IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.4111/Del/2013
Assessment Year : 2006-07

DCIT, Circle- 4(1), New Delhi.	**Vs.**	JSL Ltd., O.P. Jindal Marg, Hisar.
		PAN : AABCJ1969M
(Appellant)		**(Respondent)**

ITA No.4248/Del/2013
Assessment Year : 2006-07

JSL Ltd., (Now known as Jindal Stainless Ltd.,), O.P. Jindal Marg, Hisar.	**Vs.**	ACIT, Central Circle- 6, New Delhi.
PAN : AABCJ1969M		
(Appellant)		**(Respondent)**

Department by	**:**	Shri Kumar Pranav, Sr.DR
Assessee by	**:**	Shri Ajay Vohra, Sr. Adv. Shri Neeraj Jain, Adv. Shri Abhishek Agarwal, CA
Date of hearing	**:**	07-08-2017
Date of pronouncement	**:**	03-11-2017

O R D E R

PER R. K. PANDA, AM :

These are cross appeals. The first one is filed by the Revenue and the second one filed by the assessee and are directed against the order dated

29.04.2013 of CIT(A)-XX, New Delhi relating to assessment year 2006-07. For the sake of convenience, these were heard together and are being disposed of by this common order.

2. Facts of the case, in brief, are that the assessee company has an Integrated Stainless Steel Manufacturing Plant at Hissar, which is engaged in manufacturing of Stainless Steel Slabs, Flats, Coils, Blades Steel, Black Coins, etc.. It has both cold and hot rolling mills at Hissar. It has also Ferro Chrome Manufacturing Plant at Vishakhapatnum. The assessee is a listed company and filed its return of income on 23.11.2006 declaring total income at Rs.83,00,83,200/-. Subsequently, on 23.11.2007, the assessee filed a revised statement showing the total income of Rs.81,77,08,959/-. The Assessing Officer made a reference to the TPO for determination of the arm's length price u/s 92CA(3) in respect of the international transactions entered into by the assessee during the financial year 2005-06. The TPO during the TP assessment proceedings observed that the assessee has undertaken the following international transactions during the year :-

S.No.	*Nature of transaction*	*Value of transaction*
1.	*Import of SS Scrap*	*86,540,291*
2.	*Export of Cold Rolled Product*	*22,68,203,983*

3. The TPO observed that the assessee during the impugned assessment year has a total turnover of Rs.3494.60 crores out of which Rs.2297.28 crores is

domestic turnover and Rs.1197.31 crores is export turnover. He observed that the assessee has benchmarked its international transaction of sales to its AE, PT Jindal Stainless (Indonesia) of Rs.226.82 crores using CUP method. Similarly, the assessee has also imported Scraps Grades valued at Rs.86,540,291/- from PT Jindal Stainless Indonesia. After considering the submissions made by the assessee from time to time, the Assessing Officer held that certain sales to AE were not made at arm's length price and the international transactions were understated by Rs.2,75,21,494/- in respect of following : (i) Export of Grade J4 Coil – Rs.22,031,098/- and (ii) Export of J4 HR Coil – Rs.54,90,396/- totaling to Rs.27,521,424/-. The Assessing Officer in the order passed u/s 143(3) r.w.s. 144C made addition of Rs.27,521,494/- to the total income of the assessee as per direction of the TPO in determination of the arm's length price. Similarly, the Assessing Officer also made addition of Rs.50,000/- u/s 14A on the ground that the assessee has earned sum of Rs.482.26 crores as dividend on investment of Rs.25,209.08 lacs and no disallowance has been made u/s 14A of the I.T. Act. Similarly, out of total claim of Rs.3066.07 lacs on account of decapitalization of interest the Assessing Officer disallowed an amount of Rs.24,91,16,438/-. Further, as against the claim of Rs.732,77,722/- u/s 80IA made by the assessee, the Assessing Officer allowed Rs.6,43,01,040/- being 10% of total turnover of Power Units No.V & VI at Rs.64,30,10,400/-. This resulted into disallowance of Rs.89,76,682/- on account of excess deduction

claimed u/s 80IA of the I.T. Act. Similarly, the Assessing Officer also made disallowance of Rs.87,45,000/- on account of bad debts and made addition of Rs.1,45,001/- on account of deduction treating the same as unsubstantive.

