have included this item as non-operating in nature.

12. We have considered the rival submissions and perused the relevant finding given in the impugned orders as well as material referred to before us. The international transactions under dispute are with regard to purchase of raw material and sale of financed goods to AE. From the perusal of the TPO order, it is seen that the TPO had rejected most of the comparables of the assessee and had selected mostly new comparables and finally he has taken 18 comparables and out of them 12 of comparables were disputed by the assessee before the DRP which are almost the subject matter of dispute before us. Before the DRP the assessee has submitted that 10 out of 12 comparables brought by TPO were engaged into core auto component as against non-core producers/manufactures by the assessee which are mostly horns. The reasoning given by the DRP qua the comparable companies are as under:-

S.N	<i>Name of company</i>	<i>Assessee's reason for rejection</i>	<i>DRP's View</i>
1	ATS Elgi	Engaged in automotive service industry and sale of ancillary equipment.	It is engaged in production of lifting equipments, diagnostic equipments, washing equipments etc. which is essentially a service sector activity. It is not engaged in manufacturing of automotive parts as such. Hence, its FAR is not essentially similar to that of assessee. It is therefore to be rejected as comparable.
2	Imperial Auto Industries Ltd.	'Core' products include I.C. Engine Hydraulic parts Main battle tank parts Harvester parts It is largest integrated manufacturer of Fluid Transmission Products (FTP)	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable.

3	Indication Instruments Ltd.	'Core' products include Speedo cables Cable connect kits Warning / indicator light Measuring & checking gauges Engaged in R&D activities	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable. “
4	Minda Industries Ltd.	It has undergone amalgamation with Minda Autogas Ltd. Has well established brand Engaged in R&D activities	The FAR of company is essentially similar to that of the assessee. It has not been established how amalgamation has effected profits of the year. It is therefore to be retained as comparable.
5	Minda SAI Ltd.	'Core' products include Wiring harness Battery cables Wiring sets Connectors & terminals	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable.
6	Motherson Sumi Systems Ltd.	'Core' products include Wiring harness High tension cords Plastic components Engaged in R&D activities High turnover	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbour rules. Hence, its FAR being dissimilar, it is rejected as comparable.
7.	Remsons Industries Ltd.	'Core' products include Gas guard Auto control cables It has engineering centre at Gurgaon with modern testing and validation equipments	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable.
8.	Roots Industries India Ltd.	Products diverse in nature - X-ray parts Scanning machines	Perusal of financials of the company shows that its product range is quite diverse but

		<p>Horns</p> <p>Engaged in R&D activities</p> <p>Abnormally high gross profit ratio</p>	<p>segmental are not available. Its gross profit margin (47.79%) is quite higher than average (31.82%) gross profit margin of comparables taken by TPO and its cost of consumption (40.53%) is substantially on lower side as compared to average (61.74%) cost of consumption in case of comparables. FAR of the company seems to be not essentially similar to that of the assessee. It is therefore to be rejected as comparable.</p>
9.	Saks Ancilliaries Ltd.	Financials not available in public domain	TPO has mentioned that annual report shows that it is engaged in manufacturing of wire and wire products which are in core sector. Hence, its FAR being dissimilar, it is rejected as comparable.
10.	Suprajit Engineering Ltd.	'Core' products include Control cables Speedo cables Speedometers Engaged in R&D activities Ownership of brand and Goodwill High turnover	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable,

7 1 1	Tata Yazaki Autocomp Ltd.	'Core' products include Wiring harness	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable.
1 2	Ucal Fuel Systems Ltd.	The products are 'core' like 2 wheeler carburettors Fuel injection Fuel filter Air suction valve Engaged in R&D activities High turnover	It is engaged in manufacturing of core products. Core-products sector is different from non-core products sector. This distinction has been recognized even in safe harbor rules. Hence, its FAR being dissimilar, it is rejected as comparable.

13. The assessee before the DRP has made reference to the safe harbor rules wherein **clauses (b) and (h) of Rule 10TA** provides definition of core auto components and non core auto components in the following manner:-

*“Rule 10TA: (b) **“core auto components”** means. –*

- (i) Engine and engine parts, including piston and piston rings, engine valves and parts cooling systems and parts and power train component;*
- (ii) Transmission and steering parts, including gears, wheels, steering systems, axles and clutches;*
- (iii) Suspension and braking parts, including brake and brake assemblies, brake linings, shock absorbers and leaf springs;*

xxxxxx xxxxxx xxxxxx xxxxxxxx xxxxxx

(h) “non-core auto components” means auto components other than core auto components;”

14. Based on this distinction brought in the statute, the Ld. DRP has rejected most of the comparables selected by the TPO holding that these comparables were manufacturing core products which cannot be

compared with the assessee which is purely into production of non-core auto components mainly various types of horns. From the perusal of the definition of 'core auto components' as given in the Rules, it can be inferred that core auto components are crucial part of automobile that requires sophisticated technology for manufacturing and such components are very lifeline like the heart and brain of automobile which are vital for power performance, actual running and stability of the automobile. Like engines and engine parts are inextricably link with the performance of the vehicle, without which vehicle cannot move; transmission system which assists in running of car; steering and steering systems, gears and clutches; axels and wheels; suspensions which balances the vehicle; breaks, etc. In other words, without the core part neither the automobile can run nor can it function. Whereas non-core auto components which are not covered under the core components could be like accessories, equipment, vehicle parts such as head lights, wipers, dash board equipment, horns, etc., which are used in the vehicle but they are not vital for the actual running of the vehicle.

