IT : Matter remanded back to TPO to examine comparability analysis for determination of ALP of royalty fee paid by assessee, a telecommunication service provider, for use of Vodafone and Essar Trademark in terms of trademark licence agreement in view of inadequate facts about product comparability for technology for which trademark fees is paid as Royalty

• Assessee-company, a telecommunication service provider in India, has paid royalty to its associated enterprise for use of Vodafone and Essar trademark to Vodafone Ireland and Rising group in terms of an agreement entered into by the assessee along with group entities as trademark license agreement and said transaction of royalty has been benchmarked using CUP as the most appropriate method. TPO doubted applicability of CUP Method as most appropriate method in absence of complete identity between the controlled and uncontrolled transactions. Hence, he determined the ALP of the royalty payment as nilon the reasoning that no benefit accrued to the assessee or the assessee did not pay any royalty for the use of brand in the past.

• It was found that identical issue is involved with respect to the determination of the arm's length price of the international transaction of the payment of royalty to associated enterprises in assessment year 2009-10 to 2012-13. In view of the inadequate facts about the product comparability for technology for which trademark fees is paid as Royalty and absence of availability of agreement between two foreign parties, as well as terms, economic indicators, risk etc., use of database Power K without justification and not using other specific databases and use of inappropriate filters, TPO should examine the comparability analysis for determination of the arm's length price of the royalty fees paid by the assessee for all the years.

[2019] 103 taxmann.com 390 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'I-2'

Vodafone India Ltd.

v.

Assistant Commissioner of Income-tax

KULDEEP SINGH, JUDICIAL MEMBER
AND PRASHANT MAHARISHI, ACCOUNTANT MEMBER
IT APPEAL NOS. 1169/DEL/2014
& 1073, 1158, 1071 (DELHI) OF 2015 & OTHS.
[ASSESSMENT YEARS 2009-10 TO 2012-13]
MARCH 25, 2019

Deepak Chopra, Adv *for the Appellant.* **H.K. Chaudhary**, CIT (DR) *for the Respondent.*

INTERIM ORDER

1. In ITA number 1169/del/2014 for assessment year 2009 - 10 Hon'ble High Court has remitted two issue back to the file of the coordinate bench vide order dated 1/6/2018 in ITA number 660/2018 and CM application 24384/2018. Controversy is on the issue of determination of ALP of payment of royalty. The fact shows that assessee has entered into an international transaction of payment of royalty fee for

use of trade name and trademarks of Rs. 114716908/- applying the CUP method as most appropriate method.

2. During the year assessee has paid royalty to its associated enterprise for use of Vodafone and Essar trademark to Vodafone Ireland marketing Ltd of INR 76477939 and Rising group limited of INR 38238969 in terms of an agreement entered into by the assessee along with group entities into a trademark license agreement with the rising group limited and Vodafone Ireland marketing Ltd for use of 'Vodafone' and 'Essar' name and trademark while providing telecommunication services in India.

3. The agreement with Rising group limited was effective from 29/06/2007. The assessee has been granted a non-exclusive license to use the 'ESSAR' Mark in relation to corporate endorsements in India. The assessee also has a right to grant sublicenses of their licenses rights of 'ESSAR' name and 'Essar' Mark in the ordinary course of business to any or all of their affiliate's and the service provider, distributors, agents, exclusive dealers and other similar persons, solely in connection with the promotion, marketing, advertising, sales and provision of telecommunication products subject to certain conditions specified in the agreement. According to the agreement, assessee is not required to pay any royalty fee up to 31/05/2008. However, after that date assessee was required to pay royalty fee of 0.15 percentage of net service revenue for the period from 01/06/2008 to 31/03/2009. According to the agreement, review of the terms will take place every 3 years commencing on April 1, 2012. The fees was payable in the US dollars exclusive of service tax and VAT in monthly installments.

4. Identical agreement containing identical terms, effective from the same date, for use of Vodafone name and order full Mark, the assessee entered into an agreement with Vodafone Ireland marketing Ltd for payment of royalty at the rate of 0.30 percentage payable in Euro.

