

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA Nos.1403/Del./2015  
(Assessment Year : 2004-05)**

**ITA Nos.1404/Del./2015  
(Assessment Year : 2005-06)**

DCIT, Circle 4 (2), vs. M/s. Bechtel India Private Limited,  
New Delhi. 418, Naurang House,  
21, K.G. Marg,  
New Delhi – 110 001.

**(PAN : AAACB0298A)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : S/Shri Nishant Saini, Aditya Anand &  
Ankit Bhatia, ARs

REVENUE BY : Shri Surender Pal, CIT DR

Date of Hearing : 24.02.2020

Date of Order : 04.05.2020

**ORDER**

**PER BENCH :**

Since common questions of facts and law have been raised in both the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, DCIT, Circle 4 (2), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeals sought to set

aside the impugned orders both dated 30.01.2015 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 254/143 (3) r/w section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment years 2004-05 & 2005-06 on the grounds inter alia that :-

**“AY 2004-05**

***“The Ld. DRP has erred in law and on facts in directing the TPO to include M/s. U.B. Engineering Ltd., Tata Projects Ltd. and L&T Sargent Lundy Ltd. as comparable ignoring the fact that the functional profiles of these companies are different from the profile of the assessee.”***

**“AY 2005-06**

- 1. The Ld. DRP has erred in law and on facts in directing the TPO to exclude M/s. NTPC Electricity Supply Company Ltd. as comparable ignoring the fact that Organisation of Economic Cooperation and Development (OECD) Guidelines advocate use of TNMM Method as it allows comparability of the functions rather than strictly focusing on product/service comparability as in the case of Cost Plus Method, Resale Price Method and Comparable Uncontrolled Price Method.***
- 2. The Ld. DRP has erred in law and on facts in directing the TPO to include M/s. U.B. Engineering Ltd., Tata Projects Ltd. and L&T Sargent Lundy Ltd. as comparables ignoring the fact that the functional profiles of these companies are different from the profile of the assessee.”***

2. This is second round of litigation as in the first round, coordinate Bench of the Tribunal had remitted the matter back to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) afresh by treating the company to be involved in the business of engineering design and drawing services instead of company engaged in Information Technology Enabled Services

(ITES) for benchmarking the Engineering Design Services (EDS) segment.

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Bechtel Corporation, USA has set up a subsidiary company in India, namely, M/s. Bechtel India Private Limited (BIPL), the taxpayer, in April 1994 to render engineering support services in respect of engineering designs and drawings. The taxpayer executes engineering designs and drawings for various overseas Bechtel entities/Associated Enterprises (AEs) to support the overseas offices turnkey project execution. The taxpayer has been established to :-

- (i) *Carry on engineering design, drawing, project monitoring and control, project support, procurement services and construction services;*
- (ii) *Create a multidiscipline engineering center for Bechtel's projects and to provide administration and processing services to Bechtel entities;*
- (iii) *Establish a strong local engineering presence for projects in India;*
- (iv) *Provide financial and management accounting services;*
- (v) *Develop a cost-effective resource base for projects worldwide through associations with major Indian producers and equipment manufacturers and also providing procurement services for other Bechtel entities;*
- (vi) *Provide outsourced services to overseas Bechtel entities.*

4. During the assessment years 2004-05 & 2005-06, the taxpayer entered into international transactions with its AEs as under :-

**AY : 2004-05**

<i>Sr.No.</i>	<i>Nature of transaction</i>	<i>Arm's length price as per taxpayer</i>
<i>(i)</i>	<i>Provision of engineering services and relating services</i>	<i>Rs.43.46 crores</i>
<i>(ii)</i>	<i>Reimbursement of expenses (paid)</i>	<i>Rs.0.16 crores</i>
<i>(iii)</i>	<i>Reimbursement of expenses (received)</i>	<i>Rs.5.53 crores</i>

**AY : 2005-06**

<i>Sr.No.</i>	<i>Nature of transaction</i>	<i>Arm's length price as per taxpayer</i>
<i>(i)</i>	<i>Provision of engineering services and relating services</i>	<i>Rs.45.77 crores</i>
<i>(ii)</i>	<i>Reimbursement of expenses (paid)</i>	<i>Rs.0.16 crores</i>
<i>(iii)</i>	<i>Reimbursement of expenses (received)</i>	<i>Rs.4.67 crores</i>

5. The taxpayer in order to benchmark its international transactions qua provision of Engineering Design Services (EDS) chosen 9 comparables in its Transfer Pricing (TP) study out of which 8 comparables have been rejected by the TPO by applying various filters and during the remand proceedings, TPO conducted fresh TP study and chosen 7 new comparables having margin of 32.47% as against taxpayer's margin of (-) 6.77% and thereby made an addition of Rs.13,67,89,416/- for AY 2004-05.