15. During the course of the hearing, following companies and the product manufactured by them were highlighted before us:-

Sl. No.	Name of Companies	Product Manufactured as per TPO
1.	Imperial Auto Industries Ltd.	Engaged in manufacturing of Radiator & heater hoses, Fuel & Vaccum hoses, fuel injection tubes, CRDi tybes, Hydraulic tubes, EGR and Belfows
2.	Saks Anciliaries Ltd.	Engaged in manufacturing of wiring harness
3.	Motherson Sumi System Ltd.	
4.	Minda Sai Ltd.	

5.	Tata Yazaki Autocomp Ltd.	
6.	Indication Instruments Ltd.	Engaged in manufacturing of dashboard instruments
7.	Suprajit Engineering Ltd.	Engaged in manufacturing of Control Cables, Speedometer, Speedo Cables
8.	Remsons Industries Ltd.	Engaged in manufacturing of control cables, push pull cables, parking brake assemblies
9.	Ucal Fuel Systems Ltd.	Engaged in manufacturing of carburetors, Throttle body, fuel injection pumps & filters

Ld Counsel had also drawn our attention to the various kinds of core and non-core functions performed and products manufactured by these companies with reference to their website and annual reports to highlight the difference in the function performed by these companies vis-à-vis the assessee company.

16. As stated above the assessee is mainly into manufacturing of various types of horns, i.e., trumpet horns, air horns, disc horns, buzzers. The horn, *per se* cannot be said to be a core auto component and therefore, if we go by the distinction drawn by the safe harbor rules as point of reference or understanding the what is core and non-core components, then the products of the assessee falls in the category of non-core auto components. The distinction between core and non-core auto components assumes great significance in analysing the FAR analysis, because specific characteristics of the auto component manufactured and sold commands different terms of price negotiations, margins, and kind of assets deployed in terms of technology, R & D, skilled man power, etc. A core component definitely commands higher price and bigger bargaining power in the automobile industries as compared to manufacturers who are producing simply

ancillary parts and non-core products like wind shields, horns, car accessories, etc. If we go by the components manufactured by some of the comparable companies as discussed by the DRP, like, **Imperial Industries Ltd.** it is seen that it is mostly engaged in manufacturing of radiator and heater hoses, fuel and vacuum hoses, fuel injection tubes, CRDi tubes, hydraulic tubes, EGR and Belfows. It manufactures various parts of engine, transmission system, breaks etc. which all form part of the IC engine part which is known as fluid transmission products used for internal combustion. These products are the core part of any auto components for running and transmission and therefore without these products, the vehicle cannot perform or run.

17. Similarly with regard to other four comparables namely, **Saks Ancillaries Ltd., Motherson Sumi System Ltd., Minda Sai Ltd., Tata Yazakin Antocomp Ltd.** are mostly engaged in manufacturing of wiring harness. Wiring Harness connects the various parts of the engine with the other parts of vehicle like blood vessels to the heart because it transmits the electric power created by the ignition to the various engine components and transmit power to the vehicle. Wiring harness is the network of electric system connected to the battery with engine and other parts used by electric power and also connect alternator to generate power back to the battery which in turn carries power to ignite the engine. It assists in transmission of electric power to other parts of vehicle. Hence, manufacturing of wiring harness cannot be treated as non-core auto components, because without it, the vehicle cannot run. Hence wire harnessing cannot be compared with horn, which is purely a non-core component.

18. Similarly, the other comparable, **Indication Instruments Ltd.** is engaged in manufacturing of dashboard instrument which are part of

the steering systems of the automobile that controls arrays of controls of the vehicle system including speed, fuel gauge, oil pressure, air conditioning and climate control, entertainment systems, and various types of indicators, etc. Without such instrument, running of the car cannot be controlled and performance of the engine and vehicle cannot be gauged or monitored. Hence, manufacturing of a Dashboard instrument will also constitute a high-end product and core component which cannot be compared with the company.

19. Further, in cases of **Suprajit Engineering** and **Remsons Industries Ltd.** it is seen that these companies are engaged in manufacturing of control cables, push pull cables, parking brake assemblies which controls the mechanical functions of the accelerator, brakes, clutches etc. These again are core components of any vehicle without which the vehicle cannot run and is also classified as core component under safe harbour rules. Lastly, **Ucal Fuel Systems Ltd.** is engaged in manufacturing of carburettors, throttle body, fuel injection pumps and filters which are part of the internal combustion engine and throttle body assembly is the part through which fluid flow is managed to the engine. Thus, such products are also core components.

