

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "J", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.1907/MUM/2016 (A.Y: 2011-12)**

DCIT – 8(2)(1) Room No. 624, 6 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai – 400 020	v.	M/s. Siemens Power Engineering Pvt. Ltd., {Through their successor M/s. Siemens Ltd.,} 130, Pandurang Budhkar Marg Worli, Mumbai – 400 018  <b>PAN: AACCS5323F</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**CO.No. 158/MUM/2016  
[ARISING OUT OF ITA NO.1907/MUM/2016 (A.Y: 2011-12)]**

M/s. Siemens Power Engineering Pvt. Ltd., {Through their successor M/s. Siemens Ltd.,} 130, Pandurang Budhkar Marg Worli, Mumbai – 400 018  <b>PAN: AACCS5323F</b>	v.	DCIT – 8(2)(1) Room No. 624, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020
<b>(Appellant)</b>		<b>(Respondent)</b>

**Assessee by : Shri Nitesh Joshi**  
**Department by : Shri Anand Mohan**

**Date of Hearing : 30.07.2019**

**Date of Pronouncement : 30.09.2019**

## **ORDER**

### **PER C.N. PRASAD (JM)**

1. This appeal and cross objection are filed by the Revenue and assessee against the order of the Dispute Resolution Panel – 2, Mumbai, [hereinafter for short “DRP”] in excluding two comparable companies namely M/s. Rites Ltd., and M/s. HSCC (India) both being the government companies selected by the Transfer Pricing Officer [for short “TPO”] for the purpose of benchmarking the international transactions of the assessee.

2. Briefly stated the facts are that, assessee a wholly owned subsidiary of M/s. Siemens AG, Germany is engaged in the business of preparing designs and developing drawings and designs using customized Computer Aided Designs [CAD] tools which held the associate enterprises [for short “AEs”] in planning, designing and setting up of power plants. The assessee adopted TNMM method with OP/cost as the PLI in the transfer pricing study report. The entity level operating margin of the assessee for the assessment year under consideration has been calculated at 14.71%. In the transfer pricing study report assessee selected the following nine comparable companies for the purpose of benchmarking analyses: -

<b>Sr. No,</b>	<b>Name of the Company</b>	<b>OP/Cost (%)</b>
1	Akshay Software Technologies Limited	0.69
2	C S STechenergy Limited	9.46
3	Chakkilam Infotech Limited	7.47
4	I-Design Engineering Solutions Limited	13.32
5	KLG Systel Limited	(45.89)
6	Neilsoft Limited	(2.21)
7	Powersoft Global Solutions	Not available
8	Tata Elxsi Limited	8.59
9	Varna Industries Limited	14.59
	Arithmetic Mean	0.75

3. Thus, assessee considered its transaction with AE's are at arm's length. However, Transfer Pricing Officer rejected all the comparable selected by the assessee except "I-Design Engineering Solutions Limited". According to TPO since these companies were found to be functionally different from the assessee's business profile, while completing the assessment for the A.Y. 2010-11, he selected the following comparables for benchmarking analysis of the international transactions of the assessee: -

<b>Sr. No.</b>	<b>Name of the Company</b>	<b>OP/Cost (%)</b>
1	Cades Digitech Pvt. Ltd,	5.05%
2	Dalkia Energy Services Ltd.	6.65%
3	Engineers India Limited (Consultancy Seg)	73.50%
4	HSCC (India) Limited	21.89%
5	IBI Chematur (Engineering & Consultancy) Ltd.	25.96%
6	Kirloskar Consultants Ltd.	13.32%
7	Kitco Ltd.	-0.64%
8	Mahindra Consulting Engineers Limited	27.48%
9	Rites Ltd.	30.96%
10	TCE Consultation Engineers Ltd.	46.59%
11	I-Design Engineering Solutions Limited	27.70%
	Arithmetic Mean	25.31%

4. Assessee made its detail submissions vide letter dated 18.12.2014 explaining as to how the aforesaid companies are functionally not comparable to the assessee's business profile. The TPO accepted the contentions of the assessee only in respect of two comparables Engineers India Limited (Consultancy Seg) and IBI Chematur (Engineering & Consultancy) Ltd. as not comparable companies applying the criteria that these companies having employee cost to total cost ratio less than 25% and also having service income to total income ratio less than 75% which was also adopted by the TPO in the A.Y 2010-11. Excluding those two comparable the TPO finally selected the following final set off comparables for benchmarking analysis and arrived at the arithmetic mean of 19.89%.

Sr. No.	Name of the Company	OP/Cost (%)
1	Cades Digitech Pvt. Ltd.	5.05%
2.	Dalkia Energy Services Ltd.	6.65%
3.	HSCC (India) Limited	21.89%
4	Kirloskar Consultants Ltd.	13.32%
5	Kitco Ltd.	-0.64%
6	Mahindra Consulting Engineers Limited	27.48%
7.	Rites Ltd.	30.96%
8	TCE Consultation Engineers Ltd.	46.59%
9	I-Design Engineering Solutions Limited	27.70%
	Arithmetic Mean	19.89%

5. The TPO adopted PLI of the assessee at 13.33% as OP/OC percentage as was shown in the previous assessment year i.e. A.Y. 2010-11 and accordingly the arm's length price of international

transactions relating to engineering and design services of the assessee was computed and the difference in PLI and actual price charged to AE was arrived at ₹.7,31,64,631/- and finally it was adjusted in prorata basis for the value of international transactions and made adjustment of ₹.6,33,82,492/-. Assessee filed its objections before DRP. DRP accepted the submissions of the assessee that M/s. Rites Ltd., and M/s. HSCC (India) being government companies and the revenue of these companies is substantially from projects controlled by the Government or Public Sector Undertakings and also in view of the decisions of the of Mumbai Bench of the Tribunal, the DRP directed the TPO to exclude these two companies from the set of comparable companies selected by the TPO.

6. Ld. Counsel for the assessee at the outset submits that the dispute is only in respect of these two comparables being government companies and referring to the assessment order passed u/s. 143(3) r.w.s 144C(13) of the Act giving effect to the directions of the DRP submits that if these two companies are excluded the Arithmetic Mean of the comparable selected as directed by the DRP is 18.02.% as against the Arithmetic Mean arrived at by TPO at 19.89%. Therefore, the TPO made no adjustment since the difference is within  $\pm 5\%$  of the international transactions.

7. Ld. Counsel for the assessee further referring to the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Thyssen Krupp Industries India (P.) Ltd., [385 ITR 612] submits that a question "whether on the facts and circumstances of the case and in law the Tribunal was justified in excluding M/s. Engineers India Ltd., from the list of comparables" has come up before the Hon'ble High Court and the Hon'ble High Court affirmed the order of the Tribunal in excluding the government company from the list of comparables.

8. Ld. Counsel for the assessee further submits that similar view has been taken by the Hon'ble Delhi High Court in the case of Pr. CIT v. International SOS Services India Pvt. Ltd., in ITA 454/2016 dated 30.05.2017 following the decision of the Hon'ble Bombay High Court in the case of CIT v. Thyssen Krupp Industries India (P.) Ltd., (supra). Ld. Counsel for the assessee submits that SLP filed against Hon'ble Delhi High Court judgement by the Revenue has been dismissed in SLP Civil No. 18255/2018 dated 03.07.2018. Ld. Counsel for the assessee also placed reliance on the decision of the Mumbai Bench of the Tribunal in the case of M/s. Shell India Markets Pvt. Ltd., v. ACIT in ITA.No. 193/Mum/2013 dated 10.12.2014 wherein M/s. Rites Limited has been rejected as comparable company for the reason that it is engaged into

diversified activities and it is a Government of India undertaking providing end to end solutions for turn-key projects.

9. Ld. Counsel for the assessee submits that if these two comparable are excluded from the final list of comparables as directed by the DRP there shall be no adjustment since the difference in Arithmetic Mean of the comparables selected by TPO and the DRP is within  $\pm 5\%$  of the international transactions and in which case the grounds raised in cross objection may not be gone into.

10. On the other hand, the Ld. DR submits that there is nothing in the "Act" to show that Government Companies cannot be considered as comparable companies. Ld. DR placed reliance on the decision of the Delhi Bench of the Tribunal in the case of BG Exploration & Production India Ltd., v. JCIT in ITA.No. 1170/Del/2015 and 1581/Del/2015 dated 24.04.2017 and the decision of the Hon'ble Madras High Court in the case of CIT v. Same Deutz – Fahr India (P.) Ltd., [89 taxmann.com 47]. Referring to the decision of the Hon'ble Madras High Court Ld. DR submitted that while selecting M/s. HMT Limited as comparable the Hon'ble High Court held that there is no provision of law which makes any distinction between government owned company and the company under private management for the purpose of transfer pricing adjustment and

there is no reason why the Government owned company cannot be treated as comparable.

11. Ld. DR further submits that lower Authorities have not examined FAR analysis of these two companies namely M/s. Rites Ltd., and M/s.HSCC (India). Ld. DR submits that simply because these two comparables are Government Companies they cannot be excluded.

12. In reply the Ld. Counsel for the assessee invited our attention to the decision of the Delhi Tribunal in the case of BG Exploration & Production India Ltd v. JCIT (supra) and submitted that the Tribunal found that this company is not a government company since only the specified percentage of the shareholding is held by EXIM Bank and therefore only the provisions with respect to the appointment of the auditors are regulated and it was also found that it does not have any impact on the business model of the Company. Therefore, Ld. Counsel for the assessee submits that the Tribunal found that BG Exploration & Production India Limited is not a Government Company at all. Therefore, the decision may not be applied since it is contrary to the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Thyssen Krupp Industries India (P.) Ltd., (supra). Ld. Counsel for the assessee further submits that the TPO has not brought on record any material to show that these two

companies are functionally comparable to the assessee's company and therefore, they have to be excluded.

13. We have heard the rival submissions and perused the orders of the authorities below and the case laws relied on. In the case of CIT v. Thyssen Krupp Industries India (P.) Ltd., (supra) the Tribunal excluded M/s. Engineers India Limited which is a government company from the list of comparables observing that substantial part of its revenue in execution of turnkey projects arose out of executing projects of public sector undertakings and M/s. Engineers India Limited engineers could not be considered to be a comparable since the contracts between public sector undertakings are not driven by profit motive alone but other considerations such as discharge of social obligations etc also weigh. For this reason, the Tribunal held that M/s. Engineers India Limited a government company is not comparable.

14. The Hon'ble High Court affirmed the order of the Tribunal observing as under: -

*"5. Re question (b):*

*(a) The grievance of the respondent assessee before the Tribunal was that M/s. Engineers India Ltd. has been erroneously introduced as a comparable by the TPO for determining the ALP of the respondent assessee's International Transactions. The impugned order of the Tribunal records the fact that the Engineering India Ltd. is a Government Company and its annual report indicates that a substantial part of its revenue in execution of turnkey projects arose out of executing projects of public sector undertakings. In the*

*circumstances, the impugned order of the Tribunal holds that the Engineers India Ltd. could not be considered to be comparable for the reason that contracts between Public Sector undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable. Moreover, from the annual report, it is clear that the revenue earned in executing turnkey project for other public sector undertakings was much more than the filter of 25%, which has been applied by the TPO in his order under Section 92CA(3) of the Act, while taking TRF Ltd. as a comparable on the ground that its related party transaction was not in excess of 25% of its total turnover. Thus, applying consistent filter of 25% or less of related party transaction alone to be considered comparable, Engineers India Ltd. could not be considered to be comparable.*

*(b) We find that the view taken by the Tribunal in the impugned order is a reasonable and possible view. Nothing has been shown which would justify our interference in the impugned order of the Tribunal excluding Engineers India Ltd. from the list of comparables.*

*(c) In the above view, question (b) as framed also does not give rise to any substantial question of law. Thus, not entertained”*

15. In the case of Pr. CIT v. International SOS Services India Pvt. Ltd., (supra) the Hon'ble Delhi High Court affirmed the order of the Tribunal in excluding ECIL, ITDCL and Apitco being 100% government companies from the list of comparables observing as under: -

*“8. Mr. Ruchir Bhatia, learned counsel appearing for the Revenue, submitted that there was no logic in excluding 100% government owned companies from the list of comparables only because the profit motive is not the only relevant consideration in the case of a government undertaking. Lie submitted that no reasons whatsoever have been given by the ITAT for excluding Apitco Limited as a comparable.*

*9. Mr. Neeraj Jain, learned counsel for the Assessee, on the other hand pointed out that the Mumbai Bench of the ITAT has in an order dated 27<sup>th</sup> February. 2013 in the case of ThyssenKrupp Industries India Pvt. Ltd. excluded 100% government owned companies as comparables for the same reasons given by the ITAT in the present case. That decision of the Mumbai Bench of the ITAT was affirmed by the Bombay High Court in its judgment dated 28<sup>th</sup>*

March, 2016 in ITA No. 2218 of 2013 (CIT v. ThyssenKrupp Industries India Pvt. Ltd.).

10. The Court on perusing the aforementioned judgment of the Bombay High Court finds that in para 4(a) and 4(b) of the said order the Bombay High Court has held that the view taken by the Mumbai Bench of the ITAT "is a reasonable and plausible view". It noted that the ITAT Mumbai Bench had held that the Engineers India Ltd. could not be considered to be comparable for the reason 'that contracts between Public Sector undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable' Interestingly in the present case the Assessee itself picked up two of the 100% government owned companies namely ECIL and ITDCL as its comparables but that was not accepted by the TPO or the DRP. The reason for the ITAT excluding Apitco as a comparable is also for the same reason that it was a 100% government owned company.

11. The Court finds that the view taken by the ITAT in the present case, which is consistent with the view expressed by the Mumbai Bench of the ITAT and which has been affirmed by the Bombay High Court, is indeed a plausible one to take.

12. Whether taking up a 100% government owned company as a comparable would be justified or not would depend on the facts and circumstances of the case. The basic rule as contained in Rule 10B of the Income Tax Rules would apply. In the facts of the present case, however, the Court finds that the view taken by the ITAT does not give rise to any substantial question of law."

16. We also observe that SLP filed against the judgment of Hon'ble Delhi High Court in the case of Pr. CIT v. International SOS Services India Pvt. Ltd., has been dismissed by the Hon'ble Supreme Court in SLP No. 18255/2018 dated 03.07.2018. It is not in dispute before us that the companies selected by the TPO are government companies.

17. Even though we find some force in the submissions of the Ld. DR as this Bench is bound by the decision of the Hon'ble Jurisdictional High Court, we respectfully following the decision of the Hon'ble Jurisdictional

High Court in the case of CIT v. Thyssen Krupp Industries India (P.) Ltd., (supra), we dismiss the grounds raised by the Revenue. In the result, appeal of the Revenue is dismissed.

18. Since we have affirmed the order of the DRP in excluding the government companies from the final list of comparables the grounds raised in the cross objection of the assessee are not gone into and left open without making any comments on merits of the grounds.

19. In the result, both appeal of the Revenue and the cross objection of the assessee are dismissed as indicated above.

Order pronounced in the open court on the 30<sup>th</sup> September, 2019

Sd/-  
**(G. MANJUNATHA)**  
**ACCOUNTANT MEMBER**  
Mumbai / Dated 30/09/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**