

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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &  
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER

ITA NO.7808/MUM/2012(A.Y.2008-09)

Schindler India Private Limited,  
401-B, Delphi, Hiranandani Business Park,  
Powai, Mumbai – 400 076  
PAN: AAEC5 1548J

..... Appellant

Vs.

The Asstt. Commissioner of Income Tax 8(3),  
Mumbai.

..... Respondent

Appellant by : S/Shri Dhanesh Bafna & Nishant Shah  
Respondent by : Shri Uodal Raj Singh

Date of hearing : 14/01/2020  
Date of pronouncement : 17/02/2020

ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against assessment order dated 30/10/2012 passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (in short 'the Act').

2. Shri Dhanesh Bafna appearing on behalf of the assessee submitted at the outset that though appeals of the assessee for assessment year 2004-05 and 2005-06 are pending for adjudication, the appeal for assessment year 2008-09 can be taken up for hearing as issues involved in the appeal for assessment year 2008-09

are independent and have no bearing on the issues/grounds raised in the appeals for assessment years 2004-05 and 2005-06.

Shri Uodal Raj Singh representing the Department concurred with the contentions of Id. Authorized Representative for the assessee. Thus, with the consent of both sides, this appeal of the assessee for assessment year 2008-09 is taken up for adjudication.

3. The Id. Authorized Representative for the assessee explaining the facts of the case submitted, that the assessee company is engaged in the business of installation, assembling and maintenance of Lifts and Escalators. The assessee entered into international transaction with its AEs during the period relevant to the assessment year under appeal. The assessee applied Transaction Net Margin Method(TNMM) as the most appropriate method to benchmark its international transactions, which is not disputed by the Revenue. The assessee selected OP/Sales as its PLI and has computed the same at 7.10%. The assessee selected four companies as its comparables i.e.:-

S.No.	Company Name	Operating Profit Margin (OP/Sales)
1	High Quality Steel Ltd.	3.06%
2	S S S Electrical (India) Ltd.	3.47%
3	Voltas Ltd.	8.45%
4	Alfa Laval (India) Ltd. – Process Technology	21.52%
	Mean	9.63%

The TPO accepted three comparables out of four. The TPO rejected S.S.S. Electricals (India) Ltd. on the ground that the said company is having low turnover. The TPO further observe that the annual report of the said company was not made

available and hence, the assessee has failed to prove functional comparability of the said company.

3.1 The Id. Authorized Representative for the assessee submitted that in the proceedings before DRP the assessee furnished functional comparability analysis of S.S.S. Electricals India Ltd. and also the annual report of the said company to show that the turnover of the company is more than one crore. The assessee had applied turnover filter with minimum turnover of Rupees One crore. As per the Directors report of S.S.S. Electricals (India) Ltd., the turnover of the company during the financial year 2007-08 was Rs.2,01,32,072/-. The Id. Authorized Representative for the assessee referred to page 132 of the Paper Book in support of his contentions. The Id. Authorized Representative for the assessee pointed that the DRP after considering the contention of the assessee directed the TPO to verify whether the comparable had a turnover of Rs.2 crore and in case the turnover is more than one crore, the comparable should be included in the list of comparables. However, the TPO /Assessing Officer failed to give effect to the directions of DRP.

3.2 In respect of ground No.2, the Id. Authorized Representative for the assessee submitted that the Assessing Officer received AIR information regarding assessee's transactions with 616 entities. The assessee could reconcile transaction with 602 entities from the list of 616 entries. In respect of remaining 14 transactions aggregating to Rs.68,43,715/-, the Id. Authorized Representative for the assessee categorically stated that these entities had no business relation with the assessee in the impugned assessment year, still the Assessing Officer proceeded on to make addition in respect of the remaining 14 entities. The DRP restored this issue back to the file of Assessing Officer to afford an opportunity to the assessee to reconcile the remaining transaction. The Id. Authorized Representative for the assessee submitted that the Assessing Officer did not allow any opportunity to the assessee in

compliance with the directions of the DRP. The Id. Authorized Representative for the assessee further submitted that once having denied to have any business transactions with those 14 entities during the impugned assessment year, the onus was on the Department to prove that assessee had business transaction with the said entities during the impugned assessment year. The assessee cannot be burdened to prove negative. In support of his contentions, the Id. Authorized Representative for the assessee placed reliance on the following decisions:-

- ( 1) A.F.Ferguson & Co. Vs. JCIT, ITA No.5037/Mum/2012(Mum-Trib)
- (2) Shri S.Ganesh vs. ACIT, ITA No.527/Mum/2010(Mum-Trib)
- (3) Arati Raman vs. DCIT, ITA No.245/Bang/2012(Bang-Trib)

3.3 In respect of ground No.3 to ground No.5 of the appeal, the Id. Authorized Representative for the assessee submitted that the authorities below have failed to allow deduction in respect of provision for bad and doubtful debts amount Rs.1,40,22,384/- while computing book profit under section 115JB of the Act. The Id. Authorized Representative for the assessee submitted that the assessee in the P&L Account has debited the provision for doubtful debts aggregating to Rs.1,40,22,384/- and has added back the same in sundry debtors. The assessee has given accounting treatment to the provisions for bad and doubtful debts in accordance with the decision of Hon'ble Bombay High Court in the case of CIT vs. Tainwala Chemicals and Plastics India Ltd, reported as 215 Taxman 153. The Id. Authorized Representative for the assessee to further buttress his contentions, placed reliance on the decision of the Hon'ble Gujarat High Court in the case of CIT vs. Vodafone Essar Gujarat Ltd., 397 ITR 55(Guj).

4. Per contra, the Id. Departmental Representative vehemently defended the impugned assessment order. In respect of ground No.1 the Id. Departmental Representative submitted that it is not only the turnover filter but on account of functional disparity as well S.S.S. Electricals (India) Ltd. was removed from the list of comparables by the TPO . The assessee had not furnished relevant data before the TPO for comparison. The Id. Departmental Representative further contended that assessee is having turnover of more than Rs.188.00 crores, whereas the turnover of S.S.S. Electricals(India) Ltd. is merely one crore. It is a well settled law that a company with a small turnover cannot be compared with a company having huge turnover.

4.1 In respect of ground No.2 of the appeal, the Id. Departmental Representative submitted that AIR information was received on the basis of TDS deducted in the name of the assessee. Undisputedly, the assessee was able to reconcile 602 entries from the total list of 616 entries. The Assessing Officer made addition of unreconciled 14 entries as the assessee had claimed TDS benefit of the said entries. The Id. Departmental Representative vehemently supported the finding of Assessing Officer in making the addition.

4.2 In respect of ground No.3, the Id. Departmental Representative vehemently supported the directions of DRP in not allowing deduction for provision for bad and doubtful debts while computing book profits under section 115JB of the Act. The Id. Departmental Representative pointed that the assessee had not made claim in the return of income. The assessee made claim for the first time before the Assessing Officer. Thus, the claim was rightly rejected by the Assessing Officer in the light of judgment of Hon'ble Supreme Court of India in the case of Goetze India Ltd. vs. CIT reported as 284 ITR 323 (SC).

5. The Id. Authorized Representative for the assessee controverting the submissions of Id. Departmental Representative in respect of Ground No.3 fairly admitted that the claim was made for the first time before the Assessing Officer during assessment proceedings. The Assessing Officer may not have jurisdiction to entertain fresh claim i.e. claim not made in the return of income, however, the appellate authorities are not precluded to entertain the claim made by the assessee during the assessment proceedings. The assessee's claim was considered by the DRP, however, the same was rejected on merits.

6. We have heard the submissions made by rival sides and have perused the orders of authorities below. In ground No.1 of the appeal, the assessee has assailed adjustment of Rs.7,35,65,122/- made on international transaction for import of stores and spares, Lifts and Escalators from the AEs. The assessee is engaged in installation, assembling and maintenance of Lifts and Escalators. The Assessing Officer has not disputed TNMM as the most appropriate method and the filters applied by the assessee for selecting comparables to benchmark international transactions. The assessee selected four comparables to benchmark its transactions of purchase of stores and spares of Lift and Escalators from its AEs. The list of the comparables selected by assessee have already been mentioned in para -3 of the order above. The dispute is only with regard to S.S.S. Electricals (India) Ltd.. The TPO rejected said comparable on two grounds, i.e.:

(i) the company is having turnover less than one crore; and

(ii) the company is not functionally comparable.

The assessee assailed the findings of TPO before the DRP. The Id. Authorized Representative for the assessee has drawn our attention to Para 1.17.5 of the objections filed by the assessee before the DRP. The assessee has answered both

the objections taken by TPO for rejecting the aforesaid cross objection as comparable. The Id. Authorized Representative for the assessee has referred to Directors report for F.Y. 2007-08 of S.S.S. Electricals (India) Ltd. at page 132 of the Paper Book to show that the turnover of the company was more than Rs.2 crores. A close reading of the directions of the DRP reveal that the DRP has not made any comment regarding functional disparity of the said company. As regards turnover the DRP directed the TPO to include the said company in the list of comparables, if turnover is more than one crore. The contention of the Id. Authorized Representative for the assessee is that after the directions of DRP, neither the TPO nor the Assessing Officer afforded any opportunity of hearing to the assessee. The Assessing Officer has passed the impugned order confirming adjustment in respect of international transactions. The Id. Departmental Representative has failed to controvert the contentions of the Id. Authorized Representative for the assessee. It is not emanating from the impugned assessment order dated 30/10/2012 that any opportunity of hearing was afforded to the assessee in line with the directions of the DRP.

6.1 A perusal of the Directors Report of S.S.S. Electricals (India) Ltd, which is part of Annual Report for A.Y. 2007-08. prima-facie reveal that the turnover of said company is more than two cores. Thus, the said company qualifies turnover filter applied by the assessee. It is pertinent to mention here that the range of turnover filter applied by the assessee has been accepted by the TPO. Thus, considering the facts of the case and the material available on record, we direct the TPO to include S.S.S. Electricals (India) Ltd. in the list of comparables. The assessee succeeds on ground No.1 of the appeal.

7. The Ground No.2 of appeal is against the addition of Rs.64,28,945/- on account of unaccounted income reflected in Form 26AS. A perusal of the documents

on record show that AIR information is based on TDS statement. In total 616 entries were subject matter of reconciliation. The assessee could reconcile 602 entries. As regards remaining 14 entries, the assessee categorically denied to have any business transactions with those entities in the impugned assessment year. The DRP restored this issue to the Assessing Officer to give opportunity of hearing to the assessee for reconciliation. The Assessing Officer confirmed the addition in the final assessment order without complying with the directions of DRP.. The assessee has categorically denied to have claimed the benefit of TDS or receipt of any income from unreconciled entries. We are of considered view that merely on AIR information based on TDS statement addition cannot be made in the hands of the assessee. The assessee has successfully reconciled 602 entries from the total 616 entries in question. For the remaining entries the assessee has denied to have transactions with the parties during the impugned assessment year. Since, the assessee has denied the transactions, onus was on the Revenue to show that TDS reflected in Form 26AS is in respect of the amounts that have been received by the assessee during the relevant period. The Revenue has failed to discharge its onus. The Bangalore Bench of the Tribunal in the case of Arati Raman vs. DCIT (supra) has held that addition cannot be sustained on the basis of AIR information alone. The onus is on the Department to prove correctness of information by way of bringing cogent evidence. For the sake of completeness the relevant extract of the findings of the Tribunal on this issue are reproduced herein below:-

*“13. In the present case, the assessee denies having made any such investment. The onus is on the revenue to show that the assessee made investments. The AIR which is the only basis on which the AO has proceeded to make the impugned addition is not conclusive as to the factum of the assessee having made investments. In this regard, the Id. counsel for the assessee has also filed before us the Frequently Asked Questions & Answers on AIR brought out by the Income Tax Department.*

*In answer to question 38 as to under what circumstances the AIR will not be accepted, one of the answers given by the department is that mismatch of name of filer mentioned in Form 68A with AIR file but no document submitted in support of name appearing on Form 61A (Part A). Further, the press release dated 26.10.2006 brings out the CBDT Guidelines for dealing with the grievances arising out of cases selected for scrutiny on the basis of information contained in AIR. The guidelines mentions that when a grievance is projected by a tax payer with regard to AIR, steps should be taken to redress such written grievances expeditiously.*

*14. As already stated, the Bangalore Bench of ITAT in the case of G. Selvakumar (supra) has already taken the view that assessment order based only on the AIR will not stand in the eye of law. Further, the Hon'ble Bombay High Court in the case of RBNJ Naidu v. CIT 29 ITR 194 (Nag) has held that when an assessee denies that he is in receipt of income from a particular source, it is for the ITO to prove that the assessee received income and that the assessee cannot prove the negative. In this regard, as early as on 23.01.2012 the assessee has written a letter to the CIT (Computer Operations), Banglaore-I denying the correctness of the AIR in so far as addition of Rs. 21 lakhs sustained by the CIT(Appeals) is concerned. The department has not acted on this letter. In the light of the above discussion and on the facts and circumstances of the present case, we are of the view that the addition of Rs. 7 lakhs sustained by the Id. CIT(Appeals) deserves to be deleted."*

Similar view has been taken by Mumbai Bench of Tribunal in the case of A.F Ferguson & Co vs. JCIT (supra). Thus, in view of the facts and the decisions discussed above, we find merit in the contentions of the assessee. Since the Revenue has failed to lead positive evidence, the addition of Rs. 64,28,945/- is deleted and ground No.2 of the appeal is allowed.

8. In ground No.3 to 5 of appeal, the assessee has assailed non-granting of deduction in respect of provision for bad and doubtful debts while computing book profits under section 115JB of the Act. The claim was not made by assessee in return of income. The assessee made claim of provision for bad and doubtful

debts for the first time before the Assessing Officer. The Assessing Officer rejected the same. However, the DRP entertained claim of the assessee but rejected assessee's contentions on merits.

The Id. Authorized Representative for the assessee has drawn our attention to the P&L Account for the financial year ended 31/03/2008, wherein provision for doubtful debts amounting to Rs.1,40,22,384/- has been debited to P&L Account and the amount has been reduced from debtors in the Balance Sheet. The contention of the assessee is that bad debts have been actually written off in line with the accounting treatment approved by Hon'ble Bombay High Court in the case CIT vs. Tainwala Chemicals and Plastics India Ltd.(supra),

9. Upon careful perusal of Schedule -9 of assessee's financial statements as placed on record, we find that on the one hand the assessee has debited provision for doubtful debts amounting to Rs.140.22 lakhs in the P&L Account and has also deducted accumulated provisions from Sundry Debtors in Schedule-3, on the other hand, the assessee in Schedule-9 has also claimed separate deduction of Bad Debts written off. During the relevant period the assessee has written-off bad debts amounting to Rs.19,55,117/-. Bad debts have been written off in similar manner in the immediately preceding financial year as well. Thus, it is quite evident that the assessee is claiming deduction of actual bad debts written-off and at the same time the assessee is making provision for doubtful debts. Since, deduction is being claimed as well as allowed for actual bad debts written-off, no separate deduction for provision for doubtful debts would be available to the assessee. If the claim of assessee is accepted, it would amount to double deduction which is impermissible. The assessee has itself made clear distinction between bad debts actually written off and the provision for doubtful debts. The accounting treatment being followed by

the assessee establishes that the provision for doubtful debts were mere unascertained liability.

10. The case laws relied on by the assessee would not support the cause of assessee as they are distinguishable on facts. Since, we have held that provision of doubtful debts is not an allowable deduction while computing income under normal provisions, as a corollary to the aforesaid findings the Book Profits under section 115JB are not required to be reduced by that extent. We do not find any infirmity in the impugned order in rejecting assessee's claim. Thus, in view of our above findings, ground No.3 to 5 of the appeal are dismissed.

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

Order pronounced in the open court on Monday, the 17<sup>th</sup> day of February, 2020.

Sd/-

(N.K.PRADHAN)

ACCOUNTANT MEMBER

Mumbai, Dated 17/02/2020

Vm, Sr. PS(O/S)

**Copy of the Order forwarded to :**

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

Sd/-

(VIKAS AWASTHY)

JUDICIAL MEMBER

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)

**ITAT, Mumbai**