20. Thus, all these comparable companies are manufacturing core components which are the vital for the running and performance of the vehicle. The distinction between the core and non-core component in an automobile industry assumes great importance, because manufacturing of a core component can definitely command much higher price looking to its utility in the vehicle and use of high-end technology and highly skilled human resources as compared to non-core auto component manufacturers. The FAR analysis of the core and non-core in automobile industries are different and that is why statue

has recognised this difference and has been introduced in Safe Harbor Rules, though brought from prospective date. But such a distinction can always acts like a guide in deciding the difference in FAR and comparability analysis. The reasoning given by the DRP for rejecting this comparables are based on sound principles and are thus upheld. Accordingly, the transfer pricing adjustment made by the TPO based on such comparables cannot be sustained and hence same are directed to be deleted.

21. Coming to the DRP's direction to recompute the profit margin of the assessee after treating forex loss as non-operating in nature, before us Ld. Counsel has submitted that assessee had itself revised the PLI by treating the forex gains/loss as non-operating item both for the tested party as well as the comparables which have been rejected by the TPO. Before the DRP assessee has contended that the forex should be treated as non-operating item both for the comparables and the tested party. DRP after examining the facts of the case, various judicial pronouncements and also referring to the safe harbor rules had directed the TPO to recompute the profit margin of the assessee finally after treating forex as non-operating item.

22. On the perusal of the facts on record, it is seen that assessee in its transfer pricing study while computing the foreign exchange of the tested party treated the foreign exchange loss as operating item. However, during the course of the transfer pricing proceedings relying upon the judgment of Hon'ble P & H High Court in the case of Quark Systems P. Ltd., assessee had taken a plea to remove the forex from the PLI, both for the tested party as well as that of the comparables by treating the foreign exchange as non-operating item. Here in this case the PLI of the comparables has been worked out based on operating profit by total cost. If forex gain/loss has been removed/adjusted as

operating cost not only from the tested party but also as well as comparables, then it would not affect the working of the PLI. In any case the safe harbor rules which though is not applicable for the year under consideration however have defined the operating expenses and operating revenue in the following manner: -

*“operating expense means the costs incurred in the previous year by the assessee in relation to the international transaction during the course of its normal operations including costs relating to Employee Stock Option Plan or similar stock-based compensation provided for by the associated enterprises of the assessee to the employees of the assessee, reimbursement to associated enterprises of expenses incurred by the associated enterprises on behalf of the assessee, amounts recovered from associated enterprises on account of expenses incurred by the assessee on behalf of those associated enterprises and which relate to normal operations of the assessee and depreciation and amortisation expenses relating to the assets used by the assessee, **but not including the following, namely:-***

- (i) interest expense;*
- (ii) provision for unascertained liabilities;*
- (iv) pre-operating expenses;*
- (iv) **loss arising on account of foreign currency fluctuations;***
- (v) extraordinary expenses;*
- (vi) loss on transfer of assets or investments;*
- (vii) expense on account of income-tax; and*
- (viii) other expenses not relating to normal operations of the assessee.*

"operating revenue" means the revenue earned by the assessee in the previous year in relation to the international transaction during the course of its normal operations including costs relating to Employee Stock Option Plan or similar stock-based compensation provided for by the associated enterprises of the assessee to the employees of the assessee but not including the following, namely:-

(i) interest income;

(ii) income arising on account of foreign currency fluctuations;

(iii) income on transfer of assets or investments;

(iv) refunds relating to income-tax;

(v) provisions written back;

(vi) extraordinary incomes; and

(vii) other incomes not relating to normal operations of the assessee"

23. The aforesaid definition specifically excludes the foreign exchange loss and foreign exchange gain from operating expense or as operating income. The assessee though has not applied for the Safe Harbor rules, but it always be adopted as guidance for interpretation of such items specifically when they have not been defined anywhere in law. The safe harbor has not changed the classification of foreign exchange items but has merely clarified the position by providing the same in the statute specifically when there were many decisions that any item which is not directly connected with the international transaction cannot be considered for bench marking provisions. The safe harbor rules have only clarified the further reinforced the said position. Accordingly, we hold that forex loss/gain cannot be treated

as operating income/operating cost. Thus, the grounds raised by the revenue is dismissed.

24. Now coming to the Cross Objections filed by the assessee, admittedly, when the TP adjustment stands deleted by confirming the order of the Ld. DRP, then grounds raised by the assessee has been rendered academic, hence is treated as infructuous and is dismissed as such.

25. In the result, the appeal of the Revenue is dismissed and cross objection of the assessee is dismissed *in-liminie*.

Order pronounced in the Open Court on 10th May, 2019.

sd/-

sd/-

(O.P. KANT)
ACCOUNTANT MEMBER

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 10/05/2019

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