5. Assessee in its T P Study Document at para number 5.1.1 of the transfer pricing report stated that transaction of royalty has been benchmarked using CUP as the most appropriate method. Assessee used 'PowerK' database and selected only comparable where Royalty payment at the rate of 7% of net sales by Forward Industries Incorporation, USA to Motorola incorporation USA for trademark license for use of 'Motorola' signature and logo. Since the payment of 0.15% and 0.30% of net service revenue by assessee is lower than royalty payment made in the above-mentioned comparable, assessee stated that transaction between the assessee and its associated enterprise for payment of royalty fees is at arm's-length.

6. As matter travelled to the learned transfer-pricing officer, he doubted the applicability of CUP Method as the most appropriate method in absence of complete identity between the controlled and uncontrolled transactions. THEREFORE, he rejected the CUP as the most appropriate method. **[Para no 4.6 page no 6 of the order of the TPO]**. He also did not accept benchmarking of the payment of royalty at the rate of 7% stating that

i. there are functional dissimilarities,
ii. assessee was not paying royalty earlier,
iii. absence of any cost benefit analysis and
iv. There is no economic benefit was derived by the assessee

Hence, he determined the ALP of the royalty payment as nil. **Important to note that the ld TPO did not verify the process of benchmarking of the above transaction with respect to method, comparability analysis, and it's ALP.**

7. The learned DRP did not interfere with the draft order passed by the AO incorporating ALP of the above international transaction. Hence, it was incorporated in assessment order.

8. Therefore assessee preferred an appeal before the coordinate bench, who decided in ITA number 1950/Del/2014 for assessment year 2009 - 10 on 14/03/2018 wherein the whole issue was dealt with at para number 58 - 68 as under:-

"58. The next ground is against disallowance of brand royalty of Rs. 11,47,16,908/-.

59. The facts of this ground are that the assessee reported two international transactions in Form no. 3CEB including 'Payment of Royalty fee for use of trade name and mark' amounting to Rs.11,47,16,908/-. The AO made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The TPO noticed that the assessee paid royalty amounting to Rs.7,64,77,939/- to Vodafone Ireland Marketing Ltd. for use of the brand name 'Vodafone' and Rs.3,82,38,969/- to M/s Rising Group Ltd. for use of brand name 'Essar'. The TPO observed that the Agreements for payment of royalty with both the parties were made effective from 29.06.2007. Use their respective trademarks, viz., Vodafone and Essar. Both the companies agreed not to charge any royalty till 31.05.2008. After 31.05.2008, the assessee was required to pay royalty @ 0.15% of net service revenue to Rising Group Ltd. for use of brand name 'Essar' and @ 0.30% to Vodafone Ireland for use of brand name 'Vodafone.' The assessee adopted a comparable instance of payment of royalty @ 7% of net sale of Forward Industries Inc., USA to Motorola Inc., USA, for trade mark licence for use of Motorola signature and logo. The assessee claimed that since the payment @ 0.15% and 0.30% for use of brand names, Essar and Vodafone, was lower than 7% paid by Forward Industries Inc., USA to Motorola Inc., USA, its international transactions were at ALP.

60. The TPO accepted the use of the CUP, as was also employed by the assessee, as the most appropriate method. He, however, did not treat payment of royalty @7% of the net sales of Forward Industries Inc., USA to Motorola Inc., USA, as comparable because of the functional dissimilarity. Considering the fact that the assessee was not earlier paying royalty for use of Essar and Vodafone trademarks up to 31.05.2008, the TPO determined Nil ALP of the international of payment of royalty. In support of his decision, he held that the assessee did not justify royalty rate and, further, there was no cost benefit analysis and no economic benefit was derived by the assessee. The DRP did not interfere with the draft order passed by the AO incorporating Nil ALP of the international transaction of payment of royalty, against which the assessee has come up in appeal before the Tribunal.

61. We have heard both the sides and perused the relevant material on record. The assessee used 'Vodafone Essar' brands as is apparent from page 13 of the TPO's order on which some photographs have been reproduced and it has been mentioned at the bottom: 'A Vodafone Essar Company'. When we look at the name of the assessee, being 'Vodafone Essar Digilink Limited', there remains no doubt whatsoever that the assessee did use the brand names Essar and Vodafone and such a payment is a bona fide transaction. It is for the use of such brands that the assessee paid royalty to Rising Groups Ltd. and Vodafone Ireland Marketing Ltd. at the rate of 0.15% and 0.30% respectively. The TPO has simply brushed aside the assessee's contention for use of the brands and determined Nil ALP of the of the international transaction of payment of royalty for use of the brand names on the reasoning that no benefit accrued to the assessee or the assessee did not pay any royalty for the use of brand in the past.

