

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

IT(TP)A No.2494/Bang/2017
Assessment year : 2013-14

M/s Rittal India Pvt. Ltd., No.23 & 24, KIADB Industrial Area, Veerapura, Doddaballapur-561 203. PAN – AAACB 7927 A	Vs.	The Dy. Commissioner of Income- tax, Circle-1, LTU, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri S Ramasubramanyam, C.A
Respondent by	:	Shri Pradeep Kumar, CIT (DR)

Date of hearing	:	25.02.2019
Date of Pronouncement	:	17.05.2019

ORDER

PER SHRI B.R BASKARAN, ACCOUNTANT MEMBER

The assessee has filed this appeal challenging the assessment order passed by the AO for assessment year 2013-14 u/s 143(3) r.w.s. 144C of the Act in pursuance of directions given by the Ld Dispute Resolution Panel (DRP).

2. Ground No.1 is general in nature. At the time of hearing, the Ld A.R did not press ground No.4. The ground no.2 and 3 relate to

the Transfer pricing adjustment of Rs.580.00 lakhs made by the TPO. The assessee has also raised two additional grounds seeking consequential relief in pursuance of order passed for assessment year 2012-13.

3. The assessee is engaged in the business of manufacture and sale of enclosures, heat exchangers, industrial cooling equipment and power distribution equipment.

4. We shall first take up the grounds relating to T.P adjustments. The Ld A.R submitted that the assessee has adopted TNMM method for benchmarking its international transactions and adopted Operating cash Profit/Operating Revenue (OP/OR) as Profit level indicator (PLI). In this appeal, the assessee is disputing exclusion of one comparable named Schneider Electric President Systems Ltd (Formerly called APW President Systems Ltd) and is also disputing inclusion of following two comparable companies:-

- (a) Lloyd Electric & Engg Ltd
- (b) Universal Heat Exchangers Ltd.

5. With regard to exclusion of M/s Schneider Electric President Systems Ltd, the Ld A.R submitted that the TPO has excluded the same only for the reason that it is a consistently loss making company. The Ld A.R submitted that the assessee has compared the Cash profit (i.e., excluding depreciation) earned by it with the cash profit earned by the comparable companies. The Ld A.R submitted that the M/s Schneider Electric President Systems Ltd has actually made cash profit during the year ending 31.3.2011 and 31.3.2015 to 31.3.2017. It has incurred cash loss only during

the year ending 31.3.2012 to 31.3.2014. Accordingly, the Ld A.R contended that this company cannot be considered as consistently loss making company.

6. On the contrary, the Ld D.R submitted that the year under consideration is AY 2013-14 and hence the financial results subsequent to the year under consideration should not be considered.

7. We heard rival contentions and perused the record. We notice that the TPO has excluded this company only for the reason that it is consistently loss making company. We notice that the Ld DRP has not discussed/decided on this comparable. In any case, it is the contention of the assessee that only cash profit should be compared. The assessee has also furnished a statement showing cash profit/loss of this company for the year ending 31.3.2011 to 31.3.2017. We notice that this company has earned cash profit during the year ending 31.3.2011 and incurred loss during the year ending 31.3.12 and 31.3.13. Before us, the Ld D.R contended that the operational results of the years subsequent to the year under consideration should not be taken into account. We agree with the said contentions of Ld D.R. Accordingly, we are of the view that the financial results of this company for the year ending 31.3.2013 and earlier years alone should be examined in order to decide the question as to whether this is consistently loss making company or not?

8. The Ld A.R placed his reliance on the decision rendered by Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors vs. DCIT (376 ITR 183)(Delhi) and contended that the loss making companies should not be excluded, unless it was shown that the loss has been incurred due to abnormal circumstances. The Ld A.R invited our attention paragraph 29 of the order, wherein the guidelines issued by OECD (more particularly paragraph 3.65 of OECD guidelines) are extracted. He also took support of the decision rendered by the co-ordinate bench in the case of Trilogy E-business software India P Ltd vs. DCIT (2013)(23 ITR (Trib) 464)(Bang-ITAT).

9. We notice that the co-ordinate bench in the above said case has expressed the view that there is no bar in considering companies with either abnormal profits or abnormal losses as comparable to the tested party, as long as they are functionally comparable. It was further held that it is for the assessee to demonstrate existence of abnormal factors which would warrant exclusion of the same. The Mumbai bench of Tribunal has also held in the case of Capgemini India P Ltd vs. ACIT (2013)(27 ITR (Trib.) 74 (Mum-ITAT) that comparables should not be rejected merely on account of high profit or loss.

10. In the instant case, the TPO has rejected M/s Schneider Electric President Systems Ltd only for the reason that it was consistently making losses. What is required to be shown by the TPO, as per the view taken by the above cited cases, is that there existed abnormal conditions which has resulted in losses in the

hands of M/s Schneider Electric President Systems Ltd, which would warrant exclusion of the same. Accordingly, we are of the view that this comparable requires fresh examination at the end of AO/TPO. In any case, the Ld DRP has not discussed about this comparable. Accordingly we set aside the order passed by the AO on this comparable and restore the same to his file to examine it afresh.

11. With regard to the contention of the assessee that the cash profit (profit before depreciation) should be considered as PLI, we notice that the same finds support from the decision rendered by the co-ordinate bench in the case of DCIT vs. M/s Centum Rakon India P Ltd (IT(TP)A No.472/Bang/2016 dated 20-07-2018), wherein the co-ordinate bench has followed the decisions rendered in the case of Honeywell Technology Solutions Lab vs. DCIT (61 SOT 61)(URO)(Bang.); 24/7 Customer.com (P) Ltd vs. Dy CIT (2013)(140 ITD 344) and BA Continuum India P Ltd vs. ACIT (2013)(28 ITR (Trib.) 445 (Hyd)). We notice that the co-ordinate bench has expressed the view that the profit before depreciation can be taken as PLI, if there is substantial variation in the manner of charging depreciation by the assessee and comparable companies. Accordingly we direct the AO to take into consideration the above said contention of the assessee also. We also direct the assessee to furnish the details to prove that there is substantial variation in the manner of charging depreciation.

12. The Ld A.R also submitted that the AO/TPO has not given the methodology of computation of Operating Profit/Operating

Revenue. We are of the view that there is merit in the said prayer of the assessee. Unless the manner of computation of OR/OC is given, it may not be possible for the assessee to explain the mistakes/variation in the computation. Accordingly we direct the AO to confront the workings of OP/OR with the assessee before taking any decision.

13. We shall now examine the claim of the assessee for exclusion of two comparables selected by the TPO. The first comparable is M/s Lloyd Electrical and Engineering Ltd. The Ld A.R submitted that the total turnover of the assessee company is around Rs.300 crores, out of which the turnover relating to Cooling units & accessories is only around Rs.25.44 crores. He further submitted that the turnover of M/s Lloyd Electrical and Engineering Ltd is around 1169 crores, out of which the turnover of Air conditioners division is around 823 crores. Accordingly he submitted that the turnover Air-conditioner division of M/s Lloyds is more than 10 times of the turnover of the assessee from Cooling units division. By Placing reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd vs. ITO (2018)(98 taxmann.com 183)(Kar), the Ld A.R submitted that the above said comparable would fail the turnover filter of 1 to 10 times of turnover of the assessee.

14. He further submitted that the cooling units manufactured by the assessee are for industrial purposes and hence the same cannot be compared with the comfort Air-conditioners manufactured by M/s Lloyds Electrical and Engineering Ltd. He further submitted

that the above said company has not given segmental results for various divisions. He further submitted that there was a demerger of heat exchange business in April, 2011. He submitted that the appointed date for de-merger was April, 2011 and the effective date was determined as June, 2013. Accordingly he submitted that the Ld DRP was not justified in holding that the de-merger shall have impact only from June, 2013 and accordingly rejecting this contention of the assessee. Accordingly he submitted that this comparable should be directed to be excluded.

15. We heard Ld D.R and perused the record. The business profile of the assessee company is stated as “manufacture and sale of Enclosures, Heat exchangers, Industrial cooling equipment and power distribution equipment. We notice that the business profile of M/s Lloyd Electric and Engineering Ltd has been discussed as under in the Management discussion & analysis (page 235 of paper book):-

“Lloyd Electric & Engineering Ltd is an established diversified engineering corporation with a history in business excellence. It is an acknowledged name in Heating Ventilation Air Conditioning and Refrigeration (HVAC&R) industry and Consumer Durable goods segment. Lloyd is a leading manufacturer of heat exchanger and evaporator coils serving the entire spectrum of HVAC&R industry. The company is an original equipment manufacturer (OEM) to major AC giants in India and exporters to leading brands in the rapidly growing markets of Africa and Middle East. The company also provides customised AC solutions for institutional clients like

railways, defense and metro rails and has also sustained in the transport segment. Lloyd is a premier name in the airconditioning and consumer durables goods segment. Your company has further expanded its horizons by acquiring the Heat Exchanger business of Perfect Radiators and Oil Coolers Private Ltd pursuant to the approval of scheme of Arrangement by the Hon'ble High Court of Delhi and Rajasthan thereby adding significant value by integrating and consolidating the Heat Exchanger business of Lloyd globally. The extensive product range of Heat Exchanger business includes copper and brass heat exchangers, shell & tube heat exchanger for industrial application, oil coolers for railways, and heavy automobile and tube mill for MB radiators for its existing and new customers.”