6. Likewise, in AY 2005-06, having identical facts, the taxpayer chosen 10 comparables in its TP study out of which TPO rejected 9 comparables by applying various filters, conducted fresh TP study chosen 4 new comparables qua provision of design engineering services

and the 5 comparables having margin of 29.46% as against taxpayer's (-) 0.56%, the TPO made addition of Rs.13,44,93,575/-.

7. The Revenue carried the matter before the Id. DRP by filing objections having limited grievance that the TPO has arbitrarily excluded 3 comparables selected by the taxpayer in its TP study in AYs 2004-05 & 2005-06 viz. ***UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd.*** on the ground that these comparables failed service income filter of 75%. Accepting the contentions raised by the taxpayer, the Id. DRP directed the TPO to accept the aforesaid three comparables and consequently post-DRP directions, AO passed final order with revised arm's length margin determined by AO at 15.34% & 20.23% and thereby made addition of Rs.6,22,45,957/- & Rs.9,22,55,794/- for AYs 2004-05 & 2005-06 respectively. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeals in both the AYs 2004-05 & 2005-06.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

9. Post-DRP directions, final set of comparables for benchmarking the international transactions for AYs 2004-05 & 2005-06 are as under :-

**AY 2004-05**

S.No.	Company Name	Margin as per TP Order OP/TC	Post DRP Directions	
			Margins OP/TC	Working Capital Adjusted (OP/TC)
1	Holtec Consulting Pvt. Ltd.	11.97%	11.97%	15.26%
2	IL&FS Education & Technology Services Ltd	11.22%	11.22%	12.69%
3	IL&FS Transportation Networks Ltd	51.29%	51.32%	50.86%
4	Rites Ltd	30.7%	30.70%	31.88%
5	Stup Consultants Ltd.	19.36%	19.38%	18.77%
6	T C E. Consulting Engineers Ltd	11.79%	11.78%	12.28%
7	Wapcos Ltd.	18.95%	18.95%	17.95%
8	U B Engineering Ltd.	-	4.27%	1.07%
9	L&T Sargent & Lundy Limited	-	-14.20%	-11.75%
10	Tata Projects Limited	-	-1.67%	4.40%
	Average	32.47%	14.71%	15.34%

**AY 2005-06**

S.No.	Company Name	As per TP Order OP/TC	Post DRP Directions	
			OP/TC Margins	Working Capital Adjusted (OP/TC)
1	Holtee Consulting Pvt. Ltd.	36.01%	36.00%	37.71%
2	Rites Ltd	34.19%	34.19%	32.63%
3	T C E Consulting Engineers Ltd	22.95%	22.95%	21.96%
4	U B Engineering Ltd.	-	1.36%	1.95%
5	Tata Projects Limited	-	4.03%	6.88%
	Average	31.05%	19.71%	20.23%

10. Now, the identical grievance of Revenue raised by filing presents appeals for AYs 2004-05 & 2005-06 is :-

*“The DRP has erred in law and facts directing the TPO to include UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd. as comparables on the ground that functional profile of these companies are different from the profile of the taxpayer?”*

11. However, when we examine the TP order passed by the Id. TPO qua rejection of aforesaid 3 comparables to benchmark the international transactions, it is undisputed fact that the Id. TPO has not rejected aforesaid 3 comparables on ground of functional dissimilarity rather rejected the same on ground of failing service income filter. For ready perusal, findings of the TPO rejecting comparables contained in para 4.7 of the TP order of AYs 2004-05 & 2005-06 containing identical comments are as under :-

**AY 2004-05**

	<i>Company Name</i>	<i>Comments of the TPO</i>
<i>1</i>	<i>L &amp; T -Sargent &amp; Lundy Ltd.</i>	<i>Service income less than 75%, hence rejected</i>
<i>2</i>	<i>Tata Projects Ltd.</i>	<i>Service income less than 75%, hence rejected</i>
<i>3</i>	<i>U B Engineering Ltd.</i>	<i>Service income less than 75%, hence rejected</i>

**AY 2005-06**

	<i>Company Name</i>	<i>Comments of the TPO</i>
<i>1</i>	<i>L &amp; T -Sargent &amp; Lundy Ltd.</i>	<i>Service income less than 75%, hence rejected</i>
<i>2</i>	<i>Tata Projects Ltd.</i>	<i>Service income less than 75%, hence rejected</i>
<i>3</i>	<i>U B Engineering Ltd.</i>	<i>Service income less than 75%, hence rejected</i>

12. When we examine para 4.4.4 of TP order the ld. TPO has categorically applied service income threshold income of 75% to ensure selection of companies having functional profile similar to that of the taxpayer. So, ld. TPO applied filter that companies should have at least 75% of its revenue from technical consultancy services to be eligible as a comparable to benchmark the international transactions qua EDS.

13. The ld. DR for the Revenue challenging the impugned order passed by the ld. DRP contended that the DRP has not applied its mind in deciding the issue and the findings returned by the ld. DRP are unreasonable and even no findings have been returned by the ld. DRP qua suitability of UB Engineering Ltd. as a comparable.

14. However, on the other hand, ld. AR for the taxpayer contended that the only ground on which ld. TPO has rejected UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd. is failing of service income filter of 75% which is not sustainable and drew our attention towards extract of the annual report of UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd., available at pages 379, 378 & 375 respectively of the Paper Book, produced before the ld. DRP which shows that all three companies pass service income filter of 75%. For ready perusal,

extract of annual report showing income of all the aforesaid 3 companies having service income of more than 75% is as under :-

***UB Engineering Limited***

<b><i>Company Name</i></b>	<b><i>Income from technical service</i></b>	<b><i>Total income</i></b>	<b><i>Service Income/ Total income</i></b>
<b><i>UB Engineering Limited</i></b>	<b><i>747,463,720</i></b>	<b><i>751,952,786</i></b>	<b><i>99.40%</i></b>

***TATA Projects Limited***

<b><i>Company Name</i></b>	<b><i>Income from technical service</i></b>	<b><i>Total income</i></b>	<b><i>Service Income/ Total income</i></b>
<b><i>Tata Projects Limited</i></b>	<b><i>2,561,181,348</i></b>	<b><i>2,590,244,324</i></b>	<b><i>98.88%</i></b>

***L & T Sargent & Lundy Limited***

<b><i>Company Name</i></b>	<b><i>Income from technical service</i></b>	<b><i>Total income</i></b>	<b><i>Service Income/ Total income</i></b>
<b><i>L &amp; T Sargent &amp; Lundy Limited</i></b>	<b><i>84,617</i></b>	<b><i>100,006</i></b>	<b><i>84.08%</i></b>

15. Moreover, UB Engineering Ltd. has been accepted as a suitable comparable by the Tribunal in taxpayer's own case for AY 2010-11, copy available in the judicial file, and Id. TPO in AYs 2007-08 & 2008-09 has himself included UB Engineering Ltd. for benchmarking the international transactions when undisputedly

there is no change in the business model of the taxpayer since 2007-08.

16. So far as contention raised by the Id. DR for the Revenue that Id. DRP has erred in including aforesaid 3 comparables by ignoring the fact that functional profiles of these companies are different from the profile of the taxpayer is concerned when undisputedly no such findings have been returned by the TPO nor he has questioned functional dissimilarity of taxpayer vis-à-vis UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd., this issue has been raked up before the Tribunal first time.

17. Moreover, when we examine the orders passed by the Tribunal in taxpayer's own case for AYs 2007-08, 2008-09 & 2010-11, UB Engineering Ltd. has been included by the TPO himself as a comparable and there is no change in the functional profile of the taxpayer ever. So, this contention of the Id. DR for the Revenue is not tenable. However, we direct Id. TPO to verify the data supplied by the taxpayer from annual report if the UB Engineering Ltd., Tata Project Ltd. and L&T Sargent & Lundy Ltd. are having service income of more than 75% to retain as a suitable comparables.

18. In AY 2005-06, Revenue also challenged exclusion of NTPC Electric Supply Ltd. (NTPCESL) as a comparable by the Id. DRP

on the ground that Id. DRP has ignored the fact that Organisation of Economic Cooperation and Development (OECD) Guidelines advocate use of TNMM Method as it allows comparability of the functions rather than strictly focusing on product/service comparability as in the case of Cost Plus Method, Resale Price Method and Comparable Uncontrolled Price Method.

19. When we examine the functional profile of taxpayer its functional profile is to render engineering support services by way of preparing designs and drawings as per specification for its AEs i.e. Bechtel Corporation, USA and its entire revenue is from 100% export of services to its AEs having foreign currency fluctuation risk and 100% related party transactions whereas on the other hand, NTPCESL as per its annual report, is a 100% Government owned company, subsidiary of National Thermal Power Corporation with its activities as advisory-cum-consultancy under the Accelerated Power Development Reforms Programme (APDRP), an initiative taken by the Ministry of Power for development reforms, has been undertaken by the company.

20. NTPCESL has been awarded consultancy work in the areas of Project Monitoring, Quality Assurance and inspection of APDRP work of Bhopal and Gwalior regions by Central Zone of Madhya Pradesh State Electricity Board/Madhya Pradesh Madhya

Kshetra Vidyut Vitaren Company Ltd. Similar assignments of consultancy work in Indore and Ujjain circles along with eight districts of Western Zone of Madhya Pradesh State Electricity Board/Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd. are also in progress since last year. Chandigarh Administration has decided to entrust the Turnkey Contract for design, supply, erection, testing and commissioning of a 2X20 MVA sub-station along with associated HT line at Mani majra to NTPCESL.

21. NIPCESL signed an MOU with Rural Electrification Corporation Ltd.(REC) for taking up rural electrification work in West Bengal under Government of India's Accelerated Rural Electrification Programme. A quadripartite Agreement has been signed between REC, WBSEB, Government of West Bengal and NTPCESL for the same along with a Supplementary Agreement between REC and your company for execution of the work. As per the agreement with REC, your company will be executing the work in Kharagpur Block - 1 and 2 of West Midnapore Distt, of West Bengal. The NTPCESL is yet to undertake commercial activities in the area of distribution of power. It is exploring various options in this field. NTPCESL is in discussions with the Government of Karnataka for acquisition of Manglore circle of Manglore Electric

Supply Company Ltd. (MESCOM) in Karnataka. Based on the detailed discussions with Government of Karnataka, Karnataka Power Transmission Corporation Ltd. and MESCOM a draft Agreement for acquisition of electricity distribution business in Mangalore Circle has been sent to Government of Karnataka.

22. An Expression of interest was submitted to Gujarat Electricity Board for appointment as City distribution franchisee In the Cities of Baroda and Rajkot. Discussions are in progress for identification of a Suitable distribution area in Gujarat, which is to be handed over to the Joint Venture Company to ensure bankability of the proposed 1000 MW power project at Pipavav as per the provisions of the MOU signed between NTPC, Gujarat Power Corporation Ltd. and Gujarat Electricity Board. NTPCESL has also decided to take up the distribution of electricity in the neighbouring areas of NTPC power stations. For this purpose the matter regarding required allocation of power from the unallocated quota of NTPC power stations has already been taken up with the Ministry of Power. Distribution of electricity in these areas is proposed to be undertaken by applying to the State Electricity Regulatory Commission for parallel license. As a pilot scheme, Electricity Distribution in the Korba Revenue District near NTPC station in Chhattisgarh is being undertaken.

23. NTPCESL has not been found as a suitable comparable in *taxpayer's own case in AY 2009-10 in ITANo.882/Del/2014 order dated 14.10.2015*, copy available on the judicial file, by returning following findings :-

*“17. In view of proposition laid down by the ITAT, Mumbai, we observe that in that case, Engineers India Ltd. earned income from turnkey projects by successfully completing the project of IOCL and other public sector undertaking and the related party transaction were much more than the filter of 25%, therefore, the order for exclusion of Engineers India Ltd. was passed by the Tribunal. In the present case, the NTPCES was sheltered by its holding company NTPCES and government companies and departments awarded/entrusted various projects/contracts for rural electrification, distribution of power and project management consultancy, therefore, NTPCES loses the tag of comparability with the assessee Bechtel India. We also find it appropriate to mention that it cannot be ignored that the NTPCES is also enjoying settlement of all employees from the holding company NTPCS at cost and the benefits received from the holding company and related party transactions (RPT) are not monetised in the annual report and in absence of specific data in this regard, NTPCES cannot be held as comparable with the assessee company. Therefore, AO/TPO was not justified in including NTPCES in the final set of comparables for benchmarking impugned international transaction of the assessee company and they are directed to delete the same. We order accordingly.”*

24. Even otherwise, NTPCESL is entirely provided work by its holding company, NTPC, and various projects and contracts are being awarded by Government companies/Departments and as such, is functionally dissimilar vis-à-vis the taxpayer.

25. In view of what has been discussed above, we are of the considered view that ld. DRP has rightly excluded NTPCESL as a comparable on ground of functional dissimilarity.

26. Resultantly, both the appeals filed by the Revenue are dismissed.

**Order pronounced in open court on this 4<sup>th</sup> day of May, 2020.**

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

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 4<sup>th</sup> day of May, 2020  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A).
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**