IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH I-1 NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA NO. 1358/DEL/2017
Assessment Year: 2011-12

Bombardier Transportation India Pvt. Ltd., (BTIPL), Hotel Holiday Inn, Business Centre, Aero City, Delhi Intl. Airport, New Delhi-110037 (PAN: AAACA5584C)	**vs**	DCIT, Circle-5(1), Room No. 390, C.R. Building, I.P. Estate, New Delhi.
Appellant		Respondent

Assessee by : Shri Vishal Kalra, Advocate
Department by: Shri Sanjay I. Bara, C.I.T. DR

Date of hearing : 14.05.2019
Date of pronouncement : 09.08.2019

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against the order passed by the Ld. Commissioner of Income Tax (Appeals)-19, New Delhi {CIT (A)} for Assessment Year (AY) 2011-12.

2.0 Brief facts of the case are that Bombardier Transportation India Private Limited (BTIPL) i.e. the Assessee is a company incorporated in India under the provisions of Companies Act, 1956. It is a wholly owned subsidiary of Bombardier Transportation (Holdings) Singapore Pte. Ltd. and is

engaged in the business of manufacturing and supply of metro coaches and bogies and other rail transportation systems in the Passenger ("PGR") & Bogies ("BOG") division, manufacture and supply of signalling equipment in the Rail Control Systems ("RCS") division and control systems in the Propulsion & Controls ("PPC") division.

2.1 During the captioned AY, the assessee filed its return of income declaring a loss of Rs. 832,507,390/- under the normal provisions of the Income tax Act, 1961 (hereinafter called 'the Act') and loss of Rs. 506,682,596/- under section 115JB of the Act. Subsequently, the assessee filed a revised return of income wherein it had declared a loss of Rs. 751,768,805/- under the normal provisions of the Act and loss of Rs. 506,682,596/-under section 115JB of the Act.

2.2 During the assessment proceedings, the Assessing Officer (AO) made a reference under section 92CA of the Act to the Additional Commissioner of Income Tax, Transfer Pricing Officer - 1(3), New Delhi ("TPO") for determination of the Arm's Length Price ("ALP") of the international transactions entered into by the Assessee with its Associated Enterprises ("AEs") during the

captioned AY, which were also duly reported in the Accountant's Report i.e. Form No. 3CEB, filed along with the return of income.

2.3 During the course of the Transfer Pricing (TP) assessment proceedings, the TPO accepted the arm's length nature of all the international transactions except for the transaction pertaining to "sale of metro trains" under the PGR & BOG division. The TPO proposed to disregard the Comparable Uncontrolled Price ("CUP") analysis conducted by the assessee in its TP Documentation with regard to the determination of ALP of its international transaction pertaining to "sale of metro trains" under the PGR & BOG division. Instead, the TPO proposed to apply Transactional Net Margin Method ("TNMM") and proposed a set of 6 comparables with an average Operating Profit ("OP") / Operating Cost ("OC") of 5.5%, resulting in a proposed TP adjustment of Rs. 1,402,642,087/-.

2.4 In response to the show cause notice, the Assessee that the Assessee and its AE had formed a consortium to supply metro coaches to Delhi Metro Rail Corporation ("DMRC"). Under the tri-party consortium agreement between the Assessee, the AE and DMRC, the Assessee had supplied certain metro train sets to DMRC during the relevant AY, all of which were indigenously

manufactured at the Assessee's factory at Gujarat. These metro train sets sold to the AE by the Assessee had further been sold to DMRC by the AE at the same price at which the AE had purchased from the Assessee. Based on the above, it was submitted that the price at which the AE had sold the metro train sets to DMRC acted as a valid CUP substantiating the arm's length nature of the international transaction of "sale of metro trains" entered into by the Assessee with its AE. With respect to the above, the Assessee submitted a comparison of the prices at which the Assessee had made sales to its AE and sales made by the AE to DMRC to evidence a valid internal CUP relied upon by the Assessee in order to determine the ALP of the said transaction.

2.5 With respect to the proposed application of the TNMM for determination of arm's length margin, the Assessee argued that the said approach was not appropriate. Further, the Assessee submitted that BEML Limited ('BEML') was the only other comparable in India which is engaged in manufacture of metro trains and in respect of which financial information is available in public domain. Based on the above, the Assessee had submitted before the TPO that only BEML should be

considered as a valid comparable. The TPO, in his order, accepted BEML as one of the comparable for determining the ALP of the captioned international transaction. However, in addition to accepting BEML, the TPO also selected 5 additional comparables which were based on his own set of quantitative and qualitative filters.

2.6 With respect to the additional comparables, it was submitted that while selecting the additional 5 comparable companies (namely Titagarh Wagons Limited, Texmaco Rail and Engineering Limited, Braithwaite India Limited, Burn Standard Company Limited and Besco Limited), the TPO had made an inappropriate comparison whereby these companies which were into wagon manufacturing were compared to the Assessee which is a manufacturer of metro trains, thus ignoring the fundamental difference between wagons and metro trains business.

