

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

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAVISH SOOD, JM**

**ITA No.2132/Mum/2016
(Assessment Year :2011-12)**

M/s. China First Metallurgical Construction India Pvt. Ltd Flat No.1-B/ 1302, 13 th Floor Bhoomi Paradise, Sector-11 Sanpada (E), Navi Mumbai	Vs.	Dy. Commissioner of Income Tax, Panvel Circle, 3 rd Floor, Trifed Tower Opp. Khanda Colony New Panvel – 410 206
PAN/GIR No.AACCC4228P		
(Appellant)	..	(Respondent)

**ITA No.555/Pun/2016
(Assessment Year :2011-12)**

Dy. Commissioner of Income Tax, Panvel Circle, 3 rd Floor, Trifed Towre Opp. Khanda Colony New Panvel – 410 206	Vs.	M/s. China First Metallurgical Construction India Pvt. Ltd Flat No.1-B/ 1302, 13 th Floor Bhoomi Paradise, Sector-11 Sanpada (E), Navi Mumbai
PAN/GIR No.AACCC4228P		
(Appellant)	..	(Respondent)

Assessee by	Ms. Ritika Agarwal & Shri Salman Balbale
Revenue by	Shri Anand Mohan
Date of Hearing	05/09/2019 & 13/12/2019
Date of Pronouncement	20/12/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

These cross appeals in ITA No.2132/Mum/2016 & 555/Pun/2016 for A.Y.2011-12 preferred by the order against the final assessment order

passed by the Assessing Officer dated 29/01/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 17/12/2015 for the A.Y.2011-12.

2. The ground No. 1 raised by the assessee was stated to be not pressed at the time of hearing for which necessary endorsement was made by the Id. AR. Accordingly, the ground No.1 raised by the assessee is dismissed as not pressed.

3. The ground Nos.2 & 3 raised by the assessee are general in nature and does not require any specific adjudication.

4. Transfer Pricing Issue:

Ground No.4 of assessee appeal and ground Nos. 1 to 7 of revenue appeal.

The brief facts of this issue are that the assessee is wholly owned subsidiary of China Metallurgical Group Corporation, China. The assessee entered into the Indian market in 2005 with Registered Office in Mumbai and Corporate Office in Kolkata. Project Management offices are located in Asansol, Bellary, Hazira and Bokaro. It primarily focuses on metallurgical industry and has undertaken sinter plant project in ESSAR (2007-08) integrated steel plant in Electrosteel Integrated Ltd, material handling system in IIACO (2007-08). Its proper project management, experience in construction and high efficiency had helped it in obtaining several important projects in India. The list of international transactions carried out by the assessee with its associated enterprises (AEs) is as under:-

Sr. No.	Nature of International Transactions	Amount (in INR)	Most appropriate Method
1	Manpower charges	43,07,68,000	CUP
2	Equipment purchases	2,63,54,791	
3	Drawings purchases	5,17,22,000	
4	Material purchases	2,14,65,243	
5	Geographical Survey & Consultancy charges	4,69,00,000	
	Total	57,72,10,134	

4.1. The Profit Level Indicator (PLI) adopted by the assessee was Operating Profit / Net Sales (OP/NS) which was calculated at 1.07%. The summary of functional analysis with respect to international transactions carried out by the assessee with its AE is as under:-

A summary of the functional analysis with respect to the international transactions of China First, India is presented below:

Purchase of equipment:- During PY 2010-11, the Company has purchased equipments amounting to INR 2,63,54,791/-

Receipt of manpower:- During FY 2010-11, the Company has procured manpower from its AE for the purpose of executing projects awarded in India. All key decisions with respect to the construct/on contract are initiated by the Company. China First, China is engaged in providing manpower as per the project requirement for execution of the construction of integrated steel plant. The company has paid INR 43,07.68.000/- to the overseas AE, in respect of such manpower charges.

Purchase of drawings:- During FY 2010-11, the Company has purchased detailed engineering drawings for construction, erection, installation and commissioning of steel structure pursuant to onshore services and construction contracts for integrated steel plant project for EIL The company has paid INR 5,17,22,000/- in respect of such drawings.

Purchase of material:- During FY 2010-11 the Company has purchased materials from the overseas AE for construction of the integrated steel plant project. The AE has charged INR 2,14,65,243/- for supply of such materials.

Geographical survey & consultancy charges:- During FY 2010-11, the Company has incurred certain expenses on geographical survey and consultancy provided by its overseas AE. The geographical survey and consultancy is to be provided on regular intervals to inspect the status of the feasibility of a construction work. The company has paid INR 4,69,00,000 to the overseas AE for provision of such geographical survey and consultancy services”.

4.2. The assessee had adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method as noted by the Id. TPO in para 6.1 of his order. The assessee is a tested party herein. The PLI i.e. OP/OI of the assessee is 1.07%. The Id. TPO noted that the companies involved in construction and allied activities like construction of industrial plants, power plants and other industrial plants were searched. The filters applied by the Id. TPO are as under:-

- i) Construction and allied activities.
- ii) Quantitative filter of sales between Rs.10 Crores and Rs.500 Crores.
- iii) Construction income as a percentage of gross sales with more than 80% accepted.

4.3. The assessee took the following comparables for the purpose of benchmarking and the adjusted margins thereon after considering the depreciation as operating cost and without considering working capital adjustments as under:-

	Company Name	Adjusted Operating Profit by Sales
1	Exelon Infrastructure Ltd.	-1.79%
2	KND Engineering Technologies Ltd	-7.12%
3	Pacecon Engineering Project Ltd	-8.99%
4	Prashanth Projects Ltd	1.95%
5	Toyo Engineering India Ltd.	-0.12%
6	UB Engineering Ltd	6.13%

4.4. The Id. TPO observed that on going through the comparables, it is seen that Pacecon Engineering Project Ltd and Toyo Engineering India Ltd, are loss making companies and has huge losses during the year. As seen from the Annual Financial Reports, M/s. UB Engineering Ltd. is functionally incomparable to the assessee and hence rejected. Hence, three of the comparables of the assessee were passed through the functionality filter of the TPO.

4.5. The Id. TPO further observed that certain comparables were chosen by the assessee in the earlier year but had not considered the very same comparables during the year.

4.6. The Id. TPO including the comparables which were taken by the assessee in the earlier year and after rejecting certain comparables chosen by the assessee, arrived at the final list of comparables with their respective operating margins as under:-

Sr. No.	Name of Companies	Net Sales	Oprtnng Profit (inc Depr)	Oprtnng Profit (inc Depr/Sales - %
1.	Artson Engineering Ltd.	135.93	7.64	5.62%
2.	Avasarala	161.16	41.35	25.66%

	Technologies Ltd.			
3.	Exelon Infrastructure Ltd	38.33	0.77	2.01%
4.	KND Engineering Technologies Ltd	71.96	-1.16	-1.61%
5.	Offshore Infrastructures Ltd	367.17	28.18	7.67%
6.	Prashant Projects Ltd.	33.93	1.57	4.63%
7.	Rajpath Contractors & Engg. Ltd	102.09	8.20	8.03%
8.	Vijay Tanks & Vessels Ltd.	350.23	33.67	9.61%
9.	Artefact Projects Ltd	20.96	3.52	16.79%
10.	Engineers India Limited	2652.64	633.87	23.90%
11	SPML Infra Ltd	1222.88	105.22	8.60%
				10.08%

4.7. Based on the above, the Id. TPO arrived at the adjustment of Rs.25,86,21,362/- to be made to the arm's length price as under:-

Particulars	Amount (Rs.)
Operating Income (A)	287,12,50,999
Operating costs (B)	216,05,29,056
Operating Profit (c)	3,08,00,738
OP/OR (actual)	1.07
Arm's length OP/OR	10.08%
Arm's length operating profit (D)=Ax10.08%	28,94,22,100
Adjustment=D-C	25,86,21,362

5. The assessee submitted before the Id. DRP that transfer pricing report clearly contained the reasoning for acceptance or rejection of companies for the purpose of arm's length pricing analysis. Thereafter, working capital adjustment was made to the operating profit margins to ensure comparability with the international transactions entered into by the assessee. The assessee pleaded that the transfer pricing analysis showed

that the main operating profit by net sales margin of the final set of comparables engaged in construction and allied activities was -1.66% and list of particulars of international transaction of the assessee company that achieved the margin of 1.07% was determined to be at arm's length. It was pleaded that the Id. TPO rejected three out of six comparables chosen by the assessee and had further included eight more comparable companies for the purpose of determining the arm's length operating profit margins without considering the reasons supporting their comparability / uncomparability as furnished by the assessee from time to time. It was further pleaded that the Id. TPO erred in disregarding the quantitative and qualitative filters applied for the transfer pricing analysis and has proceeded to determine the arm's length operating profit margin at 10.08% without considering the working capital adjustment thereto. It was specifically brought to the notice of the Id. DRP that the total value of international transaction entered into by the assessee company was Rs.52,72,10,034/- on which, the Id. TPO had made an adjustment of Rs.25,86,21,362/- which works out to approximately 50%.

5.1. The assessee made specific objections before the Id. DRP for inclusion and exclusion of certain comparables on case to case basis by narrating functional dissimilarities and factual mistakes committed by the Id. TPO in his order. It was specifically pleaded by the assessee before the Id. DRP that the set of comparable companies for each assessment year needs to be determined on the basis of a detailed analysis and after application of quantitative and qualitative filters to the set of companies obtained for the relevant assessment year from the financial data base. The company may be comparable in the preceding assessment years, the same may or may not be comparable for the relevant assessment year considering the prevailing facts and circumstances. Accordingly, it was

argued that the action of the Id. TPO to include certain comparable companies merely on the ground that they were included as comparables in the preceding assessment year is totally unjustified, erroneous and arbitrary.

5.2. Since there was no dispute with regard to the PLI and MAM adopted by the assessee, the Id. DRP proceeded to adjudicate each of the comparables that were objected to either for inclusion / exclusion as under:-

9. In Ground No.3, the assessee has raised objections against the action of the TPO of excluding one of the comparables selected by the assessee, i.e., M/s, U B Engineering on the grounds of functional non-comparability. The assessee has contended that the company was engaged in mechanical erection and engineering procurement in construction (EPC) and electrical. Business activities include fabrication & erection of structures, installation, testing and commissioning of electrical & mechanical equipments, piping and turnkey EPC projects. It caters to various industries such as power, refineries, steel, cement, fertilizers and petrochemicals. We find that the TPO has given no reason for concluding that this company was not functionally comparable to the assessee. On the other hand, the activities that the company is engaged in shows that the functions that this company is performing are broadly comparable to the functions being performed by the assessee. U B Engineering should, therefore, be included as a suitable comparable. The ground of objection is allowed.

10. In Ground Nos. 4 & 5, the assessee has objected to the rejection of 2 companies, M/s. Toyo Engineering India and M/s Pacecon Engineering Projects Ltd. as comparables to the assessee company. The A.O. has rejected the above 2 companies for the only reason that these companies are loss making and have incurred huge losses during the year. We are of the opinion that merely because a company has incurred a loss in the year under consideration, it cannot be excluded from the list of comparables. For excluding a company, it should be a persistently loss making company. The TPO has not given any finding that Pacecon had made losses in the immediately preceding assessment year also. The A.O. is directed to verify this fact, if Pacecon had made losses in the immediately preceding year also, it shall not be taken as a suitable comparable to the assessee in the assessment year under consideration. However, if Pacecon ' had not made operating losses in the immediately preceding year, the same shall be included in the list of comparables

10.1 As regards Toyo Engineering India, the assessee has contended that it has an operating profit of Rs.21.7 crores which can be verified from the P & L A/c of the company and, hence, the TPO has erred in excluding the company from the list of comparables. Under the circumstances, the A.O. is directed to verify the aforesaid contention of the assessee. If Toyo Engineering has in fact earned an operating profit during the assessment year, the same shall be included in the list of comparables.

11. As regards Ground Nos. 6 & 7, the assessee has basically objected to the inclusion of Engineers India Ltd and M/s. Artefacts Projects Ltd in the list of comparables. The objection is on the ground that Engineers India Ltd. does not qualify in the quantitative filter of excluding companies wherein the construction income as a percentage of net sales is less than 80% and it also has a very high turnover as compared to the assessee and also fails the quantitative filter of : turnover less than Rs. 1000 crores applied by the assessee in its TPSR and which has not been objected to by the TPO. "

11.1 We have considered the submissions of the assessee in respect of Engineers India Ltd. We find that the application of the turnover filter by the assessee has not been objected to and rejected by the TPO in his order. The turnover of Engineers India Ltd. is stated to be 2656 crores as against the turnover of only Rs.290 crores of the assessee. In Capgemini India Pvt. Ltd. [2013] 33 taxmann.com 5, the Hon'ble ITAT has observed in the context of manufacturing companies that:-

"The concept of economy of scale is relevant to manufacturing concerns, which have high fixed assets and, therefore, with the rise in volume, cost per unit of the product decreases, which is the reason of increase in margin as scale of operations goes up because with the same fixed cost there is more output when the turnover is high".

11.2 Since the application of the turnover filter of Rs.1,000 crores has not been rejected by the TPO and since the turnover of Engineers India Ltd. is many times more than the turnover of the assessee, the said company cannot be considered to be a suitable comparable in the facts and circumstances of the case. The A.O. is, therefore, directed to exclude this company from the list of comparables,

11.3 As regards Artefact Projects Ltd, it is seen from the website that the said company ventured into Infrastructure Consultancy Services as Engineers, Planners & Project Management Consultants in 1988. Its focus is on Services for Highways, Airports, Urban Development (include SEZs, Reality, Townships), It provides entire bandwidth of services from Concept to Commissioning including designing,

drawing, estimation, traffic and revenue studies, contract management, supervision and monitoring, operation and management plans etc.. The assessee has also submitted that the company is engaged in the business of project consultancy and derives its revenue from consultancy segment which is a source distinct and different from the primary source of profits of the assessee company. We find that other than stating that "the company is taken as a comparable as it is functionally similar to the assessee", the TPO has not shown that this company is in fact functionally similar to the assessee, M/s. Artefact Projects Ltd. is, therefore, held to be functionally different from the assessee and is directed to be excluded from the list of comparables.

12. As regards Ground Nos.8 & 9, we find that the companies being objected to as comparables by the assessee were included as comparables in the immediately preceding assessment year also, it will have to be seen afresh as to whether the companies are functionally similar or broadly comparable with the assessee. We find that Avasarala Technologies Ltd., Artson Engineering Ltd., Offshore Infrastructure Ltd. and Vijay Tanks & Vessels Ltd., are found to be functionally broadly similar to the assessee. Rajpath Contractors & Engineers Ltd, are also primarily stated to be engaged in construction of buildings. Hence, it is also broadly similar in functions to the assessee. From the description in the TPSR, it is clear that SPML infra Ltd. is functionally broadly comparable to the assessee.

12.1 We also find that the business activities of the assessee company during the current assessment year remains the same as in the earlier assessment years. in the earlier assessment year, certain companies were found to be functionally comparable to the assessee company by the CIT(A) and the DRP. Hence, unless and until the functions of these comparables are shown to have changed in the current assessment year or the functions of the assessee company are shown to have become different from the earlier years so as to make the comparables dissimilar to the functions of the company, the TPO has every right to consider these comparables for the purpose of computing the arm's length price of the international transaction. The action of the TPO of selecting the comparables which have been upheld by the higher authorities is, therefore, upheld. The ground of the objection filed by the assessee is dismissed."

6. Aggrieved both assessee as well as revenue are in appeal before us.

7. We have heard rival submissions and perused the materials available on record including the judicial pronouncements that were referred to, before us at the time of hearing by both the sides. At the outset, we find that there is no dispute with regard to adoption of MAM, tested party and PLI in the instant case. The only dispute involved is with regard to inclusion and exclusion of certain comparable companies. The interconnected issue involved herein is whether certain comparables which were selected by the assessee in the Transfer Pricing Study Report (TPSR) in the immediately preceding assessment year could be rejected by the assessee in the Transfer Pricing Study Report (TPSR) for the year under consideration without bringing on record any change in the facts and functional profile of those comparable companies distinct with that of the assessee herein.

7.1. We find that the assessee is engaged in the business of engineering procurement and construction contracts on turnkey basis of industrial and power plants excluding hydro power. We find that the assessee had disputed the inclusion of following comparable companies while benchmarking its international transactions and seeking exclusion of the same:-

Sr. No.	Name of Comparable Company	OP/ Sales as reflected by TPO
1	Vijay Tanks and Vessels Ltd.	9.61%
2	Artson Engineering Ltd	5.62%
3	Avasarala Technologies Ltd.	25.66%
4	Offshore Infrastructures Ltd	7.67%
5	Rajpath Contractors and Engineering Ltd	8.03%
6	SPML Infra Limited	8.60%

7.2. The only comparable disputed by the revenue is exclusion of Engineers India Ltd. having margin of 23.90%.

7.3. Exclusion of Vijay Tanks and Vessels Ltd. – 9.61% Margin

We find that this company was included by the assessee in the Transfer Pricing Study Report (TPSR) for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company during that year . We find that the assessee had pleaded that M/s Vijay Tanks and Vessels Ltd is an international engineering, procurement, fabrication and construction company in the energy sector and amongst the world's leading service providers for storage tanks and process equipment. The said comparable provides EPC contracting services for oil and gas storage terminals and fabricates pressure vessels and process equipments for range of industries. We find from the Transfer Pricing Study Report (TPSR) of AY 2010-11, wherein, this comparable i.e Vijay Tanks and Vessels Ltd was shown to have been engaged in the business of construction of other industrial plants in the approved database. Accordingly, this company was selected as a comparable by the assessee as functions performed by both the entities were similar in AY 2010-11. We find that the inclusion of this comparable has been accepted by the Id TPO for AY 2010-11 vide order u/s 92CA(3) of the Act dated 13.11.2013, wherein no TP adjustment has been made / suggested by the Id TPO on any of the international transactions carried out by the assessee during the AY 2010-11. We find that during the year under appeal i.e AY 2011-12, the functions performed by Vijay Tanks and Vessels Ltd and functions performed by the assessee remain the same. Hence there is no reason for excluding the

said comparable while computing the ALP of international transactions carried out by the assessee. Hence we hold that the Id DRP had rightly directed the inclusion of Vijay Tanks and Vessels Ltd in the final list of comparables. The claim by the assessee for exclusion of the same is hereby dismissed.

7.4. Exclusion of Artson Engineering Ltd., - 5.62% margin

We find that this company was included by the assessee in the Transfer Pricing Study Report (TPSR) for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company during that year. We find that the assessee had pleaded that in case of Artson Engineering Ltd, the Board for Industrial and Financial reconstruction (BIFR) had vide its order dated 27/11/2007 sanctioned a rehabilitation scheme which was under implementation at that stage. The Id. AR pleaded that since the company was under BIFR, the operations of the company were significantly different from assessee thereby making it functionally uncomparable. We find from the Transfer Pricing Study Report (TPSR) of AY 2010-11, wherein, this comparable i.e Artson Engineering Ltd was shown to have been engaged in the business of construction of other industrial plants in the approved database. Accordingly, this company was selected as a comparable by the assessee as functions performed by both the entities were similar in AY 2010-11. We find that the inclusion of this comparable has been accepted by the Id TPO for AY 2010-11 vide order u/s 92CA(3) of the Act dated 13.11.2013, wherein no TP adjustment has been made / suggested by the Id TPO on any of the international transactions carried out by the assessee during the AY 2010-11. We find that the Id. AR had not provided any evidence before us to drive home the point that the

functions performed by Artson Engineering Ltd during the A.Y.2011-12 were different from that of the assessee. We find that the Id. AR had only provided the 2 page financials of Artson Engineering Ltd. which admittedly does not contain the functions performed by the said comparable. The functional dissimilarities, if any, during the A.Y. 2011-12, could not be substantiated by the Id AR by cogent evidences. We also find that even when this comparable was included in the list of comparables by the assessee for A.Y.2010-11, the said comparable was under the purview of BIFR. Hence, there is absolutely no good reason for the assessee to take a divergent stand by excluding the same without valid reasons in the form of functional dissimilarities , among others. Hence we hold that the Id DRP had rightly directed the inclusion of Artson Engineering Ltd. in the final list of comparables. The claim by the assessee for exclusion of the same is hereby dismissed.

7.5. Exclusion of Avasarla Technologies Ltd:- 25.66% margin

We find that this company was included by the assessee in the Transfer Pricing Study Report (TPSR) for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company during that year. From the extract of the annual report submitted by the assessee with regard to this comparable under the caption "Segment information", we find that this company provides complete range of engineering solutions to its customers separate across industries. The company's operating business is organized and managed into two primary business segments namely Engineering Projects and Engineering others, with each segment representing a strategic business unit. The engineering project segment provides complete engineering solutions in the areas of process

machinery and automation systems. The Engineering Others segment provides products and services in the areas of Outsourced Machinery in space research, healthcare, precision assembly, speciality metal and allied services. We find that the Id. AR had further submitted that this company was engaged in highly Niche segment of nuclear power machinery based on consistent customer domain and is also engaged in equipments and sub-assemblies for nuclear island, waste fuel handling & processing site services for nuclear power plants, fuel fabrication, equipment of R & D labs, equipments for defence, components for aerospace and oil & gas. It was further pleaded by the Id. AR that engineering construction division which has a very significant presence in the nuclear sector is an important business vertical of Avasarla Technologies Ltd. We find from the Transfer Pricing Study Report (TPSR) of AY 2010-11, wherein, this comparable i.e Avasarla Technologies Ltd was shown to have been engaged in the business of construction of industrial plants in the approved database. Accordingly, this company was selected as a comparable by the assessee as functions performed by both the entities were similar in AY 2010-11. We find that the inclusion of this comparable has been accepted by the Id TPO for AY 2010-11 vide order u/s 92CA(3) of the Act dated 13.11.2013, wherein no TP adjustment has been made / suggested by the Id TPO on any of the international transactions carried out by the assessee during the AY 2010-11. We find that during the year under appeal i.e AY 2011-12, the functions performed by Avasarla Technologies Ltd and functions performed by the assessee remain the same. Hence there is no reason for excluding the said comparable while computing the ALP of international transactions carried out by the assessee. Hence we hold that the Id DRP had rightly directed the inclusion of Avasarla Technologies Ltd in the final list of comparables. The claim by the assessee for exclusion of the same is hereby dismissed.

7.6. Exclusion of Offshore Infrastructures Ltd., - 7.67% margin

We find that this company was included by the assessee in the Transfer Pricing Study Report (TPSR) for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company during that year. We find that the Id. AR had pleaded that Offshore Infrastructure Ltd. is primarily engaged in real estate construction and accordingly functionally not comparable with that of the assessee, but we find that this comparable was sought to be included by the assessee in the Transfer Pricing Study Report for A.Y.2010-11 wherein the functions performed by this comparable was stated as under:-

OIL is a medium sized, fast growing, multi disciplinary engineering Construction Company. it is one of very few Indian Constructions Companies possessing Multi Disciplinary Engineering Skills and having presence in all sector of industry be it Housing, Defense, Pharma, Petroleum, Petrochemical, Power, Water Supply or critical Nuclear sector. The Company has got experience of building large REFINERIES / POWER PLANTS / OIL TERMINALS / WATER SUPPLY RESEVOIERS / PUMPING STATIONS / NUCLEAR PLANTS etc.

The Company maintains a vast equipment pool comprising large fleet of cranes, lifting & material handling equipments, fabrication machineries & civil construction plant & machineries to offer safe & mechanized construction service to its clients. Its major activities include: Mechanical Construction, Industrial Plants, Oil & gas Pumping & Receiving stations, Refineries, Chemical Plants, Fertilizers Plants, Power Plants, Construction of Medium and Large Petroleum products, edible Oil and chemicals Tank Farms. It is further engaged in Civil and Structural Works which includes Civil Construction, Fabrication and Erection of Structural Steel for Power Plants and Refineries Mass Housing. Some of its prestigious clients are Multinational Industrial giants and their subsidiaries viz. Cairn Energy, Shell, British Gas, Sterlite Industries, Wartsila, BASF, Dow Chemicals, etc and Indian majors like Indian Oil, Gas Authority Of India, Hindustan Petroleum, HMEL, MRPL, Bharat Petroleum,

Ranbaxy, Vedanta Group, Asian Paints, Birlas, GNFC, Reliance Energy, Jindal, TATA Power, L & T, BHEL, BARC, Lanco, Reliance Power, and many others.

From the perusal of the aforesaid functions, we find that there is no change in the functions performed by the said comparable. We find from the Transfer Pricing Study Report of AY 2010-11, wherein, this comparable i.e Offshore Infrastructures Ltd., was shown to have been engaged in the business of construction of allied activities in the approved database. Accordingly, this company was selected as a comparable by the assessee as functions performed by both the entities were similar in AY 2010-11. We find that the inclusion of this comparable has been accepted by the Id TPO for AY 2010-11 vide order u/s 92CA(3) of the Act dated 13.11.2013, wherein no TP adjustment has been made / suggested by the Id TPO on any of the international transactions carried out by the assessee during the AY 2010-11. We find that during the year under appeal i.e AY 2011-12, the functions performed by Offshore Infrastructures Ltd., and functions performed by the assessee remain the same. Hence there is no reason for excluding the said comparable while computing the ALP of international transactions carried out by the assessee. Hence we hold that the Id DRP had rightly directed the inclusion of Offshore Infrastructures Ltd., in the final list of comparables. The claim by the assessee for exclusion of the same is hereby dismissed.

**7.7. Exclusion of Rajpath Contractors & Engineering Ltd., -
8.03% margin**

We find that this company was included by the assessee in the TPSR for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company

during that year. We find that the Id. AR had pleaded that Rajpath Contractors & Engineering Ltd., is a company functioning as real estate agency further engaged in real estate consultancy and dealing in property. The said company is primarily engaged in the construction of building whereas the assessee is primarily engaged in engineering procurement and construction contracts thereby making it functionally dissimilar. We find that this company was included in the list of comparables by the assessee in the Transfer Pricing Study Report wherein this comparable was shown to have performed function as real estate agents further engaged in real estate consultancy and dealing in property. We find from the Transfer Pricing Study Report (TPSR) of AY 2010-11, wherein, this comparable i.e Rajpath Contractors & Engineering Ltd. was shown to have been engaged in the business of construction of other industrial plants in the approved database. Accordingly, this company was selected as a comparable by the assessee as functions performed by both the entities were similar in AY 2010-11. We find that the inclusion of this comparable has been accepted by the Id TPO for AY 2010-11 vide order u/s 92CA(3) of the Act dated 13.11.2013, wherein no TP adjustment has been made / suggested by the Id TPO on any of the international transactions carried out by the assessee during the AY 2010-11. We find that during the year under appeal i.e AY 2011-12, the functions performed by Rajpath Contractors & Engineering Ltd. and functions performed by the assessee remain the same. Hence there is no reason for excluding the said comparable while computing the ALP of international transactions carried out by the assessee. Hence we hold that the Id DRP had rightly directed the inclusion of Rajpath Contractors & Engineering Ltd. in the final list of comparables. The claim by the assessee for exclusion of the same is hereby dismissed.

7.8. Exclusion of SPML Infra Ltd – 8.60% margin

We find that this company was included by the assessee in the TPSR for AY 2010-11 i.e immediately preceding assessment year. We find that during the AY 2010-11, the functions performed by the assessee company were similar to the functions performed by the comparable company during that year. We find that the Id. AR had pleaded that SPML Infra Ltd is engaged in infrastructure development, construction, trading, wind power, hydro-generation, waste management etc. It was pleaded that even management discussion analysis report specifies that the said company has vertical comprising of water, environmental, electrical and civil infrastructure works. The Id. AR pleaded that diversified portfolio of the said comparable results in mitigating the risks. Further it was pointed out that the clientele of SPML mainly consists of government undertakings thereby making it functionally dissimilar with that of the assessee. It was also further pleaded by the Id. AR that this comparable has very high turn over and thereby operating on a large scale benefit would ensure economies of scale, higher risk taking capabilities, robust delivery and business models as opposed to the small or medium sized companies as that of the assessee herein. Similarly, the goodwill and brands of these companies enjoy premium pricing and due to scale of operations, these companies enjoy economies of scale, lower cost of infrastructural facilities and employees. Accordingly, it was pleaded that the margins of these comparables cannot be compared with that of the assessee. We find that the turnover of this comparable company i.e. SPML Infra Ltd. for the year under appeal i.e. A.Y.2011-12 was Rs. 1222.88 Crores as is evident from the submission made by the assessee before the lower authorities. The turnover of the assessee herein for A.Y.2011-12 was Rs.287.12 Crores as is evident from the order of the Id. TPO. We find that the Id. TPO had applied quantitative filter of inclusion of certain comparables whose sales

fall within the range of Rs.10 Crores to 500 Crores. Since the turnover of this comparable i.e. SPML Infra Ltd. is more than Rs.500 Crores, we hold that the inclusion of this comparable goes against turnover filter applied by the Id. TPO. Accordingly, we direct the Id. TPO to exclude SPML Infra Ltd. from the final list of comparables. The objection raised by the assessee for exclusion of the same is hereby allowed.

7.9. We find that the Id. AR had placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs. Tata Power Solar Systems Ltd in ITA No.1120 of 2014 dated 16/12/2016 wherein one of the questions raised before the Hon'ble High Court was as under:-

(a) Whether on the facts and in the circumstance, of the case and in law, the Tribunal was justified in excluding two comparable viz. Indowind Energy Ltd. and B. F. Utilities Ltd. for determination of Arm's Length Price (ALP) of international transaction with AEs, when these two comparable were originally included by the assessee company among the compatibles?

The decision rendered by the Hon'ble High Court disposing off the aforesaid question is as under:-

3. Re Question (a):

a) The Respondent-Assessee is engaged in design, development and manufacture and sale of Solar Modules and Systems. During the previous year relevant to subject Assessment Year, the Respondent-Assessee had reported International Transaction with its Associated Enterprises (AE). In the Transfer Pricing Study submitted by the Respondent-Assessee to the Revenue, it had included M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. in the list of two comparables for the purpose of arriving at Arms Length price(ALP) in respect of its transactions entered into with its A. E. However, before the Transfer Pricing Officer(TPO)itself, the Respondent-Assessee sought to withdraw M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. from the list of comparables. This, interalia on the ground of functional differences. However, the same was not permitted by the TPO and was taken into consideration while determining the ALP. This resulted in a draft

Assessment Order based on ALP arrived at on a comparability study inclusive of M/s. Indowind Energy Ltd. and B. F. Utilities Ltd.

(b) The Draft Resolution Panel (DRP) on an application made to it by the Respondent-Assessee did not disturb the inclusion of M/s.Indowind Energy Ltd. and B. F. Utilities Ltd. among the list of comparables to determine the ALP as reflected in the draft Assessment Order. This essentially on the ground that the Respondent-Assessee had itself relied upon by M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. as comparables. Therefore, it was not permissible for the assessee now to withdraw the two companies from comparability analysis.

(c) By the impugned order, the Tribunal allowed the Respondent-Assessee's appeal. It held that merely because an Assessee has included M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. in its list of comparables to determine the ALP would not by itself estop a party from establishing that these companies are not comparable. The impugned order found that the two comparables viz: M/s. Indowind Energy Ltd. and B. F. Utilities Ltd., were engaged in completely different line of business i.e. generation of wind energy while the Respondent-Assessee is engaged in generation of solar energy. Thus, not functionally comparable. In the above view, the impugned order on the basis of Function, Assets & Risk (FAR) analysis excluded M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. from the list of final comparables to determine the ALP.

(d) We find that the impugned order of the Tribunal holding that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistake as on facts, it is not comparable. The Transfer Pricing Mechanism requires comparability analysis to be done between like companies and controlled and un- controlled transactions. This comparison has to be done between like companies and requires carrying out of FAR analysis to find the same. Moreover, the Assessee's submission in arriving at the ALP is ' not final. It is for the TPO to examine and find out the companies listed as comparables which are, in fact comparable. The impugned order has on FAR analysis found that M/s. Indowind Energy Ltd., and B.F.Utilities Ltd., are not comparable. They are in a different area i.e. wind energy while the Respondent-Assessee is in the field of solar energy.

(e) In the above view, question (a) as proposed does not give rise to any substantial question of law. Thus, not entertained.

7.9.1. From the perusal of the aforesaid judgment, it could be seen that for exclusion of certain comparables, in the facts and circumstances of the case before the Hon'ble Bombay High Court, that assessee had clearly brought out the functional dissimilarities with that of the comparable companies. Hence, under these circumstances, the Hon'ble Jurisdictional High Court allowed the claim of the assessee by applying the well settled principle that there is no estoppel against law. We find that the reliance placed on the aforesaid decision of Hon'ble Jurisdictional High court is factually distinguishable with that of the assessee in the instant case. We have clearly brought out that the functions performed by the respective comparable companies were similar to that of the assessee as detailed supra in respect of each of the comparables that are in dispute. Hence, the reliance placed on the decision of Hon'ble Jurisdictional High Court does not come to the rescue of the assessee.

7.10. We hold that the Id. TPO while giving effect to the order of this Tribunal should also arrive at the final list of comparables as directed hereinabove and grant working capital adjustment on the margins of respective comparables as the law thereon is very well settled. The assessee is also directed to re-furnish the workings for working capital adjustment of the final comparable companies to inform the TPO to make

necessary verification and arrive at the revised margin in accordance with law.

7.11. The Transfer Pricing grounds raised in the appeal of the assessee are accordingly disposed off as above.

7.12. Exclusion of Engineers India Ltd – 23.90% margin

We find that the Id. DRP had directed the Id. TPO to exclude this comparable i.e. Engineers India Ltd., as it goes beyond the turnover filter range applied by the Id. TPO in his order. We find that the turnover of Engineers India Ltd., for A.Y.2011-12 i.e. year under appeal is Rs.2652.64 Crores as is evident from the facts submitted before the Id. TPO. We find that the Id. TPO had applied turnover filter to include only those particulars which fall within the turnover range of Rs.10 Crores to 500 Crores. Admittedly this company i.e. Engineers India Ltd. falls outside the said turnover range and accordingly, the same had been rightly directed to be excluded by the Id. DRP from the final list of comparables, on which action, we do not find any infirmity. Hence, the objection raised by the revenue for exclusion of this comparable i.e. Engineers India Ltd., is hereby dismissed.

7.13. We find that the revenue had sought exclusion of some more comparables such as Excelon Infrastructure Ltd, KND Engineering

Technologies Ltd, Prashant Projects Ltd and Pacecon Engineering Pvt. Ltd from the list of comparables on the ground that these comparables also fail the turnover filter applied by the TPO but we find that inclusion of these comparables by the Id. TPO in the final set of comparables were not at all agitated by the assessee before the Id. DRP on the ground of filing of turnover filter applied by the Id. TPO. Hence the ground No.5 raised by the revenue before us does not arise out of the orders of the Id. DRP. Accordingly, the ground No.5 raised by the revenue is also dismissed.

7.14. The transfer pricing grounds raised by the revenue are disposed off in the above mentioned manner.

7.15. Accordingly, the transfer pricing ground No.4 raised by the assessee is partly allowed and transfer pricing grounds raised by the revenue are dismissed.

8. Disallowance of provision made for contingency of expenses –

Rs.12,50,00,000/-

Ground No. 5 & 6 raised by the assessee

The brief facts of this issue are that the assessee company had been consistently following accounting policy of recognizing revenue and expenses pertaining to turnkey contracts on 'percentage of completion

method' after considering current as well as estimated cost. During the year under consideration, the assessee company has estimated that expenses amounting to Rs.12,75,00,000/- have been incurred till date in respect of provision of the projects awarded so completed. The estimated amount of administrative and general expenses which are specifically pertaining to the provision of such projects so completed are also included in the amount mentioned above. The Id. AO from the perusal of the profit and loss account observed that assessee has shown profit of Rs.3,55,25,899/- on turnover of Rs.287,12,50,999/- which worked out to 1.23% of sales. From the balance sheet it was also seen that an entry of Rs.12,75,00,000/- under the head 'estimated liabilities' out of which Rs.10,00,00,000/- related to other project expenses and Rs.2,75,00,000/- related to other administrative expenses was made. The Id. AO observed that as these estimated expenses were debited to the profit and loss account and were unpaid till 31/03/2011, the assessee was asked to give its reply on the issue of identifying the beneficiaries of these expenses. The assessee replied that in the financial statements for A.Y.2012-13, the entry related to estimated expenses of Rs.12,75,00,000/- was reversed by the assessee during the A.Y.2012-13. The assessee replied vide letter dated 05/03/2015 that estimated liabilities of Rs.12.75 Crores were debited to work in progress (WIP) which includes many project and other related costs on estimated basis as all the relevant expenses relate to the

year under consideration but the bills for the same were not submitted by 31/03/2011. The Id. AO observed that after hearing the CFO of the assessee on 05/03/2015, it was very clear that the assessee has not identified the specific work and beneficiaries relatable to the estimated expenses. He observed that very fact with this provision for expenses has been reversed by the assessee in the immediately succeeding year in its books goes to prove that the provision made for expenses during the year under consideration was not genuine and only contingent in nature. The Id. AO also observed that assessee has shown work in progress of Rs.101,15,64,631/- as against advances received from customers of Rs.188,39,88,741/-. He observed that usually the work in progress would atleast be to the tune of advances received from customers whereas in the instant case, figure of work in progress is much lower. Hence, he disregarded the contention of the assessee that estimated expenditure of Rs.12.75 Crores is included in the work in progress. Finally, the Id. AO proceeded to disallow the sum of Rs. 12.50 Crores towards the provisions for estimated expenses. The Id. DRP observed that even after providing sufficient opportunities before it to the assessee, the assessee has not come forward to furnish the details and explanations with proper evidences by furnishing the details of beneficiaries of those expenses. Accordingly, the Id. DRP concluded that assessee has not been able to

prove the genuineness of the expenses, and hence, the disallowance made thereon to the tune of Rs.12.50 Crores by the Id. AO was upheld.

9. Aggrieved the assessee is in appeal before us.

10. We have heard rival submissions. We find that the Id. AR had filed a petition for admission of additional evidence in Rule 29 dated 16/01/2019 wherein the following additional documents were furnished by him.

Exhibit	Nature of document	Page
		no.
A	Breakup of Rs.12.75 crores.	1
B	Payment details of provisions for consumables for Rs.70,83,548/-.	2-3
C	Payment details of provisions for Crane & Fork Lift charges of Rs.172,60,947/-,	4-7
D	Payment details of provisions for Erection work for Rs.59,95,077/-	8
E	Payment details of provisions for Labour Charges for Rs.481,04,314/-	9-11
F	Payment details of provisions for Civil, STR & Erection works for Rs.500,93,802/-	12

G	A copy of ESL for YE 31/03/2011	13-16
H	A copy of ESL for YE 31/03/2012	17-23
I	A copy of ledger account of ESL for YE 2011 - W1P	24
J	A copy of ledger account of ESL for YE 2012 - WIP	25
K	A copy of legal notice to Electrosteel Steels Ltd. (ESL), invoking arbitration clause.	26-28

10.1. We find that these details were actually called for by the lower authorities from the assessee and despite several opportunities, the assessee had not furnished the same before them. Even in the petition filed under rule 29 of the ITAT rules, we find that the assessee had not furnished proper reasons for not furnishing these details even before the Id. DRP. Hence, we deem it fit and appropriate not to entertain these additional evidences filed by the assessee at this stage. However, considering the undisputed fact that the sum of Rs.12.75 Crores has been reversed by the assessee in A.Y.2012-13 i.e. amount offered to tax in A.Y.2012-13 in order to avoid double taxation of the same sums, we direct the Id. AO to remove the said sum from the income of the A.Y.2012-13. This, in our considered opinion, would meet the ends of justice for both the parties. Accordingly, the petition filed for admission of additional evidences is hereby rejected and ground Nos.5 & 6 raised by the assessee are dismissed.

11. In the result, appeal of the assessee is partly allowed and appeal of the revenue is dismissed.

Order pronounced in the open court on this 20/12/2019

**Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER**

**Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER**

Mumbai; Dated 20/12/2019
KARUNA, *sr.ps*

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, Mumbai