4. In appeal, ld. CIT(A) allowed the claim of deduction u/s 80IA of Rs.89,76,682/-, deleted the addition on account of bad debts amounting to Rs.87,45,000/-, deleted the disallowance of Rs.50,000/- made by the Assessing Officer u/s 14A and deleted the addition of Rs.24,91,16,438/- on account of decapitalization of interest income. So far as the transfer pricing adjustment is concerned, the ld. CIT(A) deleted an addition of Rs.21,54,152/- and sustained an addition of Rs.28,89,032/-. Against such partial relief given by the ld. CIT(A), the Revenue as well as the assessee are in appeal before the Tribunal by raising the following grounds :-

ITA No.4111/Del/2013 (By Revenue) :

5. Grounds of appeal :

> *"1. Whether in the facts and circumstances of the case, the Ld CIT(A) erred in deleting the addition of Rs.21,54,152/- by not applying the rate of the nearest date for comparison purpose after agreeing that nearest date should be applied for comparison purposes?*
> *1.a. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in applying the average rate of 8-03-2005 and 11-3-2005 for comprising the single product sale transaction of 01-03-2005, when rate of single nearest date of 08-03-2005 should have been applied?*
> *1.b. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in considering the period of sale from 01-03-2005 to 15-03-2005 when the product being considered has been transacted on single dated of 01-03-2005 and the transaction in subsequent date pertain to different product?*
> *2. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.50,000/- u/s 14-A made by the A.O.?*

3. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.24.91 crores by ignoring the findings of the A.O. which were based on the decision of Tuticorin Alkalis Chemical & Fertilizers Ltd. Vs. CIT 227 ITR 172 (SC)?
4. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.89,76,682/- by fully allowing the claim of deduction u/s 80IA in respect of captive power plant of the assessee, without deciding the specific findings of the A.O. that profit of the unit was inflated because of non accounting of interest on borrowed fund, low administrative expenses etc.?
5. Whether in the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs.87,45,000/- on account of bad debts write off by ignoring the findings of the A.O. that these debts were not bad in nature?
6. That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law."

ITA No.4248/Del/2013 (By Assessee) :

6. Grounds of appeal :

"1. That the Commissioner of Income Tax (Appeals) erred on facts and in the law in sustaining transfer pricing adjustment to the extent of Rs.28,89,032/- made in respect of the international transactions or export of steel products on the basis of the order passed under section 92CA(3) of the Income-tax Act, 1961 ("the Act") by the Transfer Pricing Officer.
1.1 That the Commissioner of Income Tax (Appeals) erred on facts and in law in not appreciating that the price paid on international transaction of export of goods to associated enterprise was within arm's length range of +/-5% of the price charged to unrelated third parties, in terms of the proviso to section 92C(2) of the Act.
1.2 That the Commissioner of Income Tax (Appeals) erred on facts and in law in holding that the benefit of arm's length range of +/-5% as per the proviso to section 92C(2) of the Act would not be applicable where the arms length price so determined is only a single price and not average of multiple arms length price.
The appellant craves leave to add, amend, alter and vary the above grounds of appeal on or before the date of hearing."

7. So far as the ground no.2 by the Revenue is concerned, the same relates to the order of the ld. CIT(A) in deletion of Rs.50,000/- made by the Assessing Officer u/s 14A of the I.T. Act.

8. After hearing both the sides, we find the Assessing Officer had made disallowance of Rs.50,000/- u/s 14A on the ground that assessee had earned exempt income of Rs.482.26 crores on investment of Rs.25,209.08 crores and no disallowance u/s 14A was made by the assessee. The submission of the assessee that no disallowance u/s 14A is required since all the investments are out of companies own funds was rejected by the Assessing Officer on the ground that such explanation is vague and general in nature and assessee has not proved any nexus whether investment has been made out of surplus fund or borrowed capital. However, he has also mentioned that the amount of investment and dividend income both are very nominal value looking to the size of the company. We find the ld. CIT(A) deleted the disallowance made by the Assessing Officer on the ground that the assessee has substantial funds of its own to make investment for earning exempt income and, therefore, the ad-hoc addition made by the Assessing Officer amounting to Rs.50,000/- is not justified. He has also given a finding that no nexus has been established by the Assessing Officer to show that any expenditure has been incurred for earning exempt income. We find identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. The Tribunal at para 46 of the order has restricted such disallowance to Rs.25,000/- by observing as under :-