62. Simply because no royalty was paid in the past can be no reason to treat the ALP of royalty at Nil in later years. Chapter-X of the Act dealing with the transfer pricing provisions, contemplates making a comparison of the international transaction with the comparable uncontrolled transactions. If such a comparison demonstrates that the payment under the international transaction is at ALP in comparison with the other comparable uncontrolled transactions, then the

transacted value of the international transaction has to be accepted. A comparison has to be made with comparable uncontrolled transactions and not with the assessee's past practice. So this reasoning of the TPO, as affirmed by the DRP, is not sustainable.

63. In so far as the use of the 'Benefit test' for determining the ALP of such services at Nil is concerned, it is noticed that the Hon'ble Punjab & Haryana High Court in Knorr-Bremse India P. Ltd. vs. ACIT (*2016*)*380 ITR 307* (*P&H*) *has held that the question whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. A view to the contrary would then raise a question as to the extent of profitability necessary for an assessee to establish that the transaction was at an arm's length price. A further question that may arise is whether the arm's length price is to be determined in proportion to the extent of profit. Thus, while profit may reflect upon the genuineness of an assessee's claim, it is not determinative of the same. It went on to hold that business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into bona fide or not or whether it was sham and only for the purpose of diverting the profits.*

64. Reverting to the facts of the extant case, it is established beyond doubt that brand names of Essar and Vodafone have in fact been used by the assessee, which deciphers that the international transaction entered in to by the assessee with its AEs was genuine and bona fide.

65. It is manifest that the TPO applied the CUP method for determining the ALP of the international transaction. While applying the CUP method, it was obligatory upon him to bring on record some comparable uncontrolled instance as per the mandate of rule 10B(*1*)(*a*)(*i*)*. Not even a single comparable instance has been brought on record to facilitate a comparison between the price for the use of brand by the assessee vis-à-vis that paid by other comparables in similar uncontrolled circumstances.*

66. We further find that the assessee used only one foreign comparable instance in which royalty at the rate of 7% of net sales was paid by Forward Industries Inc., USA to Motorola Inc. USA. This is not a comparable instance because of the functional dissimilarity. Motorola Inc. is in the business of designing and selling wireless network infrastructure equipments, such as, cellular transmission base stations and signal amplifiers. Motorola's home and broadcast network products include set-top boxes, digital video-recorders, and network equipment used to enable video broadcasting, computer telephony and high definition television. As against this, the assessee is engaged in providing cellular mobile telephony services. There can be no comparison of a company dealing in hardware with a company providing telephony services. Pre-requisite for application of the CUP method is that there must be a complete identity between the international transaction and the uncontrolled transaction, with which comparison is sought to be made. When we examine the nature of the international transaction under consideration and the transaction between Forward Industries Inc., USA to Motorola Inc. USA, it is manifested that there is no comparison whatsoever between the two. That apart, it is a transaction between two foreign parties and hence cannot be considered for comparing an international transaction with the Indian assessee as a tested party. We, therefore, disapprove the comparable transaction used by the assessee for benchmarking the international transaction of payment of royalty for use of brands.

67. That apart, it is noticed that the action of the TPO in determining Nil ALP of the international transaction on the ground that no benefit accrued to the assessee and then the AO making addition simply on the basis of recommendation of the TPO, is not in accordance with the judgment of the Hon'ble jurisdictional High Court in CIT v. Cushman & Wakefield (India) (P.) Ltd. (*2014*) *367 ITR*

730 (*Del*), *in which it has been held that the authority of the TPO is limited to conducting transfer pricing analysis for determining the ALP of an international transaction and not to decide if such service exists or benefits did accrue to the assessee. Such later aspects have been held to be falling in the exclusive domain of the AO. In that case, it was observed that the e-mails considered by tribunal from Mr. Braganza and Mr. Choudhary dealt with specific interaction and related to benefits obtained by assessee, providing a sufficient basis to hold that benefit accrued to assessee. As the details of specific activities for which cost was incurred by both AEs* (*for activities of Mr. Braganza and Mr. Choudhary*), *and attendant benefits to assessee were not considered, the Hon'ble High Court remanded the matter to file of concerned AO for an ALP assessment by TPO, followed by AO's assessment order in accordance with law considering the deductibility or otherwise as per section 37(1) of the Act.*

68. When we come back to the facts of the instant case, it turns out that the TPO proposed the transfer pricing adjustment equal to the stated value of the international transaction at Rs.11.47 crore and odd, inter alia, by holding that no benefit was received by the assessee and hence no payment on this score was warranted. The AO in his draft order has taken the ALP of the international transaction at Nil on the basis of such recommendation of the TPO without carrying out any independent investigation for the deductibility or otherwise of such payment in terms of section 37(1) of the Act. This addition has been made by the AO in his final assessment order giving effect to the direction given by the DRP and not by invoking section 37(1) of the Act. As per the ratio decidendi of Cushman & Wakefield India (*P.*) *Ltd.* (*supra*), *the TPO was required to simply determine the ALP of the international transaction, unconcerned with the fact, if any benefit accrued to the assessee and thereafter, it was for the AO to decide the deductibility of this amount u/s 37*(*1*) *of the Act. As the TPO in the instant case initially determined Nil ALP by holding that no benefit accrued to the assessee etc. and the AO made the addition without examining the applicability of section 37(1) of the Act, we find the actions of the AO/TPO running in contradiction with the ratio laid down in Cushman & Wakefield* (*supra*). *In these circumstances, we set aside the impugned order on this score and send the matter to the file of AO/TPO for deciding it in conformity with the above discussion and the law laid down by the Hon'ble jurisdictional High Court in the aforenoted case. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such proceedings."*

9. Assessee challenged order of the coordinate bench before the honourable Delhi High Court. Honourable High Court was pleased to pass an order on 01/06/2018. Per para number 3 of the order of the honourable High Court the following directions were given:-

"The Court has considered the submission of the parties, the ITAT remitted for fresh reconsideration of the issue relating to advertising, marketing and promotion (*AMP*) *expenses. Further more, it also, through stray sentences in the impugned order not premised on any reason in no manner observed that the benchmarking of international transactions pertaining to payment of royalty and not be done by using comparable is with transactions entered into between two foreign parties. This observation in the opinion of the court is not warranted to. Having regard to the fact that all materials were available with it, the ITAT is directed to consider the transactions involving AMP expenditure as well as the issue of royalty. In this regard its observation with respect to the comparables used by the assessee viz a viz the two foreign parties shall not be treated conclusive. The ITAT shall carry out necessary enquiry if need be by resorting to a limited remanded to the TPO or DRP as the case may be having regard to the overall facts and circumstances and decide whether AMP expenses required in the present case involved international transaction, if so, to what extent."*

10. With respect to the transaction of determination of ALP of royalty payment, the issue has been

remitted back to the ITAT.

11. Adverting on this issue the learned authorised representative, Shri Deepak Chopra, advocate referred to the brief history of the payment of the royalty by the assessee. He referred to para number 4.2 of the order of the learned transfer-pricing officer to show the functions, assets, and risk relating to the above royalty payments. He further referred to the agreement between the assessee as well as the recipient of the royalty, which is placed at page number 178 - 195 and 196 - 208 of the paper book. He further referred to the approach of the assessee in benchmarking the above payment. He further demonstrated that how the assessee has shown that the transactions of the payment of the royalty is at arm's length after showing the comparability with the single comparable transaction between the two US companies. He also referred to the order of the learned transfer-pricing officer who has stated that there is a functional dissimilarity between the transactions shown by the assessee and the transactions used by the assessee as a comparable. He referred to para number 4.6 of the order of the learned transfer-pricing officer and submitted that the learned transfer-pricing officer has rejected the benchmarking methodology of the assessee for the reason that there is no similar product comparability and there is no benefit available to the assessee. He further referred that the learned TPO was of the view that the assessee has failed to discharge its onus to produce any primary evidences that how the royalty rate has been fixed to justify that the payment of royalty is at arm's-length, the cost benefit analysis and economic benefit derived by the assessee and details of royalty rates in the industry et cetera to support that the payments are at arm's-length. He further referred to the order of the coordinate bench dated 14/3/2018 and referred to the order of the honourable Delhi High Court wherein the order of the coordinate bench was set aside back to the file of ITAT appalled in the acceptance of two foreign parties as a comparable company. In the end, he submitted that both the parties accept the CUP method and only issue is with respect to the comparability analysis. He further referred to the economic analysis, the methodology of selection of the comparables, relevant rule of the income tax rules and stated that functional similarity has nothing to do with for benchmarking the international transactions in CUP Method. He further relied very heavily on the United Nations TP manual for comparability analysis and stated that it is a comparability analysis for the 'intangible property' and benchmarking is to be applied accordingly. He further stated that functional similarity has no role to play in CUP at all. He further referred to the accept/ reject matrix placed at page number 43 of the transfer pricing study report. In view of this, he submitted that the benchmarking conducted by the assessee should be accepted and the transaction of the assessee is at arm's-length. He therefore submitted that the order of the learned transfer pricing officer/dispute resolution panel with respect to the above is not sustainable.

12. The learned departmental representative vehemently supported the order of the learned transfer-pricing officer with respect to the other contentions. He submitted that CUP method is not accepted by TPO, he referred to para no 4.6 of his order. He further submitted that the benchmarking analysis made by the assessee for the comparability analysis is only selecting one comparable transaction and that too from the software, which only has the companies listed at Security exchange commission of the United States of America. Further stated that there is no geographical adjustment made by the assessee.

13. We have carefully considered the rival contention and perused the orders of the lower authorities as well as the order of the coordinate bench and the direction of the honourable Delhi High Court. The honourable High Court has held that the benchmarking of international transactions pertaining to the payment of royalty can be done by using comparables with transactions entered into between two foreign parties. Stating so the honourable high court further held that with respect to the comparables used by the assessee viz a viz two foreign parties shall not be treated as conclusive and further directed the ITAT to decide the issue of ALP of Royalty payments . Therefore, in nutshell, With respect to the transaction of determination of ALP of royalty payment, the issue has been remitted back to the ITAT.

Therefore, the above issue was examined.

14. For determining arm's-length price of the royalty, payment it is necessary to first examine the transfer pricing study report prepared by the assessee. On careful examination of the transfer pricing study report, we are of the opinion that the transfer pricing report deserves to be rejected at the threshold itself and our reasons follows in subsequent paragraphs.

15. On selection of database, For selection of the comparables, assessee used "**PowerK"** database, which is stated to have more than 13,000 uncontrolled agreements obtained over the last several years from the securities exchange commission. There is no justification for using the database, which considers only the agreements, which are available with securities Exchange Commission. The ld AR was specifically asked about the justification of using the software '**PowerK'** despite having specific databases on royalty. Importance of Selection of database is paramount in comparability analysis.

16. Umpteen number of databases are available such as :-

(*i*) Indian databases

(*a*) Prowess [27000 Indian Companies]

(*b*) Capitaline Plus [24000 Indian Companies]

(*c*) ACE TP [38000 Companies with different verticals]

(*ii*) Foreign data Bases

(*a*) S & P' Research insight - Compustat North America database [31000 Active us Companies]

(*b*) AMADEUS [21 million Companies]

(*c*) OSIRIS [78000 Companies]

(*d*) OneSource

(*e*) FAME [9 Million companies]

(*f*) MOODY's

(*g*) EDGAR Plus [Lexis Nexis]

(*h*) BLOOMBERG

(*i*) THOMSON Reuter [10 Million]

(*j*) FACTIVA [32000 companies over 200 countries]

(*iii*) Royalty payment Specific Software

(*a*) RoyaltyStat

(*b*) RoyaltySOurce

(*c*) ktMINE

Many databases as sated above are specific to transactions of Royalty. These were not used by the assessee , but it used ' powerK' databases without properly justifying it. We did not find any justification 4 using the above database over preference to other databases in the transfer pricing documentation prepared by the assessee, before the assessing officer or DRP or before the coordinate bench in the original proceedings and even before us now. In view of these , selection of database itself is devoid of any merit.

17. Tainted qualitative Filters

In spite of our observation with selection of database , we proceed to examine the search methodology

adopted by assessee. Search process is mentioned at page no 20 , para no 20 of the TP study report.

(*i*) The first filter adopted by the assessee of identifying agreements in database involving the transfer of technology intangibles and / or network intangibles with at least one of the parties to the agreement categorized under NORTH AMERICAN INDUSTRIAL CLASSIFICATION CODE [NAIC] which contains following codes for :-

(*a*) wired telecommunication carrier

(*b*) cellular and other wireless telecommunications

(*c*) telecommunications resellers

(*d*) Satellite Communications

(*e*) cable and other program distribution

(*f*) other telecommunications

(*g*) all other telecommunications.

On looking at the details of NAIC codes, there is no justification for using the above filter and rejecting these NAIC codes :-

517312 **- Wireless Telecommunications Carriers (except Satellite)**

This U.S. industry comprises establishments primarily engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.

Illustrative Examples:

Cellular telephone services

Paging services, except satellite

Wireless Internet service providers, except satellite

Wireless telephone communications carriers, except satellite

Cross-References. Establishments primarily engaged in-

Operating and maintaining wired telecommunications networks--are classified in U.S. Industry 517311, Wired Telecommunications Carriers;

Operating and maintaining satellite networks--are classified in Industry 517410, Satellite Telecommunications;

Providing satellite television distribution services--are classified in U.S. Industry 517311, Wired Telecommunications Carriers; and

Operating as mobile virtual network operations (MVNO)--are classified in U.S. Industry 517911, Telecommunications Resellers.

Therefore, this qualitative filter even accepting the reasoning of the above filter of the assessee is accepted, the exclusion of specific above codes and selecting nearby codes did not have any justification.

(*ii*) The assessee selected the agreement type in the database of trademark (but not technology). The assessee further applied the filter of percentage of net sales, percentage of gross sales et cetera. Accordingly, assessee obtained

25 comparable agreements for further evaluation and those were tested as under[page no 21 of TP Study report] :-

a. It applied the filter that the comparable said agreement should be in force during financial year 2008 – 09 or up to 2 years prior to that. This filter resulted into the rejection of nine agreements out of 25.

b. The assessee also applied a filter of comparable agreement on related products, which resulted into rejection of 10 agreements.

c. The assessee also applied a filter that the comparable agreement should specify the payment terms. On adoption of this filter, two agreements were rejected.

d. Assessee also applied a filter that the comparable agreement should not be between related parties, which resulted into rejection of one agreement.

e. The assessee also applied a filter that agreements that are superseded by another agreement should be excluded, which resulted in rejection of further two agreements.

18. On careful analysis of the 1st filter applied by the assessee that the comparable agreement should be in force during the financial year 2008 – 09 are up to 2 years prior does not fit into the comparability analysis of the assessee because in the assessee's own case for both the years and for both the agreements the assessee also did not pay any royalty. This is the 1st year of the payment of Royalty in case of the assessee itself. Therefore for what reasons this filters are applied where it was made a necessary condition that in earlier 2 years also the comparable should have paid a royalty despite there is no such transaction in case of the assessee.

19. The assessee has also applied the second filter wherein 10 agreements are rejected stating that they should be on the related products. On looking at the except reject metrics for payment of Royalty at page number 43 of the transfer pricing document of the assessee, there is no justification that what was not comparable products despite applying the North American industrial classification Code wherein the assessee has identified the comparable classification of those products. There is no justification in the transfer pricing study report about this compared with the applicability of the filter of North American industrial classification code.

20. The assessee has also applied a unique filter that an agreement that is superseded by another agreement is required to be excluded and in that process, it rejected two agreements. If an agreement to superseded by another agreement and if it falls into the same category, same product, it is also paid in the earlier 2 years to the financial year 2008-09 and it is between unrelated parties, there is no logic or justification could be found in the transfer pricing study report of the assessee.

21. Accordingly, the qualitative filters applied by the assessee are without justification.

22. On the aspect of quantitative filters adopted by the assessee are with related to the payments. In the agreement entered into by the assessee the payment terms are payment of specified percentage over the net service revenue. However, the assessee adopted a filter of payment terms of percentage of gross sales. There is no such condition in any of the agreement entered into by the assessee with both the parties with respect to the payment of fees on gross sales. There is no justification found in the transfer pricing study report with respect to the above filter applied by the assessee.

23. Therefore one of the quantitative filters applied by the assessee also deserves to be rejected is devoid of any justification.

24. Now we come to the result of the search process conducted by the assessee. Initially after applying a particular 'powerK' database, applying filter of North American Industry Classification and also putting

the search on specific 'agreement type', and further narrowing down it by applying percentage of net sales as payment of Royalty and percentage of gross sales both, surprisingly the assessee could filter out only 25 comparable agreements out of the whole lot of 13,000 uncontrolled agreements stated to be in the database. On application of further filters out of 25 agreements, the assessee weeded out 24 comparable agreements. Therefore, in the end only one agreement was found comparable to the agreement of the assessee. This itself shows how assessee has narrowed down the comparability analysis to reach at a single agreement in the whole world of trademark license fees comparable with the transaction entered into by the assessee. According to us, it is an 'innovation' by the assessee but even not a "discovery" of the business model of paying the trademark license fees.

25. Now coming to the single agreement which was found to be comparable by the assessee, This agreement was where the licensor is Motorola incorporation USA and the licensee is forward industries incorporation USA, the period of the agreement was January 2008 to March 2009 and services were trademark license fees for the use of Motorola signature and the M logo (Emsignia) where the payment of royalty was 7% of net sales. Therefore the assessee stated that this is the only agreement which is between 2 foreign parties, both from USA is the only comparable, hence applying CUP method, comparing transaction of its AE with that solitary transaction stated that it is transaction of payment of royalty is at arm's-length. It is important to note that assessee is paying only 0.15% and 0.30% as trademark license fees and it is comparing the transaction where the royalty was paid as 7% of net sales, which is almost 50 times more than what the assessee has paid. Such a huge margin between the comparable price stated by the assessee and actual international transactions entered into by the assessee clearly makes the comparability analysis unjustified and devoid of any reasoning.

26. Next argument of the learned AR is about the product similarity cannot be an issue when applying the cup method. The coordinate bench in para number 66 has upheld that product similarity is a necessary ingredient for comparing the prices income method. Uncontrolled prices the price agreed between unconnected parties for the transfer of goods or services. If this transfer is in all material respects comparable to transfers between associates, then that price becomes a comparable uncontrolled price. In the present case the assessee has adopted external cup, therefore if transaction between two independent enterprises involves comparable goods or services under comparable conditions then only it becomes comparable uncontrolled transactions. It is an accepted fact that even minor change in the properties of the products, circumstances of the trade may have a significant effect on the prices. The product comparability is absolutely key, in particular, physical features such as size, weight, and appearance along with volume and reliability as well as the regulatory requirements and the like. US regulation 1.482.1)(d) for CUP also lays down following criteria for comparability :-

> "(*d*) Comparability -- (1) In general. Whether a controlled transaction produces an arm's length result is generally evaluated by comparing the results of that transaction to results realized by uncontrolled taxpayers engaged in comparable transactions under comparable circumstances. For this purpose, the comparability of transactions and circumstances must be evaluated considering all factors that could affect prices or profits in arm's length dealings (comparability factors). While a specific comparability factor may be of particular importance in applying a method, each method requires analysis of all of the factors that affect comparability under that method. Such factors include the following -- (i) Functions; (ii) Contractual terms; (iii) Risks; (iv) Economic conditions; and (v) Property or services."

Therefore, even otherwise it needs to be established by the assessee that underlying trademark fees is also related with similar products. Even otherwise, the finding of the coordinate bench has not been upset by honourable High court, hence we reject this argument of the ld AR.

27. As the Honourable High court has directed ITAT to determine the ALP of the Royalty (Trademark

License fees) payment and only comparable was stated to be payments by Forward Industries Inc to Motorola inc, and further as assessee did not provide any details about the agreement between Motorola and forward incorporation, we are duty-bound to make our own research on the issue.

28. We looked at the functional profile of the Forward Industries inc from (yahoo. Finance. Co) which shows that Forward Industries, Inc., together with its subsidiaries, designs, markets, and distributes carry and protective solutions primarily for hand held electronic devices. It provides carrying cases and other accessories for medical monitoring and diagnostic kits; and other portable electronic and non-electronic products, such as sporting and recreational products, bar code scanners, smartphones, GPS location devices, tablets, firearms, and other products. The company sells its products to original equipment manufacturers in the Americas, the Asia-Pacific, Europe, the Middle East, and Africa. Forward Industries, Inc. was founded in 1954 and is headquartered in West Palm Beach, Florida.

29. With respect to agreement of Motorola with the Forward Inc. it shows information dated May 27, 2008 5:53 PM ED That:-

> "Forward Industries, Inc. (NASDAQ: FORD) entered into a new, non-exclusive license agreement with Motorola Inc. (NYSE: MOT) to distribute Motorola branded products to customers in the United States, Canada, and Europe, through March 31, 2009. Under the new license agreement, Forward is permitted to design, manufacture, and sell Motorola branded carry solutions, face plates, cleaners and decorative accessories for mobile telephones and related accessories directly to third party wholesalers and retailers in the licensed territories.
>
> Forward Industries has been a Motorola licensee since 2001.[https://www.streetinsider.com / Corporate+News / Forward + Industries+%28F ORD%29 + Announces + Extended + License+Deal + with+Motorola / 3690579.ht ml]

30. In view of this, the transfer pricing study document prepared by the assessee for benchmarking the royalty payment does not inspire any confidence but merely eyewash.

31. The learned assessing officer/transfer pricing officer/dispute resolution panel also did not look into the comparability analysis and the benchmarking methodology applied by the assessee for the about transaction and merely rejected the same on the principle of benefit analysis. As a best practice, they should have examined the whole transaction of the assessee with all aspects and then pass the order is on the merits of the case, which would have saved great hardship to the assessee of frequently knocking the doors of various judicial forums. The learned authorised representative also stated that in all appeals listed before us of this assessee the above issue is common and therefore he requested that if the benchmarking methodology of determination of the arm's-length price of the royalty payment is decided once and for all, the dispute of the assessee on this aspect would be settled for all the years.

32. Though the honourable High Court has directed us to determine the arm's-length price of the royalty payment, however very kindly looking at the complexity of the issue, honourable High Court was also pleased to authorize the coordinate bench to carry out necessary enquiries and if need be to resort to a limited remand to the learned transfer pricing officer or dispute resolution panel.

33. During the course of hearing both the parties also submitted that identical issue is involved with respect to the determination of the arm's-length price of the international transaction of the payment of royalty to associated enterprises in all those years from assessment year 2009 - 10 to 2012 - 13. Therefore, it was requested that if the issues remanded to the learned transfer-pricing officer then similar direction to both the parties may be given for all those years and all those appeals may be disposed of with respect to the above ground based on the above limited remand. Therefore, at the request of the parties we also agree to give similar directions for all these years.

34. Therefore, in view of

(*a*) the inadequate facts about the product comparability for technology for which trademark fees is paid as Royalty

(*b*) Absence of availability of agreement between two foreign parties, as well as terms , economic indicators, risk etc

(*c*) No adjustment on account of geographical difference between two prices

(*d*) Use of database PowerK without justification and not using other specific databases

(*e*) Use of inappropriate filters

35. Therefore, for all these years, i.e. A Y 2009-10 to 2012 - 13, We direct limited remand to the ld TPO to examine the comparability analysis for determination of the arm's-length price of the royalty fees paid by the assessee. For the examination of the learned transfer pricing officer we direct the assessee to submit a fresh comparability analysis before the learned transfer pricing officer justifying the use of various database with the rationale for using them, justifying each and every filter that assessee would like to use, justify the various differences in the prices and it is adjustment to be made and all the necessary details before the learned transfer pricing officer on or before 15/04/2019. The learned transfer-pricing officer will also examine them, also make his own determination of ALP of Royalty on or before 05/05/2019, and seek any explanation/submission clarification on or before 22nd of May 2019. Based on examination and on his finding on the submission of the assessee, ld TPO/AO is directed to submit on or before 30/05/2019 remand report before the coordinate bench and the copy to the assessee on the determination of ALP of the above royalty payment. Needless to say that both the parties are free to decide any other method or mechanism of determination of ALP of above royalty payment, if in case it is found that CUP is not the correct method in absence of availability of the comparable data. After that on 03/06/2019, the matter is posted for hearing before the coordinate bench. Interim order pronounced in the open court on 25/03/2019.

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