

आयकर अपीलीय अधिकरण "J" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1889/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. MX Systems International Private Ltd., 202A-202D, Arvind Chambers, Western Express Highway, Andheri (E), Mumbai-400069	बनाम/ v.	DCIT 12(3)(2) R.No. 147B, Aayakar Bhavan, Mumbai-400020
स्थायी लेखा सं./PAN :AAECM5026B		

आयकर अपील सं./I.T.A. No.1888/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. Minimax GMBH & Co. KG, 202A-202D, Arvind Chambers, Western Express Highway, Andheri (E), Mumbai-400069	बनाम/ v.	Deputy Director of Income Tax Circle(International Taxation)- 3(2)(2) Scindia House, Ballard Pier, Mumbai
स्थायी लेखा सं./PAN : AANFM0654P		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri. Chetan A. Karia
Revenue by :	Shri. Pavan K Beerla (DR)

सुनवाई की तारीख /**Date of Hearing** : 24-04-2019

घोषणा की तारीख /**Date of Pronouncement** : 22-07-2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

These two appeals, filed by two separate assessee's, being ITA No. 1888 & 1889/Mum/2015 respectively , both for assessment year 2010-11 , involves

common issues and hence these two appeals were heard together and disposed off by this common order.

1.2 First , we shall take up appeal of the assessee namely MX System International Private Limited in ITA no. 1889/Mum/2015 for AY 2010-11 , which appeal filed by the assessee has arisen against assessment order dated 29.12.2014 passed by learned Assessing Officer(hereinafter called “the AO”) u/s 144C(13) read with Section 143(3) of the Income-tax Act,1961 (hereinafter called “ the Act”), which in turn was passed in pursuance to Directions issued by learned Dispute Resolution Panel-IV, Mumbai(hereinafter called “ the DRP”) dated 19.12.2014 issued u/s 144C(5) of the 1961 Act . Earlier, the AO passed draft assessment order dated 14.03.2014 u/s 144C(1) read with Section 143(3) of the 1961 Act , wherein transfer pricing additions were made by the AO in the aforesaid draft assessment order based on order dated 30.01.2014 passed by learned Transfer Pricing Officer, Mumbai (hereinafter called “the TPO”) u/s 92CA(3) of the 1961 Act. Subsequently, the assessee filed objections before learned DRP against the aforesaid draft assessment order dated 14.03.2014 passed by the AO , which were disposed off by learned DRP by issuing directions dated 19.12.2014 u/s 144C(5) of the 1961 Act.

2. The grounds of appeals raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) in ITA no. 1889/Mum/2015 for AY 2010-11, read as under:-

“In the facts and circumstances of the case and in Law:-

1. The Hon'ble DRP failed to not appreciate that no proper show cause notice was served by the TPO complying with the mandatory requirement of section 92CA(3) read with section 92C(3) of the Act and accordingly TP adjustment made by learned TPO/AO suffers from legal infirmity and was void abinitio.

2. The Hon'ble DRP has failed to appreciate that the AE M/s. Minimax PO is a PE in India and regularly assessed in India also as a Foreign company which is assessable at a higher rate of tax than the assessee. Thus there is no possibility of shifting profit outside India or erosion of country's tax base. Accordingly no transfer pricing adjustment were called for in respect of transactions entered with the said AE.

3. *The Hon'ble DRP has erred in holding that transfer pricing provisions relating to the transactions done with Minimax PO during the F. Y.2009-10 which is a PE are applicable in the appellant case without appreciating the fact that following the provision of Indo German DTAA and non-discrimination clause therein PE should be treated as residence of India only.*
4. *The Hon'ble DRP has erred in issuing directions to the TPO for computing the ALP considering two comparables namely M/s. Kiddie India Ltd and M/s. Nitin Fire Protection India Ltd without appreciating the fact that M/s. Nitin Fire is not functionally comparable with the appellant company.*
5. *The Hon'ble DRP failed to consider the additional comparables provided by the appellant , which are functionally comparable with the appellant's case.*
6. *The Hon'ble DRP erred in not considering 3 years data (multiple year data) and directing to consider only one year data for benchmarking whereas looking to the nature of appellants business the use of multiple years data is justified for benchmarking.*
7. *The Hon,ble DRP failed to appreciate that there were extraordinary cost suffered by the appellant in DIAL project so this extraordinary cost ought to have been considered by determining the ALP.*
8. *The Hon,ble DRP failed to appreciate that the loss suffered by the appellant is on account of business exigences and complexities in the project and not due to charging or paying higher/lower prices to AE's.*
9. *The Hon'ble DRP has failed to appreciate that when the upward transfer pricing adjustment were already made in the case of the AE M/s. Minimax PO office then no transfer pricing adjustment were required to be made in the hands of the appellant company again.*
10. *The Hon'ble DRP has erred in dismissing the objection raised for disallowance of foreseeable loss of Rs. 17,61,703/- without appreciating the fact that this loss was on account of delay in completion of the project for which projectwise details of losses were filed before them.*
11. *The order of the Hon'ble DRP issuing directions as well as order passed by the TPO as well as Assessing officer in pursuance of the Directions issued by Hon'ble DRP are erroneous which deserves to be set aside.*
12. *The appellant reserves the right to add, withdraw, amend or alter any of the grounds of appeal at any time prior to or during the course of proceedings before the Hon'ble Tribunal."*

3. This appeal has arisen from assessment framed by the AO u/s. 143(3) r.w.s. 144C(13) of the 1961 Act vide assessment order dated 29.12.2014 passed by the AO in pursuance to directions given by learned DRP, wherein transfer pricing additions to the tune of Rs. 19,43,77,501/- were made while computing Arms Length Price in relations to international transactions entered into by assessee with its AE.

3.2 The background of the case is that the assessee is engaged in the business of developer, integrator and consultant of all types of electronic, electrical mechanical, engineering systems related to fire protection and telecommunication. The assessee is a joint venture between Mr. Harish Salot and Minimax International GmbH & Co. KG. The 74% equity is held by Minimax. The assessee is a complete service provider in the domain of fire protection system . The assessee offers engineered fire detection, protection and suppression systems; fire fighting foams, DCP Skids, Gas Suppression Systems and hardware. The assessee protects government, power plant, aviation, marine, transportation, petrochemical, wind turbines, museums, commercial buildings, hotels and public buildings and industrial markets. The assessee is headquartered in Mumbai, and has branches at Delhi, Kolkata, Bangalore and Chennai.

3.3 During the year under consideration, the assessee has entered into following international transactions with its AE's, as detailed hereunder:-

Sr. No.	Nature of transaction	Amount (Rs.)	Method Adopted
1	Purchase of Raw material	2,77,41,929	Transaction Net Margin Method ('TNMM')
2	Sale of Cylinders	3,34,675	TNMM
3	Sale of Materials	33,43,52,572	TNMM
4	Receipt of Services	44,08,571	TNMM
5	Provision of Services	1,10,80,015	TNMM
6	Purchase of Capital Goods	20,65,937	CUP ('Comparable Uncontrolled Price')

7	Allocation of Rent and other services	540,000	Cost
8	Reimbursement of expenses	44,13,758	Cost
9	Recovery of expenses	15,35,344	Cost

3.4 In TP study report(TPSR), the assessee was selected as tested party and Operating profit/Operating Cost was taken as PLI . The international transactions were benchmarked at entity level by applying TNMM. In TPSR, it is mentioned that the above transactions of purchase and sale are undertaken for completing the ongoing projects in India. Further, the provision and receipt of services are also ancillary to the completion of these projects. Therefore , these transactions are closely linked and hence are to be evaluated collectively.

3.5 The working of the assessee's PLI were as under:-

Particulars	Amount in Rs
Sales	74,40,88,809
Operating Expenses	76,92,97,738
Operating Profit	(-) 2,52,08,929
Operating Margin	(-)3.28

3.6 The assessee selected two comparables after undertaking search process in Prowess. The margins of the comparables are as under:-

S.No.	Name of company	F.Y.2007-08	FY 2008-09	FY 2009- 10	Weighted average
1	Kidde India Ltd	-2.51%	-11.00%	-6.75%
2	Nitin Fire Protection	—	30.85%	21.99%	26.42%
Arithmetic Mean				21.99%	9.84%

3.7 The TPO rejected Kidde India Ltd. as comparable for the following reasons , as detailed hereunder:-

“Kidde India Ltd needs to be rejected for the following reasons :

i) Single-year margin needs to be considered for considered and since the data of the said company is not available for FY 2009-10, the company cannot be considered for benchmarking.

ii) Even if weighted average margin of three years is taken, it is seen that the company is a consistent loss-maker. In atleast two out of last three years, losses were shown.”

3.8 Thus finally PLI was taken to be that of Nitin Fire Protection Industry Ltd., i.e. for FY 2009-10 at 21.99% and the adjustments were made to ALP of the international transactions entered into by the assessee with its AE, to the tune of Rs. 19,43,77,502/- , which adjustment to ALP was worked out by TPO as under:

(Amount In Rs.)

Operating Income(A)	744,088,809.00
Operating Cost(B)	769,297,738.00
Operating Profit(C)	-25,208,929.00
OP/OC(actual)	-3.28%
Arm’s Length OP/OC	21.99%
Arm’s Length operating profit(D)=B X 21.99%	169,168,572.99
Arm’s Length operating income(E)=D+B	938,466,310.59
Adjustment =E-A	194,377,501.59

3.9 The AO framed draft assessment order dated 14.03.2014 u/s. 143(3) r.w.s. 144C(1) of the 1961 Act accepting TP additions as were made by TPO in its order passed u/s 92CA(3) of the 1961 Act. In its draft assessment order, the AO had also disallowed an amount of Rs. 17,61,702/- towards foreseeable loss on the ground that the same is contingent in nature.

3.10 The assessee filed objection against draft assessment order with learned DRP-IV, Mumbai which were dismissed by learned DRP by issuing its direction dated 19.12.2014 u/s. 144C(5) of the Act , as under:

“ Directions of DRP

8.6. As regards the argument that three year data should be considered, while it is correct that multi year data is allowed by the transfer pricing provisions, however, the same is allowed subject to fulfilment of the condition that ‘such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared.’ In the arguments presented by the assessee, while it has generally argued for allowance of multi-year data, no facts relating to the present case have been brought out as influencing the determination of transfer price in its case. This being the case, the arguments are for argument's sake and devoid of hard and/ or ascertainable facts having bearing on the case under consideration. This issue has been considered and decided by Special Bench of ITAT in the case of M/s. Aztec Software Vs. ACIT 107 ITD 141 (Bang.)(SB), which has held that data for the relevant period alone is to be considered. The use of data only for F.Y.2009-10 is in accordance with the provisions of 92C(3). Accordingly, the objections of the assessee are not found to be tenable.

8.7. The assessee has argued for adjustment to its own PLI for the losses incurred. Adjustments to the PLI of the tested entity is not permissible under the domestic transfer pricing provisions and rules. This has been acknowledged and affirmed in various decisions of ITAT. For instance in a recent decision in the case of DCIT vs EDAG Engineers & Design India Pvt. Ltd. reported in (2014) 111 DTR (Del) (Trib) 70 it was held in Para 5 that

‘The CIT(A) granted impugned relief by making adjustments, on account of capacity underutilization, in the results shown by the tested party and thus computing hypothetical financial results which the tested party would have achieved in perfect conditions. Such an exercise is impermissible. As is the undisputed legal position, such comparability adjustments can only be made in the comparables and not the tested party itself. It is specifically provided in Rule 10B (1)(e)(iii) that adjustments for variations, which could materially affect the amount of net profit margin in the open market in comparable uncontrolled transactions, are to be made in respect of net profits realized by the comparable transactions or enterprises. The CIT(A) was thus clearly in error in proceeding to make capacity underutilization adjustments in the profits earned by the assessee. That apart, in the case of a one hundred percent captive service unit, as is the

*assessee before us, the very concept of capacity underutilization may not really make any sense unless the assessee has not been able to offer, for reasons beyond its control, the underutilized capacity to its AE. There is no finding on this aspect of the matter. As the assessee does not have the liberty to work for any other customer, and is wholly dependent on its AE for productive, use of its capacity to work, the AE should normally make good any losses to the captive unit caused by its not being able to make use of the available capacity. In the case before this, the AE has indeed given some financial support to the assessee which has been reduced from the ALP adjustment figure, and the business rationale of AE's extending financial support to the assessee is thus not in doubt, However, there is nothing on record to show how this financial support has been computed and is on what ground, and on what basis this financial support is given. The reason for underutilized capacity and the facts regarding financial support extended to the assessee are not clear from the material on record. **The CIT(A) has granted the impugned relief merely by making capacity underutilization adjustments to the profits achieved by the tested party, but then such an approach, as we have noted earlier, is wholly unsustainable in law.**"(emphasis supplied)*

Some amount has been considered by the assessee for reduction out of the expenses/ addition to receipts in working out the PLI at 50.84%. It is not possible to verify the correctness or accuracy of this claim and the same is hypothetical and not factual. Such adjustment to determine PLI of tested entity does not have sanction of law. The claim is rejected. -

8.8. It has been argued that M/s. Kidde India Ltd which had been included as comparable in preceding year should not be excluded in the current year on ' principles of consistency. But at the same time the assessee has sought to exclude M/s. Nitin Fire Protection Industries Ltd. this year when it was included as comparable in the preceding year. Thus, the assessee has contradicted its argument and fails on the consistency argument expounded. The argument of consistency is therefore rejected. .

8.9 It has been argued that the TPO had not complied with the mandatory provision of Sec.92CA r.w. proviso to 92C(3) and therefore principle of natural justice was violated. If there was any lack of opportunity, the order does not become void but only remains voidable. The submissions filed before the TPO in this regard dated

20/01/2014 (paper book page 273) shows that the issue was discussed and clarifications were furnished by assessee. It is seen that an opportunity has admittedly been given through the order sheet noting. In any case, any deficiency in the opportunity has been made good during the DRP proceedings. Accordingly, this ground is dismissed.

8.10. The assessee has claimed that its own PLI should be taken as (-) 0.93% as against (-) 3.28% reported in TSPR and considered and accepted by the TPO. In the submissions filed it is seen that items of income that it had considered as non operating earlier, is now claimed to be operating. Similarly, expenses that it had claimed to be operating earlier, is now claimed to be non operating. Such income are foreign exchange gain, recovery of rent and salary expenses. These are non operating and are therefore rightly excluded by the TPO. The expenses now excluded are claim for foreseeable loss. It is now claimed that this is an extraordinary expense claim. On the one hand the assessee claims that this is a valid expense claim in computing the taxable income, but for transfer pricing it claims that this is an estimate and extraordinary. This is clearly an inconsistent stand. The assessee has modified its argument as it suits it. The PLI computed by assessee reported in TSPR and accepted by TPO warrants no interference.

8.11. It has been argued that transfer pricing provisions should not be made applicable as the transactions are with the Minimax PO which is a PE and therefore treated as domestic / resident tax payer and non discrimination clause of DTAA will apply. This is not acceptable.

it is noted that . . .

- the transactions are reported as International Transactions by the assessee itself in report in Form 3CEB .

- the transactions therein are reported not merely with Minimax PO but also with Minimax GMBH from whom purchases/imports, sale of cylinders, import purchase of capital goods , receipt of services and other transactions are reported,.

-the return of income is filed in respect of Minimax GMBH in the status as Foreign Limited Liability Partnership Firm with rate of tax applicable to other than domestic company.

- the relevant contracts entered into by Minimax GMBH with L & T Ltd and other companies and the contract entered into by MX Systems with Minimax Gmbh and/or Mimimax PO is not filed, but from the submissions it is

clear that the some of the transaction of the assessee relating to execution of turnkey contracts is with Minimax PO but is dictated and governed by the primary contract entered into by Minimax GMBH. Thus, without prejudice, even if it is treated that Minimax PO is a domestic entity, the transactions are clearly influenced by Minimax GMBH and its management is same as Minimax GmbH and therefore it is covered u/s 92A.

- In COCA COLA INDIA INC. vs. ASSISTANT COMMISSIONER OF INCOME TAX & ORS. The Hon'ble HIGH COURT OF PUNJAB & HARYANA, reported in (2009) 309 ITR 194 in answering the question

(iii) Whether provisions of Chapter X are attracted when both the parties to a transaction are subject to tax in India, in absence of allegation of transfer of profits out of India or evasion of tax ?

held that

"52. We have already reproduced the amended provisions of Chapter X. According to the petitioner, the same should be held to be inapplicable, as making the same applicable will render them unconstitutional. The petitioner has not challenged their validity. We do not find any substance in the submission that if the said provisions are made applicable to the petitioner, the same would be unconstitutional. There is no lack of legislative competence for enacting the said provisions and making them applicable to the petitioner or to a class of persons falling in the category of the petitioner. Potential of multinational companies to allocate profits in intra groups transactions to outside jurisdiction or resulting in tax evasion is an acknowledged fact and is duly recognized in legislation, not only in India but elsewhere also. Keeping in view this mischief to be remedied and to advance the object of taxing the real income, provisions have been enacted. The amended provisions certainly advance the declared object by laying down the requirement of and mechanism for determination of ALP. 'International transaction' and 'associated enterprises' have been well defined under ss. 92B and 92A of the Act. International transaction is a transaction between two or more associated enterprises, either or both of whom are non-residents. Associated enterprise is an enterprise which participates in management or control of capital or other gains. The provision for computing ALP has been applied to income arising from international transactions. The statute is, thus, applicable to well defined class which meets the test of intelligible differentia. It also meets the test of rational relationship to the object i.e. to determine the real income. The income arising from international transaction is to be computed having regard to ALP as per guidelines laid

down in s. 92C of the Act by adopting one of the laid down methods, at the discretion of the competent authority. Mere fact that the assessee has chosen one of the said methods, does not take away the discretion to select any other method which may be considered to be more appropriate for the purpose of determining the true income. Proviso to s. 92C(3) of the Act provides for an opportunity to the assessee as to why ALP should not be determined as proposed. Under s. 92CA of the Act, the AO can make a reference on the issue of computation of ALP to a TPO. The TPO is required to issue notice to the assessee to lead evidence for determining what was the ALP.

53. We do not find any ambiguity or absurd consequence of application of Chapter X to persons who are subject to jurisdiction of taxing authorities in India nor we find any statutory requirement of establishing that there is transfer of profits outside India or that there is evasion of tax. Only condition precedent for invoking provisions of Chapter X is that there should be income arising from international transaction and such income has to be computed having regard to ALP. "International transaction" as defined under s. 92B of the Act, as already observed, certainly stands on different footing than any other transaction. ALP is nothing but a fair price which would have been normal price. There is always a possibility of transaction between a non resident and its associates being under-valued and having regard to such tendency, a provision that income arising out of said transaction could be computed having regard to ALP, will not be open to question and is within the legislative competence to effectuate the charge of taxing real income in India.

54. We, thus, do find any merit whatsoever in the contention that provisions of Chapter X cannot be made applicable to parties which are subject to jurisdiction of taxing authorities in India.,without there being any material to show transfer of profits outside India or evasion of tax between the two parties. The contention that according to the permission granted by the RBI under the FERA, the assessee cannot charge more than particular price, can also not control the provisions of the Act, which provides for taxing the income as per the said provision or computation of income, having regard to ALP in any international transaction, as defined, "(emphasis supplied).

- even If transactions are between two resident entities, the Hon'ble ITAT in the case of Vodafone India Services Pvt Ltd. in its recent order dated 10/12/2014 in ITA 7514/Mum/2013 has upheld the applicability of the transfer provisions, in facts of that case.

- In the TPSR in case of Minimax GMBH, it is clearly admitted that the Indian Transfer Pricing legislation

applies to Minimax PO, it being a non resident having transaction with resident and non resident AEs (internal page 19).

it is therefore held that the transfer pricing provisions are applicable in this case.

8.12. It has been argued that there is no motive to shift profit outside India. This argument is not accepted as the application of Transfer Pricing provisions is not contingent on establishing the motive of shifting profits as was held in Aztec case by ITAT.

8.13. It has been argued that two new comparables should be included viz. New Fire Engineers Pvt. Ltd. and Logicon Building Systems Pvt. Ltd. whose PLI as per assessee is 7.29% and 6.26% respectively. At the outset, it is noted that cherry picking, whether by TPO or the assessee, is not acceptable in transfer pricing analysis. The TPSR has listed out the search undertaken on the public databases by the assessee and the results of the search are reported giving the companies thrown up by objective parameters and the corresponding companies rejected by assessee. These two companies do not figure in this accept-reject matrix. Thus, a transparent and fair search process has been vitiated in this selective picking up of two companies. The search methodology has not been indicated by the assessee nor shared. These companies were not brought before the TPO. Hence these two companies cannot be accepted. Without prejudice to the above, in the case of New Fire and Logicon Building Systems, the annual report do not give any information of functions to verify comparability nor any comparability on FAR is given or possible. It appears that assessee has merely relied on the generic name of product mentioned in the Balance Sheet Abstract which cannot be a substitute for analysis.

8.14. The assessee has contested the TPO's action in dropping of Kidde India Ltd on grounds of it being a consistently loss making company and data not being available for FY 2009-10. The assessee has filed copy of annual report of UTC Fire & Security India Pvt Ltd. (formerly Kidde India Ltd.), and thus the argument that data for FY 2009-10 is not available no longer holds true. Even with this latest set of accounts, where loss incurred is reported, the TPO's assertion that it is a consistently loss making company still holds true. It is further seen that this company too has related party transactions of about 21%. Further, during FY 2009-10, 32 % of its revenue is from sale of product and spares (item 16 in Notes to Accounts), it has acquired GE Security business in India as a part of Global acquisition of GE Security business (Business Outlook section of the director's report) in the current year

F Y 2009-10. Thus its business has changed to include provision of Security Technology. This will further vitiate comparability.

8.15. . It has been argued that Nitin Fire Protection Industries Ltd., though considered as a comparable in. TPSR both in current and preceding year, should now be excluded since it has substantial related party transactions; it is functionally not comparable. Now this leaves a situation where if its contention is accepted, there are no comparables left and thus the benchmarking done by assessee fails.

8.16. Transfer Pricing is not an exact science. The availability of data has also to be considered when perfect comparability cannot be ensured within the data available. In the facts of the present case for this year, the TPO is directed to consider both Nitin Fire Protection Industries Ltd. and Kidde India Ltd as comparable with data of FY 2009-10 alone to be taken and similar accounting treatment to be followed in computation of PLI.

8.17. It has been argued that the adjustment should be computed only in respect of the transactions with the AE and not on entity level. There is no quarrels with this proposition. However, when the controlled transaction with AE is revenue received, the appropriate PLI is OP/OC. Thus, the PLI has to be applied to the relevant OC in respect of the controlled transaction. The TPO is directed to compute the adjustment keeping this direction in mind for which the assessee will furnish the necessary details.

8.18. It has been argued that for same transaction, two arms length price cannot be determined by two TPOs examining the two entities to the transaction. The contention is correct. Since the objections have been filed in respect of Minimax PO also which is also before this panel, the same will be considered for appropriate directions in that case.

II. Other Direct Tax Grounds:

9.1. The objection no. II(i) is in respect of disallowance of foreseeable loss of Rs. 17,61,702/- by the A.O. The assessee had debited an amount of Rs. 17,61,702/- as reported in Schedule K of the Profit and Loss account. In the assessment proceedings the assessee did not furnish supporting/ justification for claiming the loss as a result of which the same was disallowed.

9.2. Before the Panel it was explained that the assessee was following accounting system AS 7 issued by Institution of Chartered Accountants of India which is binding. It was explained that in respect of few projects where estimated cost exceeded the estimated revenue,

provisions were made for foreseeable loss. The summary of foreseeable loss was filed as follows:

Sr.No.	Name of the customer	Project Code	Amount
1.	VOLKS WAGAN	101935680011	1,750
2.	VIKAS TELCON	1001725980011	29,764/-
3.	MAHINDRA PUNE	1-020211-800-11	15,89,804/-
4.	MINIMAX DIAL-DELHI	101896680011	1,40,385/-
		Total amount	17,61,703/-

It was stated that the reason for the foreseeable loss was the delay in the completion of the projects. The assessee is following a percentage completion method of accounting.

Directions of DRP

9.3 *The assessing officer has noted that the details with supporting/ justification for making this claim was not filed. Even before the Panel, mere figures are stated and reference to AS-7 is made but details to show that the claim is correct is not available. The objection is dismissed.”*

3.11 This led AO to frame assessment order dated 29.12.2014 u/s. 143(3) r.w.s. 144C(13) of the 1961 Act, wherein aforesaid additions as per directions of learned DRP were made to the income of the assessee.

4 Now aggrieved with the additions as were made to the income of the assessee by authorities below, the assessee has filed an appeal with tribunal. The learned counsel for the assessee has submitted before the Bench that the assessee is engaged in providing fire safety to various buildings in different sectors of economy. It was explained that 74% of equity is held by its foreign parent namely Minimax GmbH Co. KG. Our attention was drawn to the directions issued by DRP. It was explained that fire safety contract was awarded by DIAL in favour of L&T, who in turn sub-contracted work to Minimax GmbH who further in turn awarded work to the assessee. The assessee has in its TPSR submitted had included Nitin Fire Protection

Industries Limited and Kidde India Limited as comparable. The TPO accepted Nitin Fire Protection Industries Limited while rejected Kidde India Limited as comparable. The contention of the assessee before the tribunal is against exclusion of Kidde India Ltd. as comparable, which as per assessee could not be rejected as the said comparable was accepted by TPO in immediately preceding year also. Secondly, the learned counsel for the assessee has taken an objection that merely because Kidde India Ltd. had made losses, the same cannot be rejected as comparable as it is in the same business of fire safety. Further assessee has also objected to the inclusion of Nitin Fire Protection Industries Ltd., on the grounds that it is also in the business of trading of fire equipments while the assessee is only into the business of executing turnkey projects in the field of fire safety. The assessee has also pleaded that Nitin Fire Protection Industries Ltd. has related party transactions of more than 25% and hence the same should be excluded as comparable. It is also pleaded by learned counsel for the assessee to include new comparables viz. New Fire Engineers Pvt. Ltd. as well Logicon Building Systems Pvt. Ltd. as comparables for computing ALP of its international transaction with AE's. It is also pleaded before the Bench that in assessee's own case multiple year data should be used to benchmark its international transactions with AE's as the projects which are undertaken by assessee are long term projects with completion cycle of 2-3 years. The Ld. Counsel for the assessee has submitted that the assessee will be pressing ground no. 4, 5, 6, 7, 8, 10 and 11, while other grounds being ground number 1,2,3,9, and 12 raised by assessee in memo of appeal filed with tribunal be dismissed as not being pressed. The prayers are made that ground number 4-8, 10 and 11 raised by assessee in memo of appeal filed with tribunal be set aside and restored to the file of the AO for fresh adjudication on merits in accordance with law.

4.2. The Ld. DR did not object for the dismissal of ground no. 1, 2, 3, 9 and 12 raised by assessee in its memo of appeal filed with tribunal which are not being pressed. The learned DR also fairly agreed that the matter can be restored to the file of AO/TPO for fresh adjudication on merits in accordance with law.

4.3. The learned counsel for the assessee submitted that Rule 10B of Income-tax Rules, 1962 be applied and abnormal expenses incurred by the

assessee towards project over-run be excluded. It was also submitted that the authorities below while making assessments in the case of the assessee as well Minimax Gmbh & Co. KG are different and prayers are made that since common issues are involved it will be in the interest of justice if there are co-ordinating among both the AO/TPO of both these assessee's to have co-ordinated assessment so that conclusions do not differ on similar facts.

5. We have considered rival contentions and perused the material on record. After hearing both the parties, we dismiss ground no. 1, 2, 3, 9 and 12 raised by assessee in its appeal in memo of appeal filed with tribunal as not being pressed by the assessee. We order accordingly.

5.2 With respect to other grounds of appeal namely ground number 4-8,10 and 11 raised by the assessee in memo of appeal filed with the tribunal, we have considered rival contentions and perused the material on record. We have observed that the assessee is engaged in the business of developer, integrator and consultant of all types of electronic, electrical mechanical, engineering systems related to fire protection and telecommunication. The assessee is a joint venture between Mr. Harish Salot and Minimax International GmbH & Co. KG. The 74% equity is held by Minimax. The said Minimax International GmbH & Co, KG is a foreign company , which is approved by RBI as Project office assessable to tax in India as PE. The assessee is a complete service provider in the domain of fire protection system . The assessee offers engineered fire detection, protection and suppression systems; fire fighting foams, DCP Skids, Gas Suppression Systems and hardware. The assessee protects government, power plant, aviation, marine, transportation, petrochemical, wind turbines, museums, commercial buildings, hotels and public buildings and industrial markets. The assessee is headquartered in Mumbai, and has branches at Delhi, Kolkata, Bangalore and Chennai.

5.3 The assessee has entered into international transactions with its AE's, as detailed hereunder:-

Sr. No.	Nature of transaction	Amount (Rs.)	Method Adopted

1	Purchase of Raw material	2,77,41,929	Transaction Net Margin Method ('TNMM')
2	Sale of Cylinders	3,34,675	TNMM
3	Sale of Materials	33,43,52,572	TNMM
4	Receipt of Services	44,08,571	TNMM
5	Provision of Services	1,10,80,015	TNMM
6	Purchase of Capital Goods	20,65,937	CUP ('Comparable Uncontrolled Price')
7	Allocation of Rent and other services	540,000	Cost
8	Reimbursement of expenses	44,13,758	Cost
9	Recovery of expenses	15,35,344	Cost

5.4 In TP study report, the assessee was selected as tested party and Operating profit/Operating Cost was taken as PLI . The international transactions were benchmark at entity level by apply TNMM. In TPSR, it is mentioned that the above transactions of purchase and sale are undertaken for completing the ongoing projects in India. Further, the provision and receipt of services are also ancillary to the completion of these projects. Therefore , these transactions are closely linked and hence are to be evaluated collectively were the contentions of the assessee before the authorities below.

5.5 The working of the assessee PLI was as under:-

Particulars	Amount in Rs
Sales	74,40,88,809
Operating Expenses	76,92,97,738
Operating Profit	(-) 2,52,08,929
Operating Margin	(-)3.28

5.6 The assessee in its TPSR selected two comparables after undertaking search process in Prowess. The margins of the comparables are as under:-

S.No.	Name of company	F.Y.2007-08	FY 2008-09	FY 2009- 10	Weighted average
1	Kidde India Ltd	-2.51%	-11.00%	-6.75%
2	Nitin Fire Protection	—	30.85%	21.99%	26.42%
Arithmetic Mean				21.99%	9.84%

5.7 The TPO rejected Kidde India Ltd. as comparable for the following reasons , as detailed hereunder:-

“Kidde India Ltd needs to be rejected for the following reasons :

i) Single-year margin needs to be considered for considered and since the data of the said company is not available for FY 2009-10, the company cannot be considered for benchmarking.

ii) Even if weighted average margin of three years is taken, it is seen that the company is a consistent loss-maker. In atleast two out of last three years, losses were shown.”

5.8 Thus finally PLI was taken to be that of Nitin Fire Protection Industry Ltd., i.e. for FY 2009-10 at 21.99% and the adjustments were made to ALP of the international transactions entered into by the assessee with its AE, to the tune of Rs. 19,43,77,502/- , which adjustment to ALP was worked out by TPO as under:

(Amount In Rs.)

Operating Income(A)	744,088,809.00
Operating Cost(B)	769,297,738.00
Operating Profit(C)	-25,208,929.00
OP/OC(actual)	-3.28%
Arm’s Length OP/OC	21.99%
Arm’s Length operating profit(D)=B X 21.99%	169,168,572.99
Arm’s Length operating income(E)=D+B	938,466,310.59

Adjustment =E-A	194,377,501.59
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5.9 The said adjustments to ALP were approved by learned DRP and objections filed by the assessee were dismissed. The AO has also made additions to the income of the assessee towards provisions for losses made to the tune of Rs.17,61,702/- being contingent in nature.

Sr. No.	stature of transaction	Amount (Rs.)	Method Adopted
1	Purchase of Raw material	2,77,41,929	Transaction Net Margin Method ('TNMM')
2	Sale of Cylinders	3,34,675	TNMM
3	Sale of Materials	33,43,52,572	TNMM
4	Receipt of Services	44,08,571	TNMM
5	Provision of Services	1,10,80,015	TNMM
6	Purchase of Capital Goods	20,65,937	CUP ('Comparable Uncontrolled Price')
7	Allocation of -Rent and other services	540,000	Cost
8	Reimbursement of expenses	44,13,758	Cost
9	Recovery of expenses	15,35,344	Cost

5.10 The assessee has claimed that it is engaged in executing turnkey projects in the filed of fire safety and that M/s. Kidde India Ltd. is also engaged in executing turnkey projects in the field of fire safety. It is also claimed that in the preceding year TPO has accepted M/s. Kidde India Ltd. and it is claimed that merely because there is a loss incurred by M/s. Kidde India Ltd. during the year under consideration , the said comparable cannot be rejected. We have observed that Kidde India Limited has not only incurred losses for both the years (as per audited financial statements for the year ended 31.03.2010 placed on record) but its network has also been eroded completely due to accumulated losses exceeding network. The accumulated

loss are to the tune of Rs. 92.99 crores as against share capital and reserves and surplus, which are to the tune of Rs. 69.91 crores. The said Kidde India Limited has also been dealing in sale of products and spares which is as much as 32% of operating income . No doubt consistency is to be followed in income-tax proceedings but principles of res judicata are not applicable in income-tax proceedings. The onus is on the assessee to bring on record cogent material to substantiate inclusion of Keddy India Limited as comparable for computing ALP.

5.11 So far as Nitin Fire Protections Limited is concerned , perusal of audited financial statements for the year ended 31.03.2010 will reveal that apart from providing turnkey solutions including procurement , designing, system integration, commissioning and installation of safety and security solutions , is also in manufacturing and trading activities.

5.12 It was submitted before us that in these turnkey projects, the project cycle is of 2-3 years and comparable profits for last three years should be taken , as assessee is into executing turnkey project which take two to three years to execute/complete . It is also claimed that assessee has incurred extraordinary expenses due to delay in DIAL project and these extraordinary expenses incurred should be excluded while computing PLI of the assessee . The assessee apart from comparables as selected in TPSR through searches in Prowess, has also introduced new comparables namely New Fire Engineers Pvt. Ltd. and Logicon Building Systems Pvt. Ltd. which were not accepted by learned DRP as comparables mainly on the grounds that these comparables were not selected by assessee while conducting its TPSR through Prowess. The learned DRP rejected these comparables firstly that the assessee cannot be allowed to do cherry picking of comparables and secondly financial segment data's are not available to make FAR analysis for comparison with assessee. The onus is on assessee to bring on record cogent material to prove that these comparables are functionally comparable with that of the assessee.

5.13 The learned counsel has prayed that in the interest of justice , matter may be restored to the file of the AO/TPO for fresh adjudication on merits in accordance with law after considering all the contentions of the assessee. The learned DR has also fairly submitted that the issues in this appeal can

be set aside and restored to the file of the AO/TPO for fresh adjudication of the issue on merits in accordance with law. . In our considered view also keeping in view facts and circumstances of the case, end of justice will be met in this case if the matter is restored back to the file of AO/TPO for fresh adjudication of all the issues which had arisen in this appeal, in accordance with law on merits .We clarify that we have not commented on the merits of the issues in this appeal. Further, all the issues are kept open. The AO/TPO shall adjudicate the issues in denovo proceedings unhindered by any of our observations, in accordance with law on merits. Needless to say that proper and adequate opportunity of being heard shall be provided by AO/TPO to the assessee in accordance with principles of natural justice in accordance with law . All the evidences/explanations/contention raised by the assessee in denovo proceedings before the AO shall be admitted by AO/TPO which should then be adjudicated on merits in accordance with law. We order accordingly.

6. Thus , in the result the assessee's appeal in ITA no. 1889/Mum/2015 for AY 2010-11 is allowed for statistical purposes. We order accordingly.

7. Since, appeal in ITA no. 1888/Mum/2015 for AY 2010-11 raises similar issues as are involved in appeal in ITA no. 1889/Mum/2015 for AY 2010-11, thus our decision in ITA no. 1889/Mum/2015 shall apply mutatis mutandis to the appeal in ITA no. 1888/Mum/2015 for AY 2010-11. Thus, appeal in ITA no. 1888/Mum/2015 is also allowed for statistical purposes. We order accordingly.

Order pronounced in the open court on 22.07.2019

आदेश की घोषणा खुले न्यायालय में दिनांक: 22.07.2019 को की गई ।

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 22.07.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**