> *"46. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer as well as the CIT(A) and the Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case has earned exempt income of Rs.3,60,000/- on investment of Rs.15,00,000/- in Magnum Global Fund. Since no suo moto disallowance was made by the assessee u/s 14A of the I. T. Act, the Assessing Officer observed that assessee must have incurred some expenditure for earning tax-free income and made adhoc disallowance of Rs.50,000/- which has been upheld by the CIT(A). It is the submission of the ld. counsel for the assessee that no disallowance has been made in the past and no nexus has been proved by the Assessing Officer. No material has been placed on record to show that the assessee has incurred some expenditure for earning tax-free income. In our opinion, although, there is no disallowance of interest expenditure for earning tax-free dividend income, however, it cannot be said that no administrative expenditure has been incurred for earning the tax-free income of Rs.3,60,000/- on the investment of Rs.15,00,000/-. Since the dividend income is on account of investment in Magnum Global Fund of Rs.15,00,000/-, therefore, considering the totality of the facts of the case, disallowance of Rs.50,000/- on ad-hoc basis under the facts and circumstances of the case appears to be on higher side. Although, the ld. counsel for the assessee submitted that no disallowance has been made in the past, however, it was not brought to our notice as to whether the disallowance was not made in scrutiny assessment or summary assessment. Considering the totality of the facts of the case, disallowance of Rs.25,000/- under the facts and circumstances of the case, in our opinion, will meet the ends of justice. We hold and direct accordingly. The ground nos.1.1 to 1.2 by the assessee are accordingly partly allowed."*

9. Following the order of the Tribunal in assessee's own case in the immediately preceding assessment year, we direct the Assessing Officer to restrict the disallowance to Rs.25,000/- u/s 14A of the I.T. Act. The ground raised by the Revenue is accordingly partly allowed.

10. So far as the ground no.3 by the Revenue is concerned, the same relates to disallowance of Rs.24.91 crores on account of capitalization of interest.

11. After hearing both the sides, we find the Assessing Officer made disallowance or addition of Rs.24,91,16,438/- on the ground that the assessee company on the one hand has made decapitalization of interest income of

Rs.3066.07 lacs and on the other hand has shown such interest expenses as revenue to the extent of Rs.9539.99 lacs. Rejecting the various decisions including the decision of the Hon'ble Supreme Court in the case of CIT vs. Karnal Cooperative Sugar Mills Ltd. reported in 243 ITR 2 relied upon by the assessee, the Assessing Officer held that the interest earned as a result of apportionment of loan received for the purpose of green field project at Orissa Project is inextricably and intrinsically linked.

12. We find the ld. CIT(A) deleted the addition by observing as under :-

> *"6.3. The facts of the case are not under dispute between the assessee and the AO. the appellant had reduced the cost of capital by interest earned on the borrowed fund for acquisition of capital. The AO had taxed this interest income. The AO has relied on the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. vs. CIT (227 ITR 172). On the other hand, the appellant has relied on the decision of jurisdiction High Court in the case of NTPC SAIL Power Company Pvt. Ltd. vs. CIT (ITA No.1238/2011, order dated 17.07.2012). The facts of this decided case and that of the appellant are similar. In the case of NTPC SAIL Power Company Pvt. Ltd., the company had borrowed fund for capital investment in new units which was utilized to earn interest on deposits and advances made out of such funds and claimed it as capital receipt. The High Court held that the appellant was right in claiming it as capital receipt by setting off/ netting off against interest on borrowed sum. In the present case also, the appellant netted off the interest received on the amount which was borrowed for investment in green field Orissa Project against the expenditure incurred on the project. Further, the Hon'ble High Court of Delhi in the case of NTPC SAIL Power Company Pvt. Ltd. (supra) has discussed the case cited by the AO, namely, Tuticorin Alkali Chemicals and Fertilizers Ltd. (supra) in the judgment. Therefore, respectfully following the decision of the Hon'ble High Court as well as decision of the Hon'ble Supreme Court in the case of CIT vs Bokaro Steel Ltd. (1999) 102 Taxman 94 (SC), I hold that the interest received on the borrowed fund exclusively for the purpose of setting up of a unit at Orissa is not taxable as interest income. AO is directed to delete the addition made in this regard."*

13. We find identical issue had come up before the Tribunal in assessee's own case. We also find the Tribunal vide ITA No.2518/Del/2013 order dated

30.05.2017 has accepted the alternate contention of the assessee and allowed deduction of interest expenses incurred on earning interest income on certain deposits u/s 57(iii) by observing as under :-