2.7 Further, it had been submitted that it had analysed few more comparables and had found 2 more such comparables which were similar to the aforesaid companies proposed by the Ld. TPO. These 2 comparables were Jessop & Co. Limited which was rejected by the TPO on the ground that it failed his

quantitative filter of sales turnover of 50% and Bharat Wagon & Engineering Limited which was rejected on the ground that its financial data for the captioned AY was not available.

2.8 Thereafter, the TPO considered a revised average OP/OC margin of 4.74% (after including one comparable i.e. Jessop & Co. Limited) using TNMM as the most appropriate method. The final comparable set considered by the TPO is provided below:

Sr. No.	Company name	OP/OC
1	Besco Limited	6.14%
2	Texmaco Rail & Engineering Limited	21.26%
3	Titagarh Wagons Limited	19.52%
4	Braithwaite & Co. Limited	6.65%
5	Burn Standard & Co. Limited	-5.73%
6	BEML Limited (Railway Customer Business Segment)	-14.84%
7	Jessop & Co. Limited (CS Wagon and EMU segment)	0.15%
Average		4.74%

2.9 Accordingly, the TPO in his order issued under section 92CA(3) of the Act, made a TP adjustment of INR 1,108,096,654/- to the captioned international transaction of the Assessee on a proportionate basis. Based on the same, the AO issued the final assessment order making a TP adjustment of

INR 1,108,096,654/- to the taxable income for the captioned AY.

2.10 Further, aggrieved with the contentions of the TPO the Assessee filed an appeal before the Ld. Commissioner of Income Tax (Appeals) who rejected the contentions of the Assessee with respect to application of internal CUP. However, the Ld. CIT (A) accepted Assessee's contentions with regard to Free of Cost ("FOC") Supplies and the AO passed an order after giving effect to the same on July 20, 2017, wherein the Arm's length margin was determined to be 3.78% and the amount of adjustment was revised to INR 1,007,722,861/-.

2.11 Now, the assessee is in appeal before this Tribunal (ITAT) and has raised the following grounds of appeal:-

> *"1. That on the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals) erred in not holding that the order passed by the Assessing Officer ('AO')/ Transfer Pricing Officer ('TPO') is bad in law and void-ab-initio.*
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> *2. That on the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals) erred in not holding that the reference made by the AO suffers from jurisdictional error in as much as the AO did not record any reasons in the assessment order based on which the AO reached the conclusion that it was "expedient and necessary" to refer the matter to the TPO for computation of the Arm's Length Price ("ALP"), as required under section 92CA(1) of the Act.*

3. *That on the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in upholding the action of the TPO in enhancing the ALP of the international transaction pertaining to sale of metro trains in the Passengers (PGR) and Bogies (BOG) division by INR 1,108,096,654 by rejecting Comparable Uncontrolled Price (CUP) method applied by the appellant and instead applying Transactional net margin method (TNMM) as the most appropriate method.*

4. That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that the appellant had supplied metro train to the associated enterprise at the same price at which the same was sold by the associated enterprise to the unrelated party, i.e., Delhi Metro Rail Corporation ["DMRC"], and therefore the said international transaction was appropriately benchmarked applying Comparable Uncontrolled Price method.

4.1 That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) / Transfer Pricing Officer ["TPO"] erred in not appreciating that CUP method was validly applied as the most appropriate method for benchmarking the international transaction of sale of metro train sets.

4.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting the CUP method applied by the appellant allegedly holding that "the appellant did not produce any instance of CUP, i.e., the appellant did not show that the assessee supplied the same good to third party nor has shown that the associated enterprise has purchased goods from the third party for the same price."

4.3 That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in not appreciating that since no income was retained by the associated enterprise from the international transaction of sale of metro train by the appellant, no Transfer Pricing

adjustment was otherwise warranted in respect of the same.

5. That the Commissioner of Income-tax (Appeals) erred on facts and in law in making the Transfer Pricing adjustment allegedly on the basis that the associated enterprise, while negotiating price for supply of trains to DMRC, ought to have taken into account the mark-up to be provided to the appellant in India for assembling the trains, not appreciating that the same was an uncontrolled transaction undertaken with the public sector organization, in which Government itself was a party.

5.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating the Functions performed, Assets employed and Risks assumed (FAR) by the Appellant with respect to the consortium agreement entered between the Appellant, its associated enterprise and the DMRC for supply of metro trains and holding that the appellant is operating in the capacity of a contract manufacturer

5.2 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the action of the Ld. TPO in applying inappropriate quantitative and qualitative filters for selection of comparable uncontrolled enterprises

5.3 Without prejudice that the Commissioner of Income-tax (Appeals) / the TPO erred on facts and in law in considering (i) Texmaco Rail & Engineering Ltd., (ii) Titagarh Wagons Ltd., (iii) Braithwaite & Co. and (iv) Bum Standard Co. Ltd., who are engaged in supply of wagons, etc. to be functionally comparable to the appellant, not appreciating that specific characteristics of the product being different, such companies did not satisfy the test of comparability in terms of clause (i) of rule 10B(2) of the Income-tax Rules.

5.4 Without prejudice that on the facts and circumstances of the case and in law, the Commissioner

of Income-tax (Appeals) erred in not holding that only the metro coach division of BEML Ltd. executing similar contracts for supply of Metro coaches to DMRC satisfied the test of comparability as provided in rule 10B(2) of the Income-tax Rules for undertaking benchmarking analysis of international transaction of sale of metro rails undertaken by the appellant.

5.5 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in observing that "The TNMM method envisages selection of companies which are similar on the basis of a FAR analysis. This does not mean that companies are manufacturing the same product", which is contrary to the test of comparability as provided in rule 10B(2) of the Income-tax Rules.

5.6 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that Texmaco Rail & Engineering Ltd had taken over heavy engineering steel foundry business during the relevant previous year and could not therefore be regarded as an appropriate comparable for the purpose of benchmarking analysis.

5.7 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that Titagarh Wagons Ltd had acquired wagon manufacturing facility in France during the relevant previous year and could not be regarded as an appropriate comparable for the purpose of benchmarking analysis.

5.8 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that at best the "Wagons and Coaches" segment of Titagarh Wagons Ltd could only be considered as functionally comparable for the purpose of benchmarking analysis.

5.9 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting fresh

comparable companies selected by the appellant on the basis that such companies are incurring persistent losses, without appreciating that such companies are functionally similar to the companies selected by the Ld. TPO.

5.10 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting Bharat Wagon & Engineering Limited as comparable to the appellant not appreciating that the said company was selected on the basis of search process adopted by the TPO and was functionally similar to the comparables selected by the TPO.

5.11 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the action of the TPO with respect to aggregation of two segments of Jessop & Co. Ltd i.e. CS wagon segment and EMU segment.

6. Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in inappropriately including miscellaneous income earned by Jessop & Co. Ltd as part of operating income for computing the Operating Profit/ Operating Cost ratio, even though the source of miscellaneous income was not ascertainable from the audited Financial statements.

7. Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting Bum Standard and Co. Ltd. on the basis that the said company was incurring persistent loss not appreciating that the said company passed the filter of persistent losses and negative net worth applied by the TPO.

8. Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that at best the "Engineering Products" segment of Bum Standard and Co. Ltd. could only be considered as functionally comparable for the purpose of benchmarking analysis.

9. That on the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) has erred in not adjudicating ground relating to levy of interest u/s 234A, B, C and D of the Act.

The Appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the hearing before the Hon'ble Tribunal. The aforesaid grounds are mutually exclusive and without prejudice to each other."

3.0 The Ld. Authorised Representative (AR) submitted that ground nos. 1 and 2 are general in nature and do not require a separate adjudication.

3.1 With respect to ground nos. 3, 4, 4.1 and 4.2, the Ld. AR submitted that these grounds challenge the action of the Ld. Commissioner of Income Tax (A) in upholding the action of the TPO in enhancing the Arm's Length Price (ALP) of the international transaction pertaining to sale of Metro trains in the Passengers and Bogies Division by Rs. 1,108,096,654/- by rejecting Comparable Uncontrolled Price (CUP) method applied by the assessee and instead applying Transactional Net Margin Method (TNMM) as the Most Appropriate Method. The Ld. AR submitted that during the year under consideration, the assessee had sold metro train sets to its associated enterprises for Rs. 9,843,102,368/- and as these metro train sets had been sold to

the associated enterprises by the assessee which had been further sold to the Delhi Metro Rail Corporation (DMRC) by the AE at the same price at which the AE had purchased the same from the assessee, CUP method was selected as the Most Appropriate Method. However, this was rejected by the TPO which was also upheld by the Ld. Commissioner of Income Tax (A). The Ld. AR fairly accepted that the ITAT, in assessee's own case for assessment year 2010-11, had rejected the CUP method stating that the assessee had been unable to justify with documentary evidence the comparability and the issue of the quality of the product or service, contractual terms, level of market, geographical market in which the transaction took place, date of transactions, intangible property associated with the sale, foreign currency receipt, alternatives realistically available with the buyer and the seller, etc. The Ld. AR further submitted that during the year under consideration, the Ld. Commissioner of Income Tax (A) had observed that the assessee had not shown that the same quality of the product or service had been supplied to a third party at the same price at which it had sold goods to the AE. It was submitted that the same train was supplied by BTIPL to BTG which were supplied onward by BTG to DMRC and,

therefore, trains in both the transactions were identical with respect to their appearance and were designed, manufactured and tested as per the parameters set forth by the DMRC. It was further submitted that all units were metro train units manufactured indigenously by the assessee's facility and that all the inputs were obtained from the same source and the manufacturing process and the site were also identical.

3.2 Referring to the observations of the Ld. Commissioner of Income Tax (A) with respect to the contractual terms that the agreement seemed to be the one relating to a consortium but the initial deliveries were made by the AE directly to DMRC with no involvement of the assessee and, therefore, the amount of loss to be suffered by the assessee was not taken into account while entering into the contract with DMRC, the Ld. AR submitted that all supplies made to DMRC were governed by the contract RS2 (at pages 243 to 308 of the Paper Book) and all terms and conditions relating to all supplies were commercially enforceable by the same contract. The Ld. AR submitted that the key commercial considerations including price, delivery dates, warranties, liquidated damages, mode of payment, insurance etc. were agreed upon on identical lines through the same contract.

3.3 With respect to the observations of the Ld. Commissioner of Income Tax (A) on the level of market and geographic market in which the transaction took place, the Ld. AR submitted that the Ld. Commissioner of Income Tax (A) had placed reliance on the order of the ITAT in assessee's own case for assessment year 2010-11 wherein it had been mentioned that the TPO had rightly rejected the internal CUP method on the ground that buyer and seller are not only located in different geographical regions, but also at different levels of market. In this regard, it was submitted that this observation was incorrect inasmuch as the AE and the assessee were located in the same market and the goods never moved out of the country. It was further submitted that the AE had project office in India and all the supplies were made through the project office itself which was evident from the invoices raised by the AE to DMRC and, therefore, the AE and the assessee were not only in the same geographical region but also operated in the same level of market. Reference was made to pages 479 to 594 of the Paper Book which contained copies of invoices. It was further submitted that the supplies were made to the same customer through the same tender and bidding process and the entire manufacturing and supplies were made through

the same facility under identical geographical conditions and, thus, the regulatory, legal and environment related factors affecting this transaction were identical. It was also submitted that the date of transaction between the AE and the assessee, which was evident from the invoices (which were filed before the TPO and were now at page no. 479 to 594 of the Paper Book), were the same.

3.4 It was further submitted that the intangible property associated with the sale of the metro trains is the same as the products transferred by the AE to DMRC are the same as transferred by the assessee. It was further submitted that the agreement entered into with the DMRC clearly specified the currency in which the price of the product was to be billed and the underlying currency and price remained the same for both when the BTIPL billed to BTG and when subsequently BTG billed to DMRC. It was also emphasised that while entering into an agreement with DMRC, the quality of the product agreed was based on the intangible property owned by the Bombardier group and, therefore, practically there was no realistic alternative available with the buyer and seller. The Ld. AR submitted that the application of CUP was most appropriate under the given

circumstances and that there was no ambiguity on the fact that sale of metro coaches from the assessee to BTG was identical in all respects to the coaches sold by BTG to DMRC. It was prayed that the methodology adopted by the assessee should be accepted.

3.5 With respect to ground nos. 4.3, 5 and 5.1, the Ld. AR submitted that these grounds were alternate grounds on the same issue i.e. the appropriateness of the methodology adopted by the assessee. It was submitted that the remuneration of the assessee from the international transaction cannot be greater than the overall revenue received from a third party. The Ld. AR reiterated that the assessee had sold metro train sets to its AE which were further sold by the AE to DMRC and the comparison of the sale prices (as evident from the copy of invoices on page 478 to 594 of the paper book) would clearly show that the AE had sold metro train sets to DMRC at the same price without any built in mark-up at which the AR had made the purchases from the assessee. It was submitted that, thus, the entire revenue was received by the AE from the third party i.e. DMRC. Reliance was placed on the order of the ITAT Delhi Bench in the case of Global Vantedge vs. DCIT in ITA No.2763 and 2764/Del/2009 wherein

the ITAT, Delhi Bench, had held that adjustment on account of ALP of international transaction cannot exceed the maximum ALP i.e. the amount received by the AE from the customer and the actual value of international transactions, i.e. the amount received by the assessee in respect of such international transactions. It was submitted by the Ld. AR that this order of the Tribunal was upheld by the Hon'ble Delhi High Court against which the SLP filed by the revenue before the Hon'ble Apex Court also stood dismissed. For this proposition, further reliance was placed on decisions of ITAT Delhi Bench in the cases of Pepsico India Housing Pvt. Ltd. vs. ACIT in ITA No. 834/Del/2010, Interra Infotech (India) Pvt. Ltd. vs. ITO in ITA No. 5620 & 6354/Del/2012 and HCL Technologies BPO Services Ltd. vs. ACIT in ITA No. 3547 & 5071/Del/2010. The Ld. AR submitted that the entire amount recovered by the AE from third party i.e. DMRC has been passed onto BTIPL and BTIPL could not have recovered any amount which was higher than the amount charged by the AE from the third party. It was prayed that in view of the case laws cited by the Ld. AR, the amount recovered by the BTIPL from AE for sale of metro trains should be considered to meet the arm's length criteria.

3.6 The Ld. AR also submitted that this issue, although raised before the Ld. Commissioner of Income Tax (A), was not adjudicated by the Ld. Commissioner of Income Tax (A) and our attention was drawn to the findings of the Ld. Commissioner of Income Tax (A), as contained in Para 6.1 onwards, wherein the Ld. Commissioner of Income Tax (A) has only considered the appropriateness of the CUP method but has not considered this alternate submission of the assessee. It was also submitted that this alternate ground was not raised before the ITAT in earlier assessment year 2010-11 and it was prayed that in view of non-adjudication of this ground by the Ld. Commissioner of Income Tax (A), the issue should be restored to the file of the Ld. Commissioner of Income Tax (A).

3.7 With respect to ground no. 5.2, the Ld. AR submitted that this ground challenged the incorrect rejection of filters. It was submitted that with regard to this filter, the TPO had held that the industry segment in which the assessee has been operating in is not witnessing persistent losses and the Ld. Commissioner of Income Tax (A) had followed the order of the ITAT in assessee's own case for the immediately preceding year. The Ld. AR submitted that rejection of persistent loss making

companies was incorrect inasmuch as loss making companies were also part and parcel of an industry as are profit making companies. It was submitted that the elimination of companies merely on the ground that they were loss making would tantamount to eliminating one-half of the spectrum of comparable companies which would result in certain higher mark-up. It was further submitted that the Indian transfer pricing provisions provided for the comparability of the arithmetic mean of the profit level indicator of the set of comparables with that of the tested party since an industry represented all kind of companies, new and old, loss and profit making, and such companies should not be rejected from the set of comparables.

3.8 With respect to ground nos. 5.3 to 5.11 and ground no. 6, it was submitted that these grounds challenged the inclusion/exclusion of the comparables. The detailed arguments of the Ld. AR with respect to the comparables challenged are as under:-

i) <u>Texmaco Rail and Engineering Limited</u>

The Ld. AR submitted that Texmaco was dealing in wagons as against the assessee who is dealing in Metro train coaches and bogies. It was submitted that both use

an entirely different technology and, therefore, the product profile of the two companies was very much different and could not be compared. He referred to the annual report of Texmaco as placed at pages 1032, 1033, 1044, 1045 of the Paper Book and submitted that Texmaco was engaged in manufacturing of wagons, steel castings and heavy earth moving machinery and, therefore, this company had a completely different functional profile as compared to the assessee who is engaged in the manufacturing of metro train coaches. It was further submitted that while accepting the Texmaco as a comparable in assessment year 2010-11, only heavy engineering segment had been considered as a comparable whereas in the current year, the margin of this company has been taken at the entity level. It was submitted that the segmental result pertaining to heavy engineering segment should be directed to be included as done in the previous year by the TPO and upheld by the ITAT. It was further submitted that the Ld. Commissioner of Income Tax (A), while following the order of the ITAT in the earlier assessment year, allowed Free of

Cost (FOC) adjustment for supplies to be made while computing the margin of the comparable companies but the TPO, while giving effect to the order of the Ld. Commissioner of Income Tax (A), did not give effect to the FOC adjustment as directed by the ITAT in the immediately preceding assessment year. It was further submitted that heavy engineering and steel foundry businesses of Texmaco Ltd. were demerged to the company, which resulted in a substantially abnormal increase in the total income of the company *vis-a-vis* the previous year and these extraordinary events also made this company incomparable.

ii) Titagarh Wagons Limited

It was submitted that this company is dealing in wagons as against the assessee company which is dealing in Metro train coaches and bogies and both use an entirely different technology and, therefore, the product profile being different, comparison cannot be made. It was also submitted that while accepting Titagarh for the previous year, the ITAT had concluded that the company is functionally comparable after providing for free of cost

supplies adjustment. However, in the current year, another company, namely Titagarh Steel Limited merged into the company and also acquired the wagon manufacturing unit in France. Therefore, due to this extraordinary event, the company no longer remained a comparable. It was also submitted that in the immediately preceding year, the TPO had taken only wagon segment of the company as a comparable to the assessee whereas during the current year, the company as a whole was taken as a comparable whereas only the wagon segment of the company could be compared to the assessee company.

iii) Braithwaite and Co. Limited

The Ld. AR submitted that this company was also functionally incomparable because this company deals in manufacturing of wagons, bogies, couplers, steel casting and structural fabrications as against the metro coaches which were being manufactured by the assessee. It was further submitted that the Ld. Commissioner of Income Tax (A), following the order of the ITAT in the immediately previous year, had allowed the FOC supplies adjustment

to be made while computing the margins of the comparable companies in the year under consideration but adjustment for FOC has not been given appeal effect although the same was allowed by the Ld. Commissioner of Income Tax (A). It was prayed that suitable directions may be given to the Assessing Officer to give the appeal effect.

iv) Besco Limited

It was submitted that this company also was not functionally comparable as this company dealt in manufacturing of wagons as compared to the assessee dealing with metro coaches. It was further submitted that the Ld. Commissioner of Income Tax (A), following the order of the ITAT for the immediately preceding year, had allowed FOC adjustment to be made while computing the margin of the comparable companies but while giving effect to the appellate order, the TPO had not given effect to the FOC supplies adjustment as directed by the ITAT in the immediately preceding year. It was prayed that directions may be given in this regard also.

v) Jessop and Company Limited

It was submitted that the TPO while taking this company as comparable had taken the combined segmental profitability of both EMU and Wagon segments instead of taking them as separate segments. It was submitted that the statutory auditor of Jessop & Co. Limited had classified the two segments as two independent and distinct segments in the schedule pertaining to segmental reporting. It was also submitted that the TPO had considered these two segments as separate segments in assessee's own case for assessment year 2010-11. It was further submitted that in this year, the TPO has taken the miscellaneous income as operating income and computed the margin of this company although the source of miscellaneous income has not been mentioned and, therefore, the same could not have been considered as operating. It was also submitted that there were some calculation errors while calculating the margin of Jessop & Co. Limited because the TPO had taken the same at 0.5% whereas after merging the two segments, the correct margin comes to – 2.38%.

3.9 It was further submitted by the Ld. AR that ground nos. 7 and 8 were not pressed and ground no. 9 was consequential.

4.0 In response, the Ld. C.I.T. DR submitted that ground nos. 3 to 4.2 and 4.3 to 5.1 already stood covered against the assessee by the order of the Tribunal in assessee's own case for the immediately preceding year. It was further submitted that the grounds raised in ground nos. 4.3 to 5.1 were not alternate submissions of the assessee on the same issue and there was no change in facts in this year as compared to the immediately preceding year wherein the ITAT had already considered the CUP method and had rejected the same. It was submitted that under the garb of alternate submissions, the assessee was trying to build a new case. It was also submitted that the Ld. Commissioner of Income Tax (A) had duly considered all the arguments of the assessee and it was incorrect to say that the assessee's submissions had not been considered and adjudicated upon. It was also submitted that there was no requirement for the issue to be restored to the file of the Ld. Commissioner of Income Tax (A) as being prayed by the assessee. The Ld. C.I.T. DR also drew our attention to the observations of the TPO as

appearing in page 3 of the transfer pricing order and submitted that the TPO had given detailed reasons for rejecting the CUP method of the assessee. It was submitted that the order of the Ld. Commissioner of Income Tax (A) deserves to be upheld on this issue.

4.1 With respect to ground no. 5.2 on incorrect rejection of filters as claimed by the assessee, reliance was placed on the observations and findings of the TPO as well as the Ld. Commissioner of Income Tax (A).

4.2 With respect to the comparables being agitated by the assessee, the Ld. C.I.T. DR submitted that the assessee has been agitating for exclusion of Texmaco Rail & Engineering Ltd. on the ground that there were extraordinary events due to demerger in the company and, therefore, this company should be excluded but the TPO has discussed this issue in Para 36 of the order wherein it has been observed that this company has been a steady performer and the merger has not caused any radical difference to the company's results. The Ld. C.I.T. DR highlighted the fact that the business that had merged into this company was also of heavy engineering which would support the existing functions of the company and, therefore, this would not make

this company incomparable. The Ld. C.I.T. DR also highlighted the fact that the accounts of the company also did not show any infirmity.

4.3 With respect to Titagarh Wagons Limited, the Ld. C.I.T. DR submitted that the ld. Commissioner of Income Tax (A) has discussed this issue at length on page 21 of his order wherein he has duly noted that even in the immediately preceding year, the entity level results were considered and, therefore, there was no reason to take only segmental margins for the wagon segment.

4.4 With respect to the comparable Braithwaite & Co. Ltd., the Ld. C.I.T. DR had no objection to the Bench giving directions for giving appeal effect.

4.5 With respect to Jessop & Co. Limited, the Ld. C.I.T. DR submitted that since CUP method had been rejected, TNMM was taken as the Most Appropriate Method and this method envisaged selection of companies which were similar on the basis of FAR analysis. It was submitted that this company had two segments – EMU segment and CS wagon segment but both could be combined if the company is to be taken as a whole for the purpose of comparability. It was submitted that the jugglery of accounting results and mathematical results cannot be allowed to

artificially reduce the margin by increasing the large number of comparables artificially. It was also submitted that miscellaneous income is a normal incidence of business because extraordinary items of income have been shown separately.

4.6 The Ld. C.I.T. DR submitted that the appeal of the assessee deserves to be dismissed.

5.0 We have heard the rival submissions and have perused the material available on record. The first issue arising for our consideration is the assessee's challenge to rejection of CUP method by the department. Ground nos. 3, 4, 4.1 and 4.2 agitate the action of the TPO in rejecting the assessee's stand that CUP method was the Most Appropriate Method. This view of the TPO was further upheld by the Ld. Commissioner of Income Tax (A) who has relied on the order of the ITAT in assessee's own case for assessment year 2010-11 wherein the ITAT also has refused to interfere on the rejection of the CUP method by the lower authorities. Undisputedly, the facts in this year are similar to the facts as in assessment year 2010-11 which has been decided against the assessee by the Coordinate Bench of the ITAT in ITA No. 1626/Del/2015 vide order dated 4.11.2015. This issue was raised by the assessee in ground no. 3.2 of assessee's appeal for

assessment year 2010-11 and the relevant findings while discussing the CUP method, are contained in Para 18, 19, 20 and 21 of the order of the ITAT for assessment year 2010-11. The same are being reproduced herein for a ready reference:-

> *"18. We have perused all the records and heard the submissions made by Ld. AR and Ld. DR. It is pertinent to note, that the Comparable Uncontrolled Price i.e. CUP method is the most direct method for applying the arm's length principle. But the strict requirements of comparability have traditionally made its usage a bit challenging. While applying CUP method, there are certain requirements which should be taken into consideration. These are (i) the data which is widely and routinely used in the ordinary course of business in the particular industry or market segment for determining the prices for uncontrolled transactions, (ii) the data which is used to set prices in the controlled transaction in the same way, as it is used by either controlled companies or uncontrolled companies in the industry, and (iii) the amount charged in the controlled transaction is adjusted to reflect differences that may affect the price that uncontrolled company would agree. In this case, the CUP method will not apply, as the contractual terms though appears similar, are different because the sales of metro train sets by BTIPL to BTG and BTG to DMRC are on different footing altogether which cannot be equated. Ld. TPO has rightly rejected the internal CUP method on the ground that buyer and seller are not only located in different geographical regions, but also at different levels of market, one is selling to international buyer and one is selling to local market. Thus here, the CUP method cannot be applicable as rightly held by Ld. TPO and Ld. DRP. On the contrary, all the transactions being transactions in MLM Division relating to import of components and sub assemblies import of capital goods, availing of intermediary services, sale of metro trains and reimbursement of ex pact salary are so closely related that they cannot be evaluated adequately on an*

individual basis. The reliance of the judgment of Hon'ble Delhi High Court in case of Ramgreen Solutions Pvt. Ltd. Vs. Commissioner of Income Tax (ITA No. 102/2015) also asserts this point and clearly held in para 44 that:

" While using TNMM, the search for comparables may be broadened by including comparables offering services/products which are not entirely similar to the controlled transaction/entity. However, this can be done only if (a) the functions performed by the tested party and the selected comparable entity are similar including the assets used and the risks assumed; and (b) the difference in services/products offered has no material bearing on the profitabililty. "

19. *The case laws which are referred by the assessee at the time of argument are not applicable in the present case first because of the factual difference as those cases were decided on its own factual matrix and whether to apply TNMM or CUP method was depending upon the various factors in those cases. Thus the case laws given by assessee will not be applicable in this context.*

20. *It is pertinent to note, that Ld. TPO relied upon the two cases namely Merck Limited and Diageo India Pvt. Ltd. Ld. TPO discussed the same and held that the level of comparability required for the analysis is different for different methods. Thus, as a methodology, under the TNMM the standard of comparability is relaxed relative to the other methods and requires similarity of functions. This finds support even in the OECD guidelines which provides that, where exact comparables (in terms of product or price) are not available, TNMM is the most 'preferred' methodology in analyzing transactions (at the net level) as it is more tolerant to differences between the tested party and comparable uncontrolled transactions. The use of TNMM method allows comparability of the functions rather than strictly focusing on product/service comparability as in the case of CPLM, Resale Price Method and CUP. Thus TPO finally held that TNMM method shall be used for benchmarking transaction pertaining to passenger and bogie segment. Thus, Ld. TPO has rightly*

applied the TNMM as most appropriate method by looking into the aspect that the assessee was unable to justify with documentary evidence the comparability on the issue of quality of the product or service, contractual terms, level of market, geographical market in which the transaction takes place, date of transactions, intangible property associated with the sale, foreign currency receipt, alternatives realistically available with the buyer and the seller.

21. In result this ground no. 3.2 is dismissed."

5.1 We further note that the issue of rejection of CUP by the TPO and as upheld by the ITAT was not challenged by the assessee before the Hon'ble High Court also and, thus, the issue has attained finality for all practical purposes. Therefore, we have no other alternative but to dismiss ground nos. 3, 4, 4.1 and 4.2 of the assessee's appeal in this year also by respectfully following the ratio laid down by the Coordinate Bench in assessee's own appeal for assessment year 2010-11 as aforesaid. Thus, ground nos. 3, 4, 4.1 and 4.2 stand dismissed.

5.2 In ground nos. 4.3, 5 and 5.1, the assessee has raised an alternate ground that remuneration to the assessee from the international transaction cannot be greater than the overall revenue received from the third party. In this regard, the assessee has drawn our attention to the order of the Delhi Tribunal in the case of Global Vantedge vs. DCIT in ITA No. 2763 and 2764/Del/2009 wherein the Tribunal had held that

adjustment on account of arm's length price of international transactions cannot exceed the maximum arm's length price. Reliance has also been placed on the fact that the Hon'ble Delhi High Court had upheld this order of the Tribunal and the SLP of the revenue before the Hon'ble Apex Court was also dismissed and further reliance has been placed by the assessee in the case of Pepsico India Housing Pvt. Ltd. vs. ACIT in ITA No. 834/Del/2010 and also some other case laws which are part of the written submissions filed by the assessee. The contention of the assessee, while relying on these judicial precedents, is that the entire amount recovered by the AE from the third party i.e. DMRC had been passed on to BTIPL and, therefore, BTIPL could not have recovered any amount which is higher than the amount charged by the AE from the third party. It has been pleaded that although this ground was vehemently raised before the Ld. CIT (A), the Ld. CIT (A) did not specifically adjudicate this ground and proceeded to dismiss the assessee's challenge to rejection of the CUP method without considering these alternate arguments of the assessee. We have perused the order of the Ld. CIT (A) and we do note that although the Ld. CIT (A) has duly reproduced the submissions of the assessee in this regard, he, however, has not

adjudicated this issue specifically. The discussion of the Ld. CIT (A) centers around the rejection of CUP method but does not refer to the submissions of the assessee regarding the issue as aforesaid. Therefore, it is our considered opinion that interest of substantial justice would be served if these grounds are reconsidered by the Ld. CIT (A) and the Ld. CIT (A), after giving due opportunity to the assessee, passes a speaking order on the issue. Accordingly, ground nos. 4.3, 5 and 5.1 are restored to the file of the Ld. CIT (A) to be considered afresh and for the purposes of passing a speaking order after giving due opportunity to the assessee to present its case. Thus, ground nos. 4.3, 5 and 5.1 stand allowed for statistical purposes.

5.3 Ground nos. 5.2 to 5.11 and 6 challenge the comparables. The comparables are adjudicated upon as under:-

i) <u>Texmaco Rail and Engineering Limited</u>

The assessee has prayed for the exclusion of this comparable on the ground that it is functionally not comparable to the assessee company because Texmaco was dealing in wagons whereas the assessee was dealing in Metro train coaches and bogies. It has also been submitted that there were extraordinary events in this

company because heavy engineering and steel foundry businesses of this company were demerged resulting in a substantially abnormal increase in the total income of that company. It has also been pleaded that in the immediately preceding year, margin of the company has been taken at the entity level. It has also been pleaded that the Ld. Commissioner of Income Tax (A), following the earlier order of the ITAT for the immediately preceding year, had allowed adjustment on account of free of cost supplies but the TPO, while giving effect to the order passed by the Ld. Commissioner of Income Tax (A), had not given effect to the adjustment on account of free of cost supplies. Thus, it is undisputed that this company was accepted as a comparable in the immediately preceding year and also the Ld. Commissioner of Income Tax (A) has given relief to the assessee by allowing adjustment to be made on account of free of cost supplies. But it is also seen that in the earlier year, only segmental results pertaining to heavy engineering segment were included whereas in this year, the margins at the entity level have been taken. Therefore, it will be in

the fitness of things if only segmental results of heavy engineering segment are included by the TPO and further the TPO also gives adequate adjustment in respect of free of cost supplies. As far as the assessee's claim of extraordinary event is concerned, it is seen that the TPO has duly considered the assessee's claim of extraordinary event and has noted that this company has been a steady performer and that the demerger has not caused any radical difference to the performance of the company. This observation of the TPO could not be contradicted by the Ld. AR on facts. Therefore, this argument is rejected and accordingly, this comparable is restored to the file of the TPO/Assessing Officer for re-adjudication and re-computation of the margin after including only the heavy engineering segment after giving the benefit of adjustment with respect to free of cost supplies.

ii) Titagarh Wagons Limited

This comparable has been objected to on the ground that this company is dealing in wagons whereas the assessee company is dealing in Metro train coaches and bogies

and, thus, they were functionally dissimilar. However, the fact remains that this company was taken as a comparable in the previous assessment year also and the ITAT had held this company functionally comparable after providing for fee of cost supplies adjustment. It is seen that in the immediately preceding year, the TPO had taken only the wagon segment of the company whereas in the current year, the company has been taken as a whole. This, in our considered opinion, needs rectification. Accordingly, while upholding the inclusion of this company as a comparable, we direct the TPO to re-compute the margin after providing for fee of cost supplies adjustment and also after taking the results of only wagon segment for the purpose of comparability.

iii) Braithwaite and Co. Limited

Although the assessee has agitated the inclusion of this comparable on the ground of functional incomparability because this company deals in manufacturing of wagons, bogies, couplers, steel casting and structural fabrications as against the metro coaches which were being manufactured by the assessee company, the fact remains

that this company was held as a comparable by the ITAT in the immediately preceding year also. However, the ITAT had directed that adjustment should be made with respect to FOC supplies while computing the margins. In this year, the TPO, while giving effect to the order of the Ld. Commissioner of Income Tax (A), has not given effect to the FOC supplies adjustment. Therefore, this comparable is restored to the file of the TPO for the limited purpose of re-computing the margin of this comparable after making suitable adjustment with respect to FOC supplies.

iv) Besco Limited

In the case of this comparable also, it is seen that the Ld. Commissioner of Income Tax (A), while following the order of the ITAT in the immediately preceding year, had directed that FOC supplies adjustment should be given while computing the margins but the TPO while giving effect to the order of the Ld. Commissioner of Income Tax (A) has not done so. Therefore, this comparable is also restored to the file of the TPO for recalculation of the margin after making adjustment to FOC supplies.

v) Jessop and Company Limited

This comparable has been agitated by the assessee on the ground that the TPO has taken combined segmental profitability of both EMU and Wagon segments whereas in the immediately preceding assessment year 2010-11, these two segments were taken as two different segments. It has also been agitated that there are computational errors while computing the margin of this company. It has also been agitated that the TPO has taken the miscellaneous income as operating income for the purposes of calculating of margin of this company. In view of the anomalies pointed out by the Ld. AR in this regard, we deem it fit to restore this comparable also to the file of the TPO for duly considering these objections of the assessee.

5.4 Ground nos. 1 and 2 being general in nature do not require any separate adjudication.

5.5 Ground no. 7 and 8 are dismissed as not pressed.

5.6 Ground no. 9 is consequential in nature and requires no specific adjudication.

6.0 In the final result, the appeal of the assessee stands partly allowed.

Order pronounced in the open court on 9th August, 2019.

Sd/-	**Sd/-**
(R.K. PANDA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 9th AUGUST, 2019
'GS'

Copy forwarded to: -

1) Appellant
2) Respondent
3) CIT(A)
4) CIT
5) DR

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	