From the perusal of the business profile of M/s Lloyds Electric & Engineering Ltd, we notice that the air-conditioning business does not confine to comfort air conditioners as projected by Ld A.R. Hence we reject the said contentions of ld A.R.

16. The Ld A.R further submitted that there was an extraordinary event of de-merger. However, we notice that M/s Lloyds Electric & Engineering Ltd has acquired two companies viz., M/s Perfect Radiators and M/s Oil Coolers P Ltd, i.e., it has merged two companies with itself and hence there was no de-merger as projected by Ld A.R. We also notice that the merger has taken place with effect from 01-04-2011. Hence the extra-ordinary event can be attributed to FY 2011-12 pertaining to AY 2012-13 only. We

are concerned with AY 2013-14 and hence no extra-ordinary event has taken place during the year under consideration.

17. The Ld A.R submitted that M/s Lloyd Electric & Engineering Ltd does not have “Enclosures business” and hence the turnover of “Air-conditioning” segment alone should be compared. Accordingly he submitted that the turnover of Air-conditioner business of M/s Lloyds is more than 10 times of the turnover of the assessee from cooling units. First of all, it was not shown to us that the “Enclosure business” is not related to Air-conditioning or Cooling units of the assessee. The nature of “Enclosure business” was not explained anywhere. If the “Enclosures” are used for Cooling systems/heat management systems, in our view, the same should be considered as part and parcel of Cooling units business of the assessee. Hence, there is lack of clarity on this aspect and accordingly we are unable to appreciate the contentions of Ld A.R in this regard. If the assessee is able to show that the Enclosures business is not related to the activity of Heat management systems, then there may be merit in the contentions of the assessee. In view of the lack of clarity, we are of the view that this contention of the assessee requires fresh examination. The question of applying turnover filter would arise only if it is shown that the Enclosures business is altogether different from heat management systems. Accordingly we restore this issue to the file of AO/TPO for examining this claim of the assessee in accordance with law by duly considering the discussions made supra.

18. The next comparable, which the assessee seeks to be excluded, is M/s Universal Heat Exchangers Ltd. The ld A.R

submitted that the turnover of this company included turnover from “fabricated items” and the same constituted about 40% of the total turnover. Further, there was no segmental results available and hence the profit from “Heat exchangers and Oil coolers” could not be ascertained for the purpose of comparing the same with the assessee company. He submitted that the Ld DRP has retained this comparable without citing any reason.

19. We heard Ld D.R and perused the record. From the perusal of the turnover details given by M/s Universal Heat Exchangers Ltd in page 307 of the paper book, we notice that the turnover from Fabricated items constitute 40% of the total turnover of the above said company. We notice that the assessee has not furnished the copies of Directors report, management discussion etc of this company. Hence the meaning attributed to “fabricated items” by M/s Universal Heat Exchangers Ltd could not be appreciated. The terminology “fabricated items” is a generalised one and it may not be correct to presume that the same does not relate to the “heat management system”. In the absence of specific details as to what is meant by “fabricated items”, we are unable to appreciate the contentions of the assessee. As discussed by us in the preceding paragraphs while dealing with the case of “enclosures”, what is required to be examined is as to whether the “fabricated items” are related to the “heat management system” or not. If it is related, then this comparable should be considered for the purpose of T.P analysis. Otherwise it may be excluded. In view of lack of clarity, we are of the view that this comparable also requires fresh examination. Accordingly we restore this comparable also to the file

of AO/TPO for examining it afresh by duly taking into account the meaning of “fabricated items” mentioned by this comparable.

20. The assessee has taken two additional grounds. The Ld A.R submitted that the decision rendered by the Tribunal for assessment year 2012-13 in respect of two issues, viz., “raw material in transit” and “stock obsolescence” shall have consequential effect in the present assessment year under consideration. Accordingly he prayed that the AO may be directed to take into account the consequential effects. We find merit in the prayer of the assessee. Accordingly we direct the AO to take into account the consequential effect in respect of above said two issues during the year under consideration.

21. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the Open Court on **17th May, 2019.**

**Sd/
(Pavan Kumar Gadale)
Judicial Member**

**Sd/-
(B.R Baskaran)
Accountant Member**

Bangalore,
Dated, 17th May, 2019.

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed
before the dictating Member
3. Date on which the approved draft comes to Sr.P.S
.....
4. Date on which the fair order is placed
before the dictating Member
5. Date on which the fair order comes back to the
Sr. P.S.
6. Date of uploading the order on
website.....
7. If not uploaded, furnish the reason for doing so
.....
8. Date on which the file goes to the Bench Clerk
.....
9. Date on which order goes for Xerox &
endorsement.....
10. Date on which the file goes to the Head Clerk
.....
11. The date on which the file goes to the Assistant
Registrar for signature on the order
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12. The date on which the file goes to dispatch
section for dispatch of the Tribunal Order
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13. Date of Despatch of Order.
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