> *"53. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. The only issue to be decided in the impugned grounds is regarding the treatment of Rs.6,11,95,775/- being interest earned on temporary funds and the income of Rs. 1,32,88,663/- on sale of investment transferred to Orissa Plant. According to the Assessing Officer, such interest income has to be brought to tax as income from other sources which has been upheld by the CIT(A) by relying on the decision of the Hon'ble Supreme Court in the case of Tuticorn Alkali Chemicals and Fertilizers Limited (supra) and various other decisions. It is the submission of the ld. counsel for the assessee that such interest income should be reduced from the capital work in progress. It is his alternate contention that if the interest income is taxed as "income from other sources" then deduction should be allowed on the interest expenditure for earning such interest income as per the provisions of section 57(iii). We find merit in the alternate contention of the ld. Counsel for the assessee. The assessee has submitted before the lower authorities that the interest received of Rs.6,11,95,775/- is on account of investment out of loan funds raised for the Orissa Project. Copy of the loan sanction letter in respect of Orissa project was also submitted during the assessment proceedings. The assessee had categorically submitted before the lower authorities that such interest expenses and the interest income as a result of apportionment of loan received on account of Orissa Project a e inextricably and intrinsically linked with each other.*
>
> *54. We find the Hon'ble Supreme Court in the case of Rajendra Prasad Mody [supra] has held hat expenditure laid out or expended wholly and exclusively for the purpose of making or earning such income is an allowable deduction. Following the above decision, we are of the considered opinion that assessee should be given due credit for interest expenditure incurred for earning such interest income. Accordingly, the alternate submission of the assessee is allowed. The Assessing Officer is directed to verify the amount of expenditure apportioned for the investment required for earning such interest income. The ground no.2 to 2.3 raised by the assessee are accordingly partly allowed for statistical purposes."*

14. Respectfully following the decision of the Co-ordinate Bench of the Tribunal in assessee's own case, we restore the issue to the file of the Assessing Officer with a direction to follow the order of the Tribunal and re-compute the

disallowance. The ground raised by the Revenue is accordingly allowed for statistical purposes.

15. In ground no.4, the Revenue has challenged the order of the ld. CIT(A) in deleting the claim of deduction u/s 80IA amounting to Rs.89,76,682/-.

16. After hearing both the sides, we find the claim of deduction of Rs.7,32,77,722/- u/s 80IA was rejected by the Assessing Officer on the ground that the Form No.10CCB filed by the assessee is incomplete and proper balance sheet and profit and loss account are not available for each unit. The Assessing Officer, therefore, estimated the profit eligible for deduction u/s 80IA of the I.T. Act at the rate of 10% turnover of the power units and worked out the deduction at Rs.6,43,01,040/- as against the claim of the assessee at Rs.7,32,77,772/- which resulted into disallowance of Rs.89,76,682/-.

17. We find the ld. CIT(A) allowed the claim of the assessee by observing as under :-

> *"7.3. I have perused the submission of the appellant and the order of the AO. The allegation of the AO is that Form No.10CCB is incomplete since it was certified based on memorandum balance sheet which was not the actual balance sheet of the units and secondly the interest expenses were not allocated to the units. The defense of the appellant is that it has complied with the requirement of law by filing certificate of the chartered accountant who has duly audited the profit & loss account and balance sheet of the appellant. Further, the appellant has stated that loans were undertaken by the appellant for its various projects which were under pre-operative phase and no loan was used for operating these units where deduction under 80IA was claimed.*
> *The line by line items in the profit and loss account and in the balance sheet of the appellant which was the annexure to Form no.10CCB was filed by the appellant during the course of the appeal hearing and on going through the same, I find that there is no justification to calculate the 80IA on an arbitrary and estimation basis. The form no.3CEB is duly signed by the chartered accountant having verified account of the appellant and certifying that the units were eligible for deduction u/s 80IA. The*

claim of the appellant that the borrowed funds were for setting up of new units and such money was used in the units which claimed deduction u/s 80IA is also correct since the appellant has sufficient funds as its working capital as discussed in Ground No.1. In view of this, I hold that the appellant is eligible for 80IA deduction as claimed by the appellant in Form no.10CCB. Addition made on account of disallowance under this ground should be deleted."

18. Since the Tribunal has already upheld the order of the ld. CIT(A) on this issue in the immediately preceding assessment year, therefore, following the same, we find no infirmity in the order of the ld. CIT(A) allowing the claim of deduction u/s 80IA of the I.T. Act. Accordingly, the order of the ld. CIT(A) is upheld and the ground raised by the Revenue is dismissed.

19. So far as the ground no.5 by the Revenue is concerned, the same relates to the order of the ld. CIT(A) in deleting the addition of Rs.87.45 crores on account of bad debt written off.

20. After haring both the sides, we find the assessee had claimed deduction of Rs.87.45 crores as bad debt in the Profit & Loss Account. These bad debts arise out of the sale of cold rolled stainless steel coils made to Dai Ichi USA, NY in the financial year 2004-05 on account of quality issue. However, the Assessing Officer concluded that the conditions as enumerated in the provisions of section 36(2) of the I.T. Act are not fulfilled and therefore, he disallowed the claim of bad debts of Rs.87.45 crores.

21. We find in appeal the ld. CIT(A) allowed the claim of such bad debts on the ground that the Assessing Officer has not given the reason for his

conclusion. From the various submissions filed by the assessee, he observed that the assessee had booked the income in the earlier year by raising invoice against the party and assessee had concluded that the amount standing against the party was not realizable and consequently has actually written off as the amount as bad debts. He held that the various decisions relied upon by the assessee before him also support the case of the assessee. He accordingly allowed the claim of the assessee. From the details submitted by the assessee during the course of hearing before us, we find the writing off of such bad debts as irrecoverable satisfy the requirement of allowance and deduction as per section 36(1)(vii) r.w.s. 36(2) of the I.T. Act. It is held by various decisions including the decision of the Hon'ble Supreme Court in the case of T.R.F. Ltd. vs. CIT reported in 323 ITR 397 that it is sufficient compliance for the claim of bad debts if the debt is actually written off in the books of account of the assessee and he is not required to demonstrate or prove as to whether the debt has actually become bad debt. The Revenue cannot insist on demonstrative proof as to whether the debt has become bad debt and non-initiation of legal proceedings against the debtor would also not automatically lead to the inference that the assessee is not entitled to write off the amount of the bad debt. In view of the above, we find no infirmity in the order of the ld. CIT(A) deleting the disallowance. Accordingly, the same is upheld and the ground raised by the Revenue is dismissed.

22. So far as the ground no.1 to 1.1 by the Revenue and 1.1 to 1.2 by the assessee are concerned, these relate to the partial relief given by the ld. CIT(A) on account of transfer pricing adjustment made by the Assessing Officer.

23. As mentioned earlier in para 4 of this order, we find based on the arguments advanced by the assessee, the ld. CIT(A) sustained the amount of Rs.28,89,032/- and directed the Assessing Officer to delete the balance amount. The relevant observations of the ld. CIT(A) reads as under :-

> *"**3.2.** The appellant had entered into international transaction with its AE in Indonesia of import of scrap amounting to Rs. 8.6 crores and export of cold rolled products amounting to Rs. 226.82 crores. As per the order of the TPO, the appellant had 6.87% net profit and 11.99% gross profit during the year.*
> ***3.3.** The appellant had used CUP method to benchmark its international transaction. The international transaction involved in import of material was accepted as at arm's length by the TPO. Similar products were also exported to unrelated parties in Middle East which were taken as CUP for justifying its international transaction involved in exports of steel products. In the transfer pricing documentation, the assessee has benchmarked the transaction of export of steel products to related party by comparing it with export of steel products to unrelated party on monthly average price basis. However, TPO found that the dates of the comparable transactions were different and went out to compare the transactions happening on the same dates. As a result of this, the TPO ended up comparing different products traded on the same dates which resulted into an addition of Rs. 2.75 crores.*
> ***3.4.** I have carefully examined the issue based on the submission of the appellant, material on record and order of the TPO. The international transactions under dispute have taken place on 22.04.2005, 30.04.2005. 19.08.2005, 27.02.2006 and 01.03.2005 to 15.03.2005 (the actual transaction happened 02.04.2005 onwards). The transactions on these days are discussed and decided in the following paragraphs. There are two common issues relevant in this case regarding the determination of the ALP of the international transaction. They are*
>
> *1. The similarity of products to be compared.*
> *2. The dates of transactions to be compared.*
>
> ***4.** <u>Issue 1 The similarity of products to be compared:</u>*

In the CUP transaction, the similarity of the product is the most important element under Rule 10B(1)(a). An apple needs to be compared with an apple and further a Shimla apple should be compared with a Shimla apple only. If Shimla apple is being compared with a California apple, then, suitable adjustments needs to be made even though they belong to the broad category of apples. In the present case, the appellant is engaged in manufacturing steel products and there are various stages of production and the final product also vary depending on the process of manufacturing, the quality and quantity of inputs being used, purpose for which the products manufactured etc. Therefore, if the similar products are available for comparison the same should be taken.

Issue 2 The dates of transactions to be compared:

As far as possible, if the comparable transactions have happened on the same day between the AE and the non AEs, the date of transaction should be the same. However, if the same or similar products are not transacted on the same date, then, the nearest date on which the similar products are transacted should be dates for comparison. In the transfer pricing report, appellant has taken monthly average rates. However, it is clear from the same TP report similar transactions have happened either on the same day or within the same week wherein similar products are traded with a AE as well as non AEs. Therefore, the transaction happening on the nearest date should be taken for comparison. It is possible that a fluctuation may happen in the same month. Therefore, a transaction happening in the beginning of the month may substantially vary from the one which had happened at the end of the same month. This may call for 'suitable adjustment' which is difficult to quantify. This difficulty can certainly be overcome if the nearest date of transaction is taken for comparison since the variation in prices of the steel products sold by the appellant, in the facts and circumstances of this case, does not vary as much within a short span of time. It can be seen in the subsequent paragraphs that most of the transactions are being compared on the same date or at the most within a span of 7 to 8 days.

4.1. *Transaction dated 22.04.2005:*

The TPO has compared Grade J4 coil exported to the AE with the exports on the same date to third party (unrelated) customers by the AE. This is tabulated in Page No. 7 of the TPO order in Table No. III and IV which is further summarized in Table No. V and VI. The most important discrepancy pointed out by the appellant in the order of the TPO is that the quality of coil sold to the AE was Grade J4 Black coil which was different from J4 HRAP coils sold on the same date to unrelated parties (in the Table No. III of the TPO order) and therefore they cannot be compared. The appellant has also supplied the invoices to show that they are not comparable products which were being compared by the TPO.

4.1.1. *Grade J4 coils being exported to the AE at Indonesia and J4 HRAP coils exported to third parties are described as follows in the submission of the appellant:*

"It is further submitted that the price of products having grade J4 HRAP is higher as compared to the grade J4 black coil due to the reason that the former is a raw coil and the latter is a final product of stainless steel coil made after undertaking various process such as Annealing-Pickling, bathing with Electrolytic Sulphuric Acid and Mixed Acid. Same is evident from the extract of the website of the company, reproduced as under:

HR Coil

HR Black: As cast/ ground slabs are first heated and soaked in reheating furnace, rolled in roughing mill to intermediate thickness and then to the final thickness in the steckel mill.
HRAP : Hot Rolled coils are annealed & pickled in continuous Annealing-Pickling lines having scale breaker, shot blasting unit, Electrolytic Sulphuric Acid and Mixed Acid bath.

HRAP coils have a cleaner surface & have improved mechanical properties for downstream processing.

In view of the aforesaid difference in the product composition, it is respectfully submitted that the aforesaid products cannot be compared for the purpose of benchmarking analysis applying CUP method which requires strict comparability."

I have also visited the website of the appellant at http://www.jslstainless.com/productline.php#hrcoil and found that the above distinction was made about the products and it was available for everybody to see.

4.1.2. *In Table No. III of the TPO order, TPO has considered 7 transactions dated 22.04.2005 of different quantity of Grade J4 coils sold to the AE. The invoice rate taken is 1100 USD per metric ton. On the same day, the appellant had exported to SON HA CO., LTD. at Vietnam. This transaction was taken as comparable by the TPO. The "material of supply" as mentioned in the invoice is "hot rolled stainless steel premium quality". The finish is no. I. Whereas the finish as mentioned in the invoice sold to the AE mentions the finish as 'Black as rolled'. Therefore, the appellant was right in pointing out that the TPO has ended up comparing different products.*

4.1.3. *On the other hand, the appellant has compared the Black rolled coils sold to M/s Foshan Shi Shiwanqu at Foshan City on 18.04.2005 to the sale made to the AE on 22.04.2005. The rate per metric ton is 1100 USD in this transaction. Therefore, the international transaction should be treated as at arm's length. No addition is required to be made on this*

transaction.

4.2. *Transaction dated 19.08.2005:*

*The appellant had sold Grade J4 HR coil to the AE as well as the non AEs. Therefore) there is no question of difference of dates or quality in this transaction. The only point raised by the appellant is that the appellant had to pay commission to the middle men in the transaction with unrelated parties and no such commission is payable in the transaction with AE. Therefore, the price paid to the unrelated parties need to be suitably adjusted by deducting the commission paid or to be paid from the invoice price raised against the third parties. The appellant had filed the details about commission paid before the TPO. The same is produced in the paper book as Annexure to the TP documentation at page no. 38. The appellant has paid USD 25 per metric ton as commission and it was built in the invoice price of USD 970. If this commission amount is reduced, then, the price paid by the third party customer to the identical goods comes to USD 945 per metric ton. As mentioned by the TPO, the 27 comparable transactions resulted into an average price of USD 970 per metric ton where in all the cases USD 25 per metric ton was paid as a commission. The TP documentation also contained 15 transactions with unrelated parties wherein price of USD 920 was charged even to unrelated parties on the same day on an identical good. There were totally 15 transactions under this head which was not considered by the TPO. It is also noticed that in the invoices raised against third parties where USD 920 was charged no commission was paid by the appellant. If all these transactions happened on same day are taken into consideration, the average price of the 42 international transaction comes to USD 952 per metric ton [(970 * 27 + 920 * 15)/ 42]. This price should be taken as arm's length price. The proviso to Section 92C(2) comes into operation since multiple price are available on the same date for the identical product. Therefore, the international transaction on 19.08.2005 should be held at arm's length. No addition is needed to be made on this transaction.*

4.3. *Transaction dated 27.02.2006 and 30.04.2005:*

The appellant had sold Grade J4 HR coil to the AE as well as third parties on the same day i.e. on 27.02.2006. There is no difference between the appellant and the TPO on the date of the transaction or on quality of the product sold. As per the order of the TPO in para 5.4.5, there were totally 19 transactions with the AE on this date. The average price was USD 915 per metric ton. On the same day, there were relevant transactions wherein the rate charged to third parties was USD 930 per metric ton. The appellant contends that the " proviso to Section 92C(2) should be invoked in this case.
Similarly, in Table No. IV, the dispute is about calculation of + / -5% as per the proviso to Section 92C(2). The date of comparison is 30.04.2005

and the quality of product being compared is also Grade J4 Black coil. The appellant contends that the international transaction is within +/-5% of the comparable transaction.

4.4. *I fail to understand the argument of the appellant since there is only one price of the comparable transaction on 27.02.2006 and 30.04.2005 which is USD 930 per metric ton and USD 1120 per metric ton respectively of the same quality goods sold which is taken as arm's length price by the TPO. As per proviso to Section 92C(2), the triggering factor to invoke calculation of +/-5% is "where more than one price is determined by the most appropriate method .... ". In the present case, the TPO has certainly taken 11 transactions for the transaction dated 27.02.2006 and two invoices of unrelated parties for the transaction dated 30.04.2005 respectively, however it results into only one price i.e. USD 930 for transaction dated 27.02.2006 and USD 1120 for transaction dated 30.04.2005. In the CUP method, transaction by transaction are compared. The nearest date on which similar commodity is sold is taken for comparison. On both the dates, the transactions have happened with the AE as well as with non AEs. The transaction with the non AEs has happened with the same price in all the invoices. Therefore, there is no multiple prices established for the transaction which has happened on the same day. Therefore, I hold that the TPO was right in rejecting the appellant's contention that the proviso to Section 92C(2) should be invoked. Therefore, the addition of Rs. 13,91,117/- and Rs. 14,97,915/- on account of international transactions conducted on 27.02.2006 and 30.04.2005 are upheld in this*

4.5. *Transaction between 01.03.2005 to 15.03.2005 (Table No. VII of the TPO order):*

The above dates are "order acceptance dates"; the actual transactions have happened on/ after 02.04.2005.

The appellant has sold the products at USD 1250 to USD 1325 per metric ton in all these 15 transactions. There was a transaction with the unrelated party on 08.03.2005. The rate was USD 1400 per metric ton. TPO has taken this transaction as ALP to compare.

The appellant has pointed out that the above 15 transactions had two different varieties of steel coils sold to AE. 9 transactions were supply of J4 HRAP coils and remaining 6 transactions were supply of Grade J4 Black coils. The chart of the comparable transaction as submitted by the appellant is reproduced below:

Table-I:

S.No.	Material Grade	O.A. No.	O.A. Date	Quantity	Invoice Rate	Value USD	Net Value USD	Average Rate (USD)
1	J4 HRAP Coils	580	I-Mar-2005	95.550	1,325	126,604	126,604	1,325
2	J4 HRAP Coils	580	I-Mar-2005	47.025	1,325	62,308	62,308	1,325
3	J 4 HRAP Coils	580	I-Mar-2005	15.895	1,325	21,061	21,061	1,325
4	J4 HRAP Coils	580	I-Mar-2005	77.525	1,325	102,721	102,721	1,325
5	J4 HRAP Coils	580	I-Mar-2005	15.535	1,325	20,584	20,584	1,325
6	J4 HRAP Coils	580	I-Mar-2005	218.370	1,325	289,340	289,340	1,325
7	J4 HRAP Coils	580	I-Mar-2005	94.985	1,325	125,855	125,855	1,325
8	J4 HRAP Coils	580	I-Mar-2005	47.980	1,325	63,574	63,574	1,325
9	J4 HRAP Coils	580	I-Mar-2005	47.105	1,325	62,414	62,414	1,325
				659.970		874,460	874,460	1,325
10	J4 Black Coil	604Al	9-Mar-2005	181.650	1,250	227,063	227,063	1,250
11	J4 Black Coil	604Al	9-Mar-2005	147.225	1,250	184,031	184,031	1,250
12	J4 Black Coil	618	15-Mar-2005	48.865	1,250	61,081	61,081	1,250
13	J4 Black Coil	618	15-Mar-2005	32.545	1,250	40,681	40,681	1,250
14	J4 Black Coil	618	15-Mar-2005	64.955	1,250	81,194	81,194	1,250
15	J4 Black Coil	618	15-Mar-2005	33.135	1,250	41,419	41,419	1,250
				508.375		635,469	635,469	1,250
				1,168.345		1,509,929	1,509929	1,292

4.6. Further, the appellant has also stated that on 11.03.2005 the appellant had sold J4 HRAP coils at the rate of USD 1220 per metric ton. The name of the party to whom this was sold on 11.03.2005 was M/s Shunde Baisheng Trading Company Ltd. This information was part of the TP documentation which is at Page 26 of the Paper book.

*Accordingly, the average price of J4 HRAP coils should be taken at USD 1310 [(1400 * 1 + 1220 * 1)/ 2]. Therefore, the transactions in the S. No.1 to 9 of the above Table has taken place at USD 1325 which is above the average ALP at USD 1310. Therefore, they should be held at arm's length, Even the rest of the transactions mentioned from S. No. 10 to 15 of the above Table fall within +/-5% of the average ALP. It should be noted that appellant has pleaded that the quality of products sold are Grade J4 Black coil to the AE where as the quality sold to the non AE was J4 HRAP coil.*

> *Therefore, the total addition sustain in this case is to the extent of Rs. 28,89,032/-. The AO/ TPO are directed to delete the balance of the addition made in this regard."*

24. So far as adjustment of Rs.14,97,915/- is concerned, the ld. AR submitted that the price charged by the assessee at USD 1100 PMT from its AEs is within +/-5% range of the price charged from the unrelated party at USD 1120 PMT. Therefore, the transaction of export of goods dated 30.04.2005 ought to be considered to be at arm's length price.

25. So far as the adjustment of Rs.13,91,117/- is concerned, he submitted that the price charged by the assessee at Rs.915 PMT from its AE is within +/-5% range of the price charged from the unrelated party at 930 PMT and, therefore, the adjustment made by the TPO is liable to be deleted. Even otherwise, he submitted that the TPO while benchmarking the international transaction, failed to allow adjustment on commission expense of USD 15 PMT in the price of uncontrolled transaction. He filed a chart to substantiate the same and submitted that after considering the adjustment on account of payment of commission of USD 15, the price charged by the assessee from the AE works out the same as the price charged by the unrelated third party. Therefore, the adjustment made by the TPO is liable to be deleted.

26. So far as the appeal of the Revenue is concerned, the ld. AR submitted that during the period 01.03.2005 to 15.03.2005, the assessee has undertaken 9

transactions of sales of J4 HRAP Coils at 1325 PMT and 6 transactions of sales of J4 Black Coils at 1250 PMT. The TPO benchmarked the said transactions considering the sale of goods undertaken by the assessee. The ld. counsel for the assessee also relied on the order of the Mumbai Bench of the Tribunal in the case of DCIT vs. The Development Bank of Singapore in ITA No.6631/Mum/2006 order dated 17.05.2013 to support the order of the ld. CIT(A) for the relief granted by him.

27. Ld. DR on the other hand heavily relied on the order of the Assessing Officer/TPO.

28. We have considered the rival arguments made by both sides, perused the orders of the Assessing Officer and the ld. CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case has made upward adjustment of Rs.27,521,494/- on the basis of order of the TPO. We find in appeal the ld. CIT(A) sustained an amount of Rs.28,89,032/- and deleted the addition of Rs.21,54,152/- and such reasons are already mentioned in the preceding paragraphs. Although, the ld. CIT(A) has sustained only an amount of Rs.28,89,032/- and deleted the balance amount we find the Revenue has challenged the deletion for addition of Rs.21,54,152/- and has not challenged for the balance addition. So far as the addition of Rs.21,54,152/- is concerned, the assessee has demonstrated before the ld. CIT(A) that he has also entered into

transaction on sale of J4 HRAP Coils with unrelated third parties on 14.03.2005 at the price of USD 1120 PMT. Therefore, the ld. CIT(A) was fully justified in upholding the action of the CUP method.

29. So far as the sustaining of Rs.21,54,152/- is concerned, it is the submissions of the ld. counsel for the assessee that price charged by the assessee from its AE is within +/-5% range.

30. We find from the submissions that the details are not coming out clearly which requires a re-visit to the file of the TPO for proper appreciation of the facts. We, therefore, in the interest of justice, deem it proper to restore the ground raised by the assessee relating to TP adjustment to the file of the TPO for fresh adjudication of the issue in the light of the submissions/details filed by the assessee in the Paper Book. The grounds no.1 & 1.a and 1.1 & 1.2 by the assessee are accordingly allowed for statistical purposes.

31. In the result, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on this 03rd day of November, 2017.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 03-11-2017.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi