IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-2', NEW DELHI

BEFORE SH. VIJAY PAL RAO, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER

ITA No. 847/Del/2012
Assessment Year : 2007-08

DCIT, Circle-11(1), Room No. 312, C.R. Building, New Delhi	**Vs.**	Ecocat India Pvt. Ltd., 12-A, Shivaji Marg, New Delhi
PAN : AAACV2674G		
(Appellant)		**(Respondent)**

Appellant by	Sh. Sanjay Kumar Yadav, Sr.DR
Respondent by	Sh. K. Sampath, Adv.

Date of hearing	02.08.2017
Date of pronouncement	15.09.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the Revenue is directed against order dated 27/12/2011 of the Commissioner of Income-tax (Appeals)-XX, New Delhi [in short ñthe CIT-(A)ò] for assessment year 2007-08, raising following grounds:

"1. On the facts and circumstances of the case and in law, the Learned CIT(A) has erred in deleting the addition of Rs.2,04,58,470/- made on account of arm's length price.

2. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing."

2. The facts in brief of the case are that during the relevant year the assessee company was engaged in manufacturing of "Catalytic Convertersö for automobiles and components of car A/C systems. The assessee filed return of income on 29/10/2007 declaring nil income. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short "the Actö) was issued and complied with. The Assessing Officer noted the international transactions carried out by the assessee with Associated Enterprises (AEs) and he referred determination of armös length price of the international transactions to the Transfer Pricing Officer (TPO). On perusal of transfer pricing study submitted under Rule 10D of Income-tax Rules, 1962 (in short "the Rulesö), the learned TPO noted following international transactions:

Nature of transaction	*Method selected*	*Total value of transaction (Rs.)*
Purchase of Components	*CUP*	*172,578,808*
Sale of Components/Convertor	*CUP*	*855,430*
Purchase of Capital Items	*CUP*	*2,341,600*
Reimbursement of Expenses	*CUP*	*147,583*

2.1 Regarding the functions carried out by the assessee, the learned TPO noted that till the year under consideration the assessee owned manufacturing facilities for only the last process (Canning) of the catalytic converters. The Coated substrate was imported from the AEs and after canning of same, the catalytic converter was manufactured and sold to the customers on the basis of tentative schedules received from the customers. The coated substrate imported from AEs, constituted 85% to 90% of its raw material.

2.2 The Ld. TPO further noted that the assessee had used ñcomparable uncontrolled priceò (CUP) method for benchmarking its international transactions. The assessee compared the prices charged from it by the AE with the prices charged by the AE from unrelated parties located in other countries. Based on the analysis, the assessee concluded that its international transactions were at armôs length.

2.3 For benchmarking the international transactions, the assessee used weighted average of the financial data for financial year 2004-05, 2005-06 and 2006-07 i.e multiple year data. The Learned TPO, referred to Rule 10B(4) of Rules & OECD guidelines and rejected the approach of the assessee of using multiple year data, relying on the decision of the ITAT Bangalore benches in the case of Aztec software and technology (2007) 294 ITR(AT) 32 and Delhi benches decision in the case of Mentor graphics private limited (2007) 109 ITD 21 and other decisions.

2.4 The learned TPO further issued a show cause notice to the assessee referring to various paragraphs of the transfer pricing study of the assessee. In the show cause notice, the learned TPO noted that the assessee was depended for purchases on AEs as substantial part of purchases (Rs.172,578,808/- out of total purchases of Rs.178,011,008/-) being from its AEs. The learned TPO also noted that during the year under consideration the assessee carried out research and development for a new catalytic converter for M/s. Mahindra and Mahindra Ltd.ôwhich shows an independent entrepreneur status of the assessee. The learned TPO noted that the assessee has shown sales of Rs.184,286,696/- and incurred loss of Rs.10,615,894/- and thus the loss was primarily due to the transaction with the AEs. The learned TPO computed unit sale price and unit purchase price for the year under consideration and compared with immediately preceding years and concluded that the assessee has not negotiated its unit purchase price in the year under consideration

with AEs. In view of the observations, the learned TPO was of the opinion that the "CUP" method was chosen by the assessee as most appropriate method, just to gloss over the facts and it does not capture the reality that the assessee was an independent entrepreneur and should be tested on the basis of own financial results and directed the assessee to carry out analysis of arm's length on the basis of Transactional Net Margin Method (TNMM).

2.5 In response, though the assessee objected rejection of "CUP" method and adopting "TNMM" as the most appropriate method for computation of the arm's length price, the assessee provided a list of 19 comparable companies with calculation of weight average operating profit margins for financial year 2005-06 and financial year 2006-07 at (-) 1.90%.

2.6 The learned TPO rejected the four comparables of the assessee on the ground of consistent loss-making companies and retained 15 comparables and there profit margin for financial year 2006-07 having arithmetic mean of 5.05% was considered for calculating the arm's length price.

2.7 The learned TPO rejected the "CUP" method of the assessee on the ground that the assessee was operating as an independent entrepreneur and therefore its finances result should have been tested in their entirety. He also noted that there are geographical differences, product differences, timing differences and differences in quantity due to bulk sale/retail sales in the transactions compared for "CUP" method by the assessee. He noted that all sales by the "AE" are to unrelated parties in the Europe and thus, according to him the "CUP" data relied upon by the assessee was not reliable and did not represent the true comparability. The learned TPO relied on the decision of the Tribunal in the case of UCB India (P) Ltd. versus ACIT (2009) 30 SOT 95 (MUM)

wherein it is held that the "CUP" method requires a high degree of comparability along the dimension of quality of the product or service, contractual terms, level of market, geographical market in which the transaction takes place, date of transaction, intangible property associated with the sale, foreign currency received etc. The learned TPO also relied on the decision of the Tribunal in the case of M/s Intervet India private limited 2010-TII-12-ITAT-MUM-TP wherein it is held that while applying "CUP" method adjustment related to economy and market conditions in different geographical locations need to be made.

2.8 Further, the learned TPO, rejected the claim of the assessee seeking comparability adjustment on the ground of exchange rate fluctuation. The assessee submitted that losses incurred by it are due to exchange rate fluctuation, whereas comparables are not exposed to this and, therefore, suitable adjustment should be allowed to the assessee. The learned TPO cited following reasons for rejection of the claim of the assessee:

a) the comparables were chosen by the assessee itself and if they are correct comparable, there was no need for any further adjustment.
b) exchange rate fluctuation is normal expense incidental to business and it may result in loss in one year but gain in another year.
c) foreign exchange risk was partially shared by certain customers.

2.9 Further, the claim of the assessee for seeking adjustment on account of increasing price of metal as well as capacity adjustment was also denied.

2.10 The learned TPO declined to exclude interest and financial charges and exchange loss from operating expenses and took operating losses at the figure of Rs. 106.15 Lacs.

2.11 Finally, the learned TPO retained 15 comparables and computed the adjustment to the international transaction as under:

"7. Based on the discussing above, the following conclusions are made.

(i) The most appropriate method shall be TNMM, OP/sales shall be the PLI.

(ii) The comparables which shall be used are.

S. No.	*Company*	*F.Y.2006-07*
1	*Auto Gallon Inds. Pvt. Ltd.*	*4.86%*
2	*Bharat Technologies Auto Components Ltd.*	*3.51%*
3	*Design Auto Systems Ltd.*	*6.12%*
4	*Gajra Bevel Gears Ltd.*	*3.33%*
5	*Goa Auto Accessories Ltd.*	*3.33%*
6	*Haryana Roadways Engg. Corpn. Ltd.*	*2.60%*
7	*Hindustan Hardy Spicer Ltd.*	*5.35%*
8	*I A Industries Ltd.*	*3.45%*
9	*Jagan Lamps Ltd.*	*-0.66%*
10	*K R Rubberite Ltd.*	*5.12%*
11	*P M P Components Pvt. Ltd.*	*10.78%*
12	*Rane N S K Steering Systems Ltd.*	*6.01%*
13	*Special Engineering Services Ltd.*	*9.24%*
14	*Standard Radiators Pvt. Ltd.*	*9.65%*
15	*X L O India Ltd.*	*3.09%*
	Arithmetic Mean	*5.05%*

The arms length price of international transaction is calculation as below. Total cost of the assessee : Rs.194,902,590
Operating profit margin of 5.05% : Rs.9,842,580
Less: operating loss shown : Rs.(-)10,615,894
ALP at a margin of 5.05% : Rs.152,120,334
Price paid : Rs.172,578,808
Difference being adjustment u/s 92 CA : Rs.20,458,474"

2.12 The Assessing Officer completed assessment under section144(c)/ 143(3) of the Act on 14/02/2011 after making addition of Rs.2,04,58,474/- as proposed by the TPO.

2.13 Aggrieved, the assessee filed appeal before the Ld. CIT-(A). The learned CIT-(A) after taking into consideration the objections of the assessee, framed three issues for adjudication as under:

Issue 1: Whether TPO was right in rejecting the CUP because appellant is suffering a loss?

Issue 2: Whether forex loss should be treated as non operative in nature in the facts and circumstances of this case?

Issue 3: What is the correct calculation of the PLI of the comparables as well as the assessee?

2.14 The learned CIT-(A) concluded the ôCUPô method adopted by the assessee as most appropriate method and upheld that there was no need for any addition to the international transaction. The finding of the leather CIT-(A) is reproduced as under:

"5.1 The TPO has not commented on the validity of the CUP in terms of its evidentiary value and its comparability. Apart from theorizing in abstract there is no factual analysis, appreciation and evaluation of the CUP data given by the appellant. While selecting the most appropriate method, it is always held that product to product comparison or transaction to transaction comparison in terms of similarity of product, size of the transaction, time etc. are the best way of comparison since this comparison is not affected by other than the material being compared. However, without giving any cogent reason Transfer Pricing Officer rejected the CUP. It is unfair to come to a conclusion that the loss incurred by the appellant

is only due to its transaction with the AE without going into the details of the market situation wherein appellant is located and other parameters. In any case, the most appropriate method selected by the appellant cannot be rejected just because the appellant is suffering losses. The TPO is contradicting himself by stating that "your status as an independent entrepreneur cannot be ignored": on the one hand, the appellant is treated as a full risk bearing independent manufacturer, on the other hand, the loss incurred by the appellant is treated as a loss imposed by is AE as if the appellant is a captive entity.

5.2. The appellant had submitted that it had not hedged its currency transaction in Euro and therefore the entire loss was on account of currency fluctuation. There is no reason to ignore this material fact. Therefore, I hold that there was no reason to reject the CUP produced by the appellant.

The appellant has brought to my notice that in the subsequent assessment year, where facts and circumstances are similar in the case of the appellant, the TPO has accepted the CUP and no addition has been made. Therefore, this also shows that there is merit in the CUP presented by the appellant.

In view of this, it is important to appreciate the evidence of CUP presented by the appellant. The appellant has produced the evidence which was produced before the TPO in Annexure -I of his submission.

5.3. The appellant is manufacturer of catalytic convertor used in automobile industry. The same products were sold by the AE of the appellant to unrelated parties. The appellant had produced along with the bills and invoices the third party sales of the AE in the relevant period. There is a 'one to one' correspondence between the product part numbers sold to the appellant and to unrelated parties. The prices are in FOB terms. As FOB prices are at origin of the goods which is at the local ports of the AE, the so called geographical difference has no meaning. This is because the AE is selling the goods at the port of its origin to the assessee as well as to the third party it is immaterial where the goods ultimately travel to. It is seen that in all cases the price paid by the appellant is lesser than what is paid by the third parties. The appellant has given CUP data for entire transaction amounting to Rs.17,25,78,808/-. In view of this, I hold that the CUP is a valid justification of the arm's length

transaction of the appellant. There is no need for any addition to the international transaction."

2.15 Further, the ld. CIT-(A), held that foreign exchange fluctuation do not form part of operation income as the assessee was not a dealer in foreign currency. The Ld. CIT-(A) computed the revised adjustment to arm's length price after removing the foreign exchange fluctuation loss from the cost of the assessee and concluded that the assessee falls within +/- 5% of the ALP as per the provisions to section 92(c) of the Act and, therefore, even under the TNMM method also no adjustment was required to the arm's length. The finding of the learned CIT-(A) on the issue is reproduced as under:

"Issue 2: Whether forex loss should be treated as non operative in nature in the facts and circumstances of this case?:

5.4. It is strongly contended by the appellant that the foreign exchange loss is a single most reason for incurring loss and it happened in an extraordinary situation of fluctuation of foreign exchange rate between Euro and Indian rupee. The business decision taken by the appellant not to hedge the Euro currency cannot be questioned and termed as "poor management". In the case of DHL Express (India) Pvt. Ltd. v. ACIT 10(1), Mumbai [2001] 11 taxmann.com 40 (Mumbai) it has been held by the Hon'ble ITAT that foreign exchange fluctuation do not form part of the operational income because these items have nothing to do with the main operation of the assessee. It is important to note here that the appellant is a manufacturer of catalytic convertor and not a dealer in foreign currency. It will be proper if the business of person is dealing in foreign currency then the loss / gain on account of fluctuation in foreign currency can be held as operational in nature. Since assessee is not in such a business, respectively following the judgment of the Hon'ble ITAT in the case of DHL Express (India) Pvt. Ltd. (supra), the foreign exchange fluctuation loss should be excluded as non operational in nature.

The appellant has suffered a loss of Rs. 1.24 crores on account of forex loss. By taking out this loss if the margin of the appellant is correctly calculated, then also the appellant falls within +/-5% of the ALP as per proviso to section 92C(2) of the IT Act. The calculation of the ALP margin as submitted by the appellant along with as calculated by the TPO is given below:

			As per TPO	*Revised*
1.	*Operating Profit Margin*		*5.05%*	*5.05%*
2.	*Total Cost of Ecocat*		*19.49*	*18.41*
3.	*Operating Profit/Net Sales*	*(1 X 2)*	*0.98*	*0.93*
4.	*Operating Profit Shown*		*(1.06)*	*0.059*
5.	*Difference*	*(3-4)*	*2.05*	*0.34*
6.	*Purchases from AE*		*17.26*	***17.26***
7.	*ALP*	*(6-5)*	*15.21*	***16.91***
8.	*5% Difference on ALP*			***0.85***
9.	*Disallowance*	*(5-8)*	*2.05*	***-0.50***

"

2.16 On the issue of the correct 'Profit Level Indicator'(PLI), the learned CIT-(A) held that mentioning of OP/sales as the PLI while calculating the margin of the comparables was a clerical mistake and actually the TPO has multiplied the main margin of the comparables with the cost base of the assessee, which was rectified by the learned CIT-(A) , while adjudicating issue No.2.

2.17 Other issues relating to the comparables were not adjudicated being academic in nature.

2.18 According to the Ld. CIT-(A) the ALP of the assessee even using the 'TNMM'with 15 comparables used by the TPO, falls within the arm's length range and, therefore, there was no justification for making any addition on account of arm's length price and accordingly directed the AO/TPO to delete the addition.

2.19 Aggrieved with the above finding of the Ld. CIT-(A), the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. The sole ground of the Revenue is in respect of deletion of the addition of adjustment of Rs.2,04,58,470/- to the international transactions.

3.1 Before us, on the issue of selection of appropriate method for computation of armôs length price, the Ld. Senior DR submitted that the learned CIT-(A) was not justified in upholding the ôCUPômethod adopted by the assessee as most appropriate method for computing armôs length price of the international transactions. He submitted that while applying the ôCUPô method adjustments for economy and market conditions in different geographical locations need to be made. He relied upon the decision of the Tribunal, in the case of M/s Intervet India Private Limited (supra). He submitted that in the case of the assessee, it has sold goods to the parties in Europe and such transactions can never be a good ôCUPôfor price charged in India. Also the pricelist of the raw materials sold to the assessee and to third-party in Europe or other countries, seemed to be case of cherry picking. He also submitted that the list of the materials sold to the assessee identified by their part numbers, seems untrue in view of the different market conditions and regulatory norms. He emphasized that in Europe, the regulating norms are far ahead of those prevailing in India as Europe had Euro IV norms, whereas India during the same period had BS-II regulatory norms and thus, the list of raw materials sold by the AEs in Europe, cannot be compared with list of raw materials sold in India. According to him, this comparison of the price by the assessee and the ôCUPô method for benchmarking, seems to be an exercise in haste and without application of mind. He also supported his argument with ôOECDôguidelines in this regard.

3.2 On the contrary, the Ld. counsel relied on the order of the learned CIT-(A) and further submitted that the TPO in subsequent assessment

year 2008-09 has accepted the ôCUPô method for benchmarking the international transactions of the assessee. Accordingly, he prayed that the order of the Ld. CIT-(A) on the issue in dispute might be upheld.

3.3 In the rejoinder, the learned Sr. DR submitted that accepting CUP method of benchmarking the transactions in subsequent years does not hold good as principle of *res judicata* in Income-tax proceedings is not applicable and each assessment year is a separate unit and what is decided in one year shall not ipso facto apply in subsequent years.

3.4 We have heard the rival submission of the parties on the issue in dispute. We find that Ld. CIT-(A) carried out the comparison of the transaction of the assessee with its AE, with the transaction of the AEs with other unrelated parties situated in Europe. The learned CIT-(A) observed that there was a one-to-one correlation between the product, part numbers sold to the assessee and to the unrelated parties. The learned CIT-(A) further observed that prices in both the situation are F.O.B. prices, which are at the origin of the goods and so there was no effect of geographical differences. The learned CIT-(A) has noted that price paid by the assessee is lesser than what is paid by the third parties. In our opinion the finding of the learned CIT-(A) on the basis of above observations is not correct. We find that when the pollution norms of the Europe and the India during relevant period are different, the quality of the product cannot be same and in such situation adopting the transaction of the AE with third-parties in Europe as ôCUPô for comparison of the transaction with the assessee, is not correct. Moreover, the currencies of both jurisdiction are different and, therefore, also prices charged to party at the Europe and to AE in the India cannot be compared. We find that in the case of UCB India (P) Ltd (supra), the Tribunal took note of the effect of minor change in the properties of the product on the pricing and held that there should be scientific basis to

say that APIs are identical with same purity, potency and characteristics and also all such data should be first obtained by the Revenue or the assessee, who wish to compare products and then arrive at ALP or wish to make adjustment to price, cost or margin. The Tribunal in the said case also taken note of the OECD transfer pricing guidelines. The learned TPO in his order has relied on the said order of the Tribunal and extracted the relevant Paras on page 12 and 13 of the order. In the case of M/s Intervet India Private Limited (supra) also the Tribunal held that mere geographical contiguity of two countries need not mean similarity in economic or market conditions (like Vietnam and Thailand). Whereas in the present case market conditions of the Europe and India are evidently not similar being different regulatory norms for pollution. Further, what the AO/TPO has taken stand on the issue in subsequent year, may not be relevant, for us. We are required to decide the issue in dispute in facts and circumstances of the year under consideration.

3.5 In view of above discussion, we are of the opinion that assesseeôs international transactions cannot be benchmarked applying the ócupô method.

3.6 The TPO has adopted TNMM as most appropriate method for computing the armôs length price on the ground that the assessee operated as independent entrepreneur, as it caters to requirement of automobiles manufacturers in India like General Motors, Mahindra and Mahindra, and Ashok Leyland and compared the profit margins with the other comparables in similar market conditions. In our opinion, the approach of the learned TPO/AO is justified and we accordingly set aside the order of the learned CIT-(A) on the issue in dispute and uphold the order of the learned TPO/AO on the issue in dispute.

4. Now the second issue for adjudicating before us is whether the loss due to fluctuation in foreign exchange should be treated as non-operative expenditure in the case of the assessee.

4.1 Before us the Ld. Sr. DR submitted that foreign exchange gain/loss arising out of the revenue transaction is required to be considered an item of operating revenue/cost both for the assessee as well as comparable. In support of his contention, the Ld. Sr. DR relied on the decision dated 15/12/2016 of the Tribunal in the case of McKinsey Knowledge Centre Private Limited Vs. DCIT, New Delhi in ITA No. 154 and 499/Del/2016.

4.2 On the contrary, the Ld. counsel of the assessee relied on the order of the learned CIT-(A) that as far as loss being an extraordinary item of the profit and loss account, it need to be excluded for the purpose of comparison of profit margin of the assessee with the comparables. The learned counsel further submitted that the Central board of Direct Taxes (CBDT) in notification dated 18/09/2013 has made safe harbour rules and according to the definitions part of the safe harbour rules, in rule 10TA, loss arising on account of foreign currency fluctuation has been excluded from the operating expenses.

4.3 In Rejoinder, the learned Sr. DR submitted that safe harbour rules are not applicable to the assessment year under consideration. Further, he submitted that the Tribunal in the case of "Mckinsey Knowledge Centre Private Limitedô (supra) has considered this arguments and rejected the contention following the Hon'ble Delhi High Court in Principle CIT Vs. Cashedge India Private Limited vide its judgment dated 04/05/2016 in ITA 279/2016 .

4.4 We have heard the rival submission and perused the relevant material on record. The Tribunal in the case of DHL Express (India) P. Ltd. (supra), which is relied upon by the learned CIT-(A), held that foreign

exchange fluctuation do not form part of the operational income because that item was nothing to do with the main operation of the assessee. But in the instant case, the foreign exchange fluctuation loss has arisen mainly on account of the revenue transactions of the assessee. Hence, the decision cited by the learned counsel of the assessee is distinguishable. In the case of McKinsey Knowledge Centre Private Limited (supra), Delhi bench of the Tribunal has decided the issue in dispute as under:

"64. The only issue raised by the Revenue in its appeal is against the treatment of foreign exchange (forex) gain/loss as an item of operating nature in the computation of the ALP of both the transactions. The ld. DR. submitted that such forex gain/loss was rightly considered by the TPO as non-operating in the computation of the ALP and hence such a view should not have disturbed. This was opposed by the ld. AR, who contended that forex gain/loss relates to the trading transactions of the assessee and hence the same was operating in the computation of OP/OC under the TNMM.

65. We find merit in the contention raised on behalf of the assessee about the inclusion of foreign exchange gain/loss in the operating revenue/costs of the assessee as well as that of the comparables. When we advert to the nature of such foreign exchange gain earned by the assessee, it has not been controverted by the ld. DR that the same is in ITA No.i54/Del/20i6 relation to the trading items emanating from the international transactions. If the foreign exchange gain/loss directly results from the trading items, we fail to appreciate as to how such foreign exchange fluctuation loss can be considered as non-operating.

66. The Special Bench of the Tribunal in ACIT Vs Prakash I. Shah (2008) 115 ITD 167 (Mum)(SB) has held that the gain due to fluctuations in the foreign exchange rate emanating from export is its integral part and cannot be differentiated from the export proceeds simply on the ground that the foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in currency of the country where such goods are sold and subsequently when the

amount is realized in that foreign currency and then converted into Indian rupees, the entire amount is relatable to the exports. In fact, it is only the translation of invoice value from the foreign currency to the Indian rupees. The Special bench held that the exchange rate gain or loss cannot have a different character from the transaction to which it pertains. The Bench found fallacy in the ITA No.i54/Del/20t6 submission made on behalf of the Revenue that the exchange rate difference should be detached from the exports and be considered as an independent transaction. Eventually, the Special Bench held that such exchange rate fluctuation gain/loss arising from exports cannot be viewed differently from sale proceeds.

67. In the context of transfer pricing, the Bangalore Bench of the Tribunal in SAP Labs India Pvt. Ltd. Vs ACIT (2011) 44 SOT 156 (Bangalore) has held that foreign exchange fluctuation gain is part of operating profit of the company and should be included in the operating revenue. Similar view has been taken in Trilogy E Business Software India (P) Ltd. Vs DCIT (2011) 47 SOT 45 (URO) (Bangalore). The Mumbai Bench of the Tribunal in S. Narendra Vs Addtl. CIT (2013) 32 taxman.com 196 has also laid down to this extent."

4.5 Further, the Tribunal has also considered the argument of the assessee on safe harbour rules to contend that foreign exchange gain or loss as non-operating item and held that safe harbour rules were not applicable in assessment year 2011-12. The relevant finding of the Tribunal is reproduced as under:

"68. The reliance of the Id. DR on Safe Harbour rules to contend that foreign exchange gain or loss be taken as non-operating, is not sustainable. There is no doubt that in such rules, forex gain/loss has been treated as non-operating. However it is relevant to note that such rules ITA No.i54/Del/20i6 are not applicable to the assessment year under consideration. Even the reliance of the Id. DR on certain decisions taking cognizance of safe harbour rules for the period anterior to their insertion in other contexts does not improve the case of the Department because the Hon'ble Delhi High Court in Pr. CIT VS. Cashedge India Pvt. Ltd., vide its judgment dated 4.5.2016 in ITA 279/2016, has held that: 'So far as the question of fluctuation

of foreign exchange was concerned, the ITAT ruled that the relevant provision, i.e. 'Safe Harbour Rules' had not been notified for the concerned assessment year and were, therefore, inapplicable'. Thus the Hon'ble High Court did not disturb the operating nature of forex gain/loss as held by the tribunal. In view of the foregoing discussion, we are of the considered opinion that the amount of foreign exchange gain/loss arising out of revenue transactions is required to be considered as an item of operating revenue/cost, both for the assessee as well as the comparables. The ground taken by the Department is, therefore, dismissed."

4.6 As in the instant case assessment year involved is 2007-08, which is even prior to assessment year 2011-12, the definition of the operating expenses provided in safe harbour rules cannot be applied.

4.7 Thus, respectfully following the decision of the Tribunal in the case of McKinsey Knowledge Centre Private Limited (supra), we hold that foreign exchange fluctuation loss is part of a operating expenses. Accordingly, the finding of the Ld. CIT-(A) on the issue in dispute is set aside and that of the Assessing Officer is upheld.

4.8 We find that the Ld. TPO/AO has considered foreign exchange fluctuation loss as part of operating expenses in the case of the assessee, however, same has also to be considered in the case of the comparables. From the order of the lower authorities, it is not clear whether the AO/TPO has considered this aspect in the case of the comparables. Accordingly, we feel it appropriate to restore the issue of computing average margin of the comparables with limited direction to consider the foreign exchange fluctuation loss as part of the operating expenses in case of comparables also. It is needless to mention that assessee shall be afforded reasonable opportunity of being heard.

4.9 As regard the third issue of Profit Level Indicator (PLI), the learned CIT-(A) has already rectified the clerical mistake as under:

"5.5 It is important to note at this point to say that while calculating the margin of the comparables, the TPO has taken OP/sales as the PLI. While calculating the ALP margin of the assessee, the TPO has multiplied the mean margin of the ALP of the comparable with that of cost base of the assessee instead of sales, which seems to be a clerical mistake. In the above calculation, this mistake is rectified.

Since the appellant falls within the range, the other issues relating to the comparable becomes academic in nature and therefore they are not separately adjudicated."

4.10 Since the assessee is neither in the appeal nor in cross objection before us and, therefore, the arguments of the learned counsel regarding adopting of incorrect PLI by the TPO are not considered.

4.11 The ground of the Revenue is allowed for statistical purposes.

5. In view of above, the appeal of the Revenue is allowed for statistical purposes.

The decision is pronounced in the open court on 15.09.2017

Sd/-	Sd/-
(VIJAY PAL RAO)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 15.09.2017
RK/-(D.T.D)

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi