

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

ITA NO. 1727/MUM/2015 : **A.Y : 2010-11**

DCIT – 1(1)(1),
Mumbai. (Appellant) vs. M/s. Alstom India Ltd.,
(Formerly Alstom Project India Ltd.)
The International, 5th floor, 16,
New Marine Lines, Off M.K. Road,
Mumbai 400 020.
PAN : AABCA8679F (Respondent)

CO NO. 71/MUM/2015 : **A.Y : 2010-11**
(in ITA NO. 1727/MUM/2015)

M/s. Alstom India Ltd.,
The International, 5th floor, 16,
New Marine Lines, Off M.K. Road,
Mumbai 400 020. vs. ITO – 1(1)(1),
Mumbai. (Respondent/
Orig. Appellant)
PAN : AABCA8679F
(Cross Objector/Orig. Respondent)

ITA NO. 1956/MUM/2015 : **A.Y : 2010-11**

M/s. Alstom India Ltd.,
The International, 5th floor,
16, New Marine Lines,
Off M.K. Road, Mumbai 400 020. vs. DCIT – 1(1)(1),
Mumbai. (Respondent)
PAN : AABCA8679F (Appellant)

ITA NO. 1585/MUM/2016 : **A.Y : 2011-12**

M/s. Alstom Projects (India) Ltd.,
(now known as "Alstom India
Ltd.") vs. ITO – 1(1)(1),
Mumbai. (Respondent)
The International, 5th floor,

16, New Marine Lines,
Off M.K. Road, Mumbai 400 020.
PAN : AABCA8679F (Appellant)

ITA NO. 2065/MUM/2016 : **A.Y : 2011-12**

ITO – 1(1)(1),
Mumbai. (Appellant)

vs. M/s. Alstom Projects (India) Ltd.,
The International, 5th floor,
16, New Marine Lines,
Off M.K. Road, Mumbai 400 020.
PAN : AABCA8679F (Respondent)

ITA NO. 2228/MUM/2017 : **A.Y : 2012-13**

M/s. GE Power India Ltd.
(formerly known as Alstom India
Ltd.)
The International, 5th floor,
16, New Marine Lines,
Off M.K. Road, Mumbai 400 020.
PAN : AABCA8679F (Appellant)

vs. Addl. CIT, Range – 1(1),
Mumbai. (Respondent)

ITA NO. 956/MUM/2018 : **A.Y : 2013-14**

M/s. GE Power India Ltd.
(formerly known as Alstom India
Ltd.)
The International, 5th floor,
16, New Marine Lines,
Off M.K. Road, Mumbai 400 020.
PAN : AABCA8679F (Appellant)

vs. DCIT, Range – 1(1)(2),
Mumbai. (Respondent)

Assessee by : **Ms. Fereshte Sethna &
Shri Mrunal Parekh**

Revenue by : **Shri Anand Mohan**

Date of Hearing : **28/08/2020 & other earlier dates**

Date of Pronouncement **31/08/2020**

ORDER**PER SHAMIM YAHYA, ACCOUNTANT MEMBER**

These are appeals by the assessee and Revenue and Cross objection by the assessee for the concerned assessment years as mentioned above. Since, the issues are common and connected and the appeals were heard together, these are being consolidated and disposed off together for the sake of convenience.

At the outset, it is noted that in ITA No. 956/Mum/2018 there is a delay of 63 days in filing the appeal. The reasonable cause for the delay has been attributed to the reason that concerned person was medically unfit. In this regard, assessee has duly submitted an Affidavit in support of the reasonable cause. Upon hearing both the parties and perusing the records, we are inclined to condone the delay. Accordingly, the delay in ITA No. 956/Mum/2018 is condoned.

The various grounds arising in the assessee's appeal and cross objection are dealt as under.

One common issue raised in these appeals relate to disallowance of the claim of adjustment for extraordinary expenses relating to recovery of production overheads, selling and administrative overheads, one time technological fee for Chennai metro in the Transport segment.

A.Y	Amount	Items of adjustment claimed
2010-11	3.52 crores	Unabsorbed production overhead
2011-12	2.42 crores	Unabsorbed production overhead

2012-13	6.03 crores	Unabsorbed production overhead
2010-11	3.4 crores	Under-recovered selling & administrative expenses
2011-12	7.27 crores	Under-recovered selling & administrative expenses
2012-13	8.78 crores	Under-recovered selling & administrative expenses
2013-14	4.70 crores	Under-recovered selling & administrative expenses
2014-15	3.39 crores	Under-recovered selling & administrative expenses
2013-14	2.36 crores	One time technological fee of Chennai Metro

The assessee company is a part of the Alstom group, which was headquartered in France. The assessee is now GE Power India Ltd. In assessee's Transfer Pricing proceedings, the Transfer Pricing Officer (TPO) had made adjustments in respect of Transport segment and Power segment.

In the Transport segment, the assessee has aggregated all the transactions pertaining to the segment and has applied Transactional Net Margin Method (TNNM) to benchmark the international transaction. During his examination, the TPO observed that while working out the margin in Transport segment, the assessee has wrongly added to operating profits the following items :-

- i) Extraordinary overheads production cost;
- ii) Extraordinary overheads selling and administrative cost; and,
- iii) One time technological fee for Chennai Metro.

The assessee's reported financials did not disclose any of these adjustments. It was claimed as adjustment after the audited financials by the assessee for transfer pricing. While examining the submissions in this regard, the TPO observed that assessee has claimed that certain available manpower could not

be utilised. The TPO observed that the assessee's expenditure are routine and normal as in the industry. The TPO was also not convinced with the documents submitted in this regard.

In assessment year 2012-13, the assessee also submitted additional evidences and the Dispute Resolution Panel (DRP) also obtained remand report. The DRP proceeded to uphold the TPO's action. The DRP observed that TPO has basically highlighted certain issues and principles which need consideration :-

- i) Whether the assessee can be allowed to use budgeted figures to work out extra ordinary expenditure ?
- ii) When the assessee itself is tested party, can the assessee deviate from actual figures of profit/loss account while benchmarking the transactions ?
- iii) Whether adjustment in the case of tested parties can be allowed/permitted when similar data for comparables is either not available or not furnished ?
- iv) Whether the claim of adjustment sought by the assessee presupposes that comparables are utilising their full capacity ?
- v) Whether the adjustment of part of the deduction overheads and selling and administrative overheads sought is extraordinary ?

The DRP proceeded to examine these issues. It referred to Rule 10B and observed as under :-

“3.11 It will be relevant to refer to Rule 10B(3) for the purpose of consideration of the issue of the comparability adjustments. Rule 10B(3) provides that an uncontrolled transaction shall be comparable to an international transaction, if none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions or likely to materially affect the price, cost or the profit arising from such transactions in the open market or reasonably accurate adjustment can be made to eliminate the material effect of such differences. In other words, if the difference between the international transactions and uncontrolled comparable are insignificant, which do not affect the price, cost or transaction, no comparable adjustment are required. However, in case the differences between the international transactions and uncontrolled comparable are significant, but reasonable accurate adjustment can be made to eliminate the differences then, comparable adjustments are required.

3.12 In this case, TNM Method has been adopted for which reference can be made to Rule 10(B)(1)(e) of the Income Tax Rules. The TNM Method described in the Rule as five sub-clauses and reference is invited to sub-clause (iii), which especially refers to adjustments. According to the Rule, the profit arising in comparable uncontrolled transaction has to be adjusted to take into account the differences, if any, between the international transaction and comparable uncontrolled transaction or between the enterprises entering into such transaction, which could materially affect the net profit margin in the open market.

3.13 The comparability adjustment under the TNM Method, taking into account the Rule 10B(3) and Rule 10B(1)(e), has been subject matter of consideration and interpretation by the Tribunal in various decisions.”

Thereafter, the DRP referred to certain case laws in this regard, which are as under :-

- i) Haworth (India) (P.) Ltd., 11 taxmann.com 76 (Del.)
- ii) M/s. Geodis Overseas (P) Ltd., 45 SOT 375 (Del.)
- iii) Honda Motorcycle & Scooters India (P) Ltd., 56 taxmann.com 237 (Delhi)
- iv) Petro Araldite (P.) Ltd., 35 taxmann.com 590 (Mum.)

- v) M/s. EDAG Engineers and Design India (P.) Ltd., 50 taxmann.com 322 (Delhi)
- vi) Westfalia Separator India (P.) Ltd., 52, taxmann.com 381 (Delhi)
- vii) Thomas Cook (India) Ltd., ITA No. 1261 & 1238/Mum/2015 dated 31.05.2016

Referring to the above cases, the DRP found that if adjustment is to be made to assessee's financials, similar adjustments are also required for the results of the comparable. The DRP observed that the Tribunal in various cases has laid down the proposition that tested party is not permitted to deviate from the book profit, on the ground of capacity utilisation, etc. The DRP inferred that the adjustment has to be made to the results of the comparable to bring it to the level of efficiency or inefficiency of the tested party. For the purpose of carrying out reasonable accurate adjustments to the comparables, proper data and details are required not only of the assessee, but also in respect of comparable companies. The DRP observed that the assessee in its submission has nowhere demonstrated data, manner and methodology of absorption of overheads by the comparables selected and used for benchmarking under the TNM method.

The DRP referring to the case laws found that similar claim by assessee of not working at full capacity and recovery of cost at a lower rate were rejected by the Tribunal. In view of the cases referred above, the DRP upheld the action of TPO denying the adjustment on account of extraordinary production overheads and extraordinary selling and administration. Against this order, assessee is in appeal before us.

The learned counsel of the assessee in his submissions submitted that the extraordinary expenditures were required to be removed for proper

comparison. As regards one-time technological assistance fee of Rs.2.36 crore in relation to Chennai Metrorail project, she submitted that the same was necessary to give the necessary upgrade to the system. She submitted that as per the Rules, in order to compute the correct profitability from an international transaction of the tested party, that is, the assessee, it is necessary to eliminate cost/expenditure in respect of extraordinary items, non-recurring events which are extraordinary in nature. She further referred to the guidance note issued by the Institute of Chartered Accountants of India (ICAI) for the definition of the term 'extraordinary item' and 'operating profit'. She submitted that, accordingly, expenses of non-recurring and/or extraordinary nature are to be excluded at the time of computing the operating profit. She submitted that one-time technological assistance expense was incurred in connection with a specific requirement of Chennai Metrorail project as the entire manufacturing unit required a technological upgrade and, therefore, such expenditure is to be treated as an extraordinary expenditure and non-recurring in nature. As regards the under-recovered selling and trading overheads, she submitted that these are extraordinary expenses. She submitted that the detailed reason for the same has been provided. She submitted that despite assessee providing all the necessary details, the authorities below have not accepted the same. In this regard, she placed reliance upon the case law from Hon'ble Apex Court for the proposition that the Revenue authorities cannot sit in the armchair of assessee to determine the nature and extent to which it should incur expenditure in relation to business. She submitted that the under-recovered selling and administrative overheads should be treated as extraordinary in nature, and thereby excluded in computing the profits. She further submitted the *safe harbour rule* and various case laws in this regard to support the case of the

assessee. She submitted that in order to carry out actual comparison between the margins of the assessee and the comparable company, the TPO ought to have allowed adjustment to eliminate differences between the tested party, that is, the assessee and the comparables. She further submitted that if the TPO was of the view that adjustments cannot be carried out in the tested party, then the TPO was duty-bound to eliminate differences by making suitable adjustments to the operating margin of comparables. In this regard, she relied upon several case laws.

She further placed reliance upon Hon'ble Bombay High Court decision and ITAT decision in assessee's own case for the proposition that proportionate adjustment on the international transactions with the AE's should be made and it should not be made at an entity level. She further submitted that in assessee's own case for assessment year 2009-10 & 2010-11 on similar facts, it has also been accepted by DRP that addition should be made only in respect of international transactions. Hence, she submitted that without admitting any disallowance of adjustment for extraordinary overheads it is her contention that if adjustment for extraordinary overheads are not allowed by the TPO and adjustment are restricted to AE transaction only, then assessee's claim would fall under the *safe harbour rule*.

The Departmental Representative in the submissions has submitted that extraordinary expenses and production overheads were disallowed by the TPO correctly. The learned Departmental Representative submitted that these are not extraordinary expenses. Since such expenses have been incurred year after year, he submitted that these are regular business expenses for any business concern. He further submitted that the Accounting Standard - 5 mentions that extraordinary items need to be disclosed in the statement of

Profit & Loss Account. He submitted that there is no such disclosure of extraordinary items in the assessee's financial accounts. Further, the learned Departmental Representative submitted that the assessee being a tested party is not permitted to make adjustment in its book profit on account of capacity utilisation etc. since as per the Rules, adjustment, if any, can be made to the results of the comparables to bring it to the level of efficiency or inefficiency of the tested party. For this proposition, he placed reliance upon several case laws.

The learned Departmental Representative further submitted that, to allow any adjustment to the comparables under transfer pricing studies, initial duty has been cast on the assessee to demonstrate with proper details manner and methodology of absorption of such overheads by comparable selected. He submitted that assessee has failed to provide such data and details to the TPO. He further submitted that it is undisputed fact that the international transactions constitute only a small portion of the total business of the Transport segment. In such circumstances, the adjustment in Transfer Pricing study, as claimed by the assessee, cannot be allowed at entity level. The learned Departmental Representative submitted that in ground No. 5 the assessee has requested to restrict the Transfer Pricing adjustment to AE transaction only.

We have carefully considered the submissions and perused the records. We find that the adjustment on account of extraordinary expenses in production overheads and selling and administrative overheads claimed by the assessee are not of any specific distinct expenditure. These are the regular expenses normally incurred by the assessee during the course of business. The assessee is making comparison from its budgeted figures and the actual

figures and has proceeded to disallow expenditures claiming them to be extraordinary and non-recurring expenses. It is a fact that these expenditures have been regularly incurred year after year. This itself shows that the assessee's claim of it being extraordinary and non-recurring is not sustainable. Assessee in its submission has given definition of 'extraordinary item' claiming them to be distinct from ordinary activity of the enterprise. How the expenditures incurred in the normal course of business year after year are distinct from ordinary activities is beyond comprehension. Furthermore, as rightly pointed out by the DRP, the assessee has proceeded to make adjustment in its profits despite the assessee being the tested party. There is nothing on record to suggest that in the comparables submitted, whether there was any adjustment for extraordinary and non-recurring items. This was required as evident from the various case laws referred by the DRP. Assessee itself being the tested party cannot adjust its profits without ensuring corresponding adjustment in the result of comparables. As regards the one-time technical assistance fee for Chennai Metrorail project is concerned, we find ourselves in agreement with the TPO that it is very much normal business expenditure of the assessee and same cannot be said to be extraordinary. That DRP has not specifically dealt with this item is not of significance. Furthermore, we find that it is an accepted accounting principle that extraordinary expenditures have to be identified separately in the financial accounts. In the financial accounts of the assessee there is no such identification of extraordinary items. Hence, the deduction of expenditure, claiming them to be extraordinary expenses for the purpose of Transfer Pricing study is clearly an afterthought devoid of cogency. The learned counsel of the assessee's submission that it was Assessing Officer's duty to bring the details of adjustment required in comparables is totally unsustainable as the

initial duty in this regard is cast on the assessee. The assessee has miserably failed in discharging this initial duty. Accordingly, in our considered opinion, the adjustment sought by the assessee in this regard has rightly been disallowed by the authorities below.

However, we agree with the submission of the learned counsel of the assessee that Hon'ble Bombay High Court in the case of assessee itself and the ITAT also in assessee's own case have held that the adjustments have to be made with regard to the transactions of the AE and not at the entity level. (CIT Vs. Alstom Projects I. Ltd. (88 Taxman.com 465), Bombay High Court upheld the order of the ITAT for A.Y. 2006-07 in ITA No. 8670/Mum/2010) Furthermore, we note that in assessee's own case, the DRP for assessment year 2009-10 and 2010-11 has held that adjustment, if any, must be made only in respect of international transactions pertaining to Transport segment of the assessee and not the segment as a whole. In our considered opinion, the above is also a sound and consistent proposition and we are of the considered opinion that the same should be applied for the current year also. Furthermore, it is a submission of counsel of the assessee with respect to the financial year 2013-14 that if the adjustment is restricted to AE transaction of Transport segment, the addition under Transport segment would significantly reduced and once adjustments are carried out, the adjustments would fall within the *safe harbour rule*. In our considered opinion, there is no infirmity in the principles in this regard. The TPO is directed to make the computation by making the adjustment to AE transaction to Transport segment.

Another issue raised relates to transfer pricing adjustment on account of disallowance of Royalty payment in the Power segment as under :-

Assessment Year	Amount
2012-13	41.73 crores (Technology Licence Agreement 24.96 crores + 16.77 crores Trademark)
2013-14	50.71 crores (Technology Licence – 33.24 crores + 16.96 crores Trademark)

The assessee has made payment as Royalty to its Associated Enterprise and the same was aggregated along with purchases, sales and provision of technical services. Assessee had applied TNMM under the Power segment. The TPO rejected the assessee's approach. He held that entity level benchmarking of royalty transaction was not acceptable. Further, he held that under the transfer pricing provisions, international transactions have to be benchmarked separately. As Royalty constituted a separate class of transaction, it should be benchmarked separately. In this regard, the TPO relied upon certain case laws.

In response, the assessee submitted alternative benchmarking by submitting comparable analysis with 8 agreements for the issue of royalty for technical know-how and 4 comparables for benchmarking royalty for trademark fees. The assessee's submission of 8 comparable agreements and royalty fee before TPO were as under:-

"1) Comparable analysis of technical know-how Royalty agreements :

In this connection, the assessee submitted following eight comparable agreements and royalty rates

<i>Sr.No.</i>	<i>Licensee Name</i>	<i>Royalty rate</i>
1	<i>Ocean Equipments Manufacturing and Sales Company</i>	<i>15.00%</i>
2	<i>Parker – Hannifin corporation</i>	<i>16.67%</i>
3	<i>Aspect Systems</i>	<i>9.75%</i>
4	<i>Aspect Systems, Incorporated</i>	<i>6.00%</i>
5	<i>Benthos Inc</i>	<i>6.00%</i>
6	<i>Blue Industries</i>	<i>7.25%</i>
7	<i>Ocean Equipments Manufacturing and Sales Company</i>	<i>10.00%</i>
8	<i>Hardings INC</i>	<i>12.00%</i>

Assessee claimed that since the arithmetic mean of royalty rates of comparable agreements are 10.30% is higher than royalty rate of 4.00% / 7.00%, the payment of royalty paid by the assessee is at Arm's length.

2) Comparable analysis of trademark Royalty agreements :

In this connection, the assessee submitted following four comparable agreements and royalty rates :

<i>S.No.</i>	<i>Licensee Name</i>	<i>Royalty Rate</i>
1	<i>Execute Sports, Padova International U.S.A., Inc.</i>	<i>3.00%</i>
2	<i>IJI ACQUISITION CORP. INTERNATIONAL JENSEN INCORPORATED</i>	<i>2.67%</i>
3	<i>Pacific Engineering company Ltd.</i>	<i>2.00%</i>
4	<i>Carlisle Tire & Wheel Co.</i>	<i>3.33%"</i>

Assessee claimed that since Royalty rates of comparables were higher than the royalty rate paid by the assessee the Royalty payment was at arm's length. However, the TPO proceeded to examine the comparables and the agreements as well as the assessee's agreements. He proceeded to reject the claim and held that these agreements cannot be considered as comparable

agreements and the analysis made by the assessee was rejected due to functional dissimilarity between the taxpayer and the comparable entities. The TPO held that assessee should have obtained comparable agreements. Hence, he proceeded to hold that assessee has failed to apply the most appropriate method and accordingly, the TPO proceeded to hold the arm's length price as Nil for assessment year 2013-14. On similar reasoning, the TPO computed the arm's length price of Royalty at Nil and did the transfer pricing adjustment.

Upon assessee's appeal, the DRP for the assessment year 2012-13 upheld the action of the TPO. For the assessment year 2013-14, the DRP dealt with the issue and came to the conclusion that TPO, in these circumstances, cannot compute the arm's length price at Nil. That, it was incumbent upon the TPO to determine the arm's length price as per the method specified in the Act and Rules. That the TPO cannot wash his hands from the statutory duty cast upon him. In this regard, the DRP also referred to several case laws.

We have heard both the parties and perused the records. We find that it will be gainful to refer to the discussion of the DRP in this regard as under for Assessment Year 2013-14.

“6.13 We are conscious of the fact that the DRP, while deciding the same issue in the preceding year, has upheld the decision taken by the TPO to benchmark the transaction at nil in absence of any proper comparable forthcoming from the assessee using CUP as most appropriate method.

6.14 In this regard, the decision of the five member Special Bench of ITAT Bench in the case of Aztech Software Technology 294 ITR (AT)(32)(Bang)(SB) is found to be highly relevant.

133. *Having regard to the statutory provisions, particularly the mandate of sections 92(1) and 92D read with relevant rules, we hold that it is obligatory on the part of the taxpayer to furnish information relating to controlled international transactions, select a suitable method for determination and furnish ALP of such international transactions carried by it and give basis and supporting authentic evidence of ALP and adjustments made. The taxpayer has further to cooperate in the determination of the ALP by the tax authorities by furnishing all relevant information. The tax authorities in cases where they are of the opinion that ALP has not been correctly determined by the taxpayer, can substitute their own ALP on the basis of material or information furnished by the assessee or collected by them. However, such ALP has to be determined having in mind provisions of sections 92 and 92C and other rules and regulations. While determining ALP, tax authorities are bound to follow principles of natural justice and be fair and reasonable to the taxpayer. Any material collected to be used against the taxpayer is to be put to taxpayer to explain. Having regard to the purpose of the legislation and application of similar enactment world over, it must further be held that adjustments made on account of ALP by tax authorities can be deleted in appeal only if the appellate authorities are satisfied and records a finding that ALP submitted by the assessee is fair and reasonable. Merely by finding faults with the transfer price determined by the revenue authorities (AO/TPO), addition on account of "adjustments cannot be deleted. This is because the mandate of section 92(1) is that in every case of international transaction, income has to be determined having regard to ALP. Therefore, unless ALP furnished by the taxpayer is specifically accepted, the appellate authorities on the basis of material available on record has to determine ALP itself. Subject to statutory provisions, Appellate authorities can direct lower revenue authorities to carry this exercise in accordance with law. The matter cannot be left hanging in between. ALP of international transaction has to be determined in every case.*

134. *There would be cases, where taxpayer does not cooperate and fails to furnish ALP or disclose full information, relevant for determination of ALP when called upon to do so by tax authorities. The taxpayer fails to discharge burden placed on the taxpayer. In similar enactments of other*

countries, it is provided that burden on the revenue authorities in such a case would be reduced. We have not come across similar provision in Chapter X of the Act. The tax authorities therefore, have to resort to provision of section 144 of the Income-tax Act and determine the ALP on the basis of the material collected or available on record. In such circumstances, the ALP determined would be on the parity with a best judgment assessment. Such assessment (determination of ALP) would have some approximations and estimations. But even such approximations and estimations must satisfy dictates of justice and fair play and look reasonable. It cannot be arbitrary and capricious. The order of TPO is appealable and therefore, it must be objective, contain detailed reasons, conform to regulations and should be seen as just and fair.

6.15 In the case of Serdia Pharmaceuticals (India) Pvt Ltd 44 SOT 391 (Mum), it was held by the Bench that there cannot be a case where no method can be applied to the transaction. Even if all the methods are considered inappropriate, the method which is less inappropriate is to be applied.

6.16 The method of carrying out the exercise of determination of arm's length price of a transaction has been very lucidly brought out by the bench in the case of Bayer Material Science (P.) Ltd. [2012] 18 taxmann.com 60 (Mum.) where in the Bench has elaborated that:

(i) As the assessee knows the nature of its business well, it is he who always has the prerogative of choosing the comparable cases.

(ii) Once the assessee has chosen the comparable cases, then it becomes the duty of the TPO to find whether these cases are, in fact, comparable or not. If he finds that the cases given by the assessee are comparable on the basis of FAR analysis, the matter ends. He will accept them and then determine the average profit.

(iii) If the TPO is not satisfied as to the comparability of some of the cases given by the assessor, he will exclude such cases from the final list of comparables, after giving cogent reasons.

(iv) The TPO may possibly find that the assessee has done cherry picking and ignored the comparable cases giving higher profit margins. In such a case he may himself find out such comparable cases and after taking objections from the assessee include them also in the final list of comparables along with those left out of the assessee's list as per step (iii) above. Here it is important to mention that the voluntary selection of comparable cases by the TPO is his power and not the duty. He may or may not exercise his power in given circumstances. If he gets satisfied with the cases left out from the assessee's list, he may skip the exercise of voluntarily finding the comparable cases at his end. Thus it is the aggregate of such cases being shortlisted from the assessee's list and those voluntarily included by the TPO, which are considered to find out the average profit for the purposes of comparison.

(v) It may also happen that all the cases chosen by the assessee turn out to be incomparable and as such the basket of comparable cases is emptied. As the exercise of determining ALP is inconceivable without any comparable case, the TPO will have to afford one more opportunity to the assessee enabling it to give certain other cases which are really comparable. On the receipt of details of such comparable cases, the steps at (ii) to (iv) shall be undertaken by the TPO.

(vi) If despite being put to notice as per step (v) the assessee fails to give any list of comparable cases or the cases given are again found to be incomparable, then the power of the TPO in voluntarily selecting comparable cases as discussed in step (iv) above shall get converted into his duty. He'll have to undertake the exercise of finding comparable cases so as to complete his job. [Para 14]

6.17 Two observations are important. The exercise of determination of arm's length price cannot be left in a lurch. The TPO is competent to reject a method or reject a comparable if he finds these to be not suited to the transaction under benchmarking. He may give opportunity to the assessee to produce desirable comparables to his satisfaction. Of course, he is permitted to effect any adjustment he may like to make in light of the variations noted in order to bring these comparables as close to the transaction under benchmarking as possible. However, if the TPO does not succeed in getting suitable comparables from the assessee, then it is his duty to either get his own comparables or make necessary adjustments to the comparables filed by

the assessee and ensure that the task of determination of arm's length price is completed satisfactorily. He cannot just wash his hands off by claiming that the assessee has failed to produce proper comparables and hence the arm's length price cannot be determined."

We find ourselves in full agreement with the above said proposition of the DRP. Accordingly, we are of the considered opinion that the determination of arm's length price as Nil by the TPO is not at all sustainable.

The assessee had duly provided the details, agreements and comparables. If the TPO is not in agreement to the same, the onus now shifts to the TPO to make the computation of arm's-length price as per the Rules and law. As rightly pointed out by the DRP, the TPO cannot wash his hands of the statutory duties thrust upon him.

For the Assessment Year 2013-14, the DRP accepted the rate of royalty for trademark at the rate of 1% as under :-

"6.21.....It is seen that the assessee has entered into two type of agreements. The first is a royalty agreement for use of trademark and specifies a royalty rate of 1% on net sales (net sales excludes all agent/dealers commission, transport cost including freight, insurance, duties, taxes and other charges and cost of raw materials, parts, components imported from foreign licensor or its subsidiaries). The assessee has provided a study where it has arrived at an arm's length royalty rate of 3.33% which has been rejected by the TPO. The TPO has held that the trade mark licensors are not functionally similar to the Licensor in the present case and hence, these agreements are not acceptable.

6.22 In our view, even if the above agreements relate to a segment which is more profitable or may invite a higher royalty charge due to its popularity, the assessee's payment of 1% royalty on its use of the AE's trade mark is significantly lower than the trade mark charges in the above cases. The trademark royalty paid by the assessee is found to be well within the range

even if an adjustment of 50% is applied on these rates to allow for the functional difference. In our view, in light of the submission made by the assessee, the trade mark royalty is liable to be accepted as being at arm's length. The TPO is directed to allow trademark royalty at 1%."

For the Royalty for technology license, the DRP contradicted itself and did exactly what the TPO has done with a difference that after holding that the comparable agreement submitted in this regard by the assessee are different, it proceeded to fix the rate of royalty in this regard the rate of 1% of net sales to AE by simply observing that the assessee has already paid royalty rate of 1% with regard to trademark.

In our considered opinion, this action of the DRP is not sustainable on the same reasoning for which the DRP for Assessment Year 2013-14 itself deviated from the DRP order for Assessment Year 2012-13 as referred herein above.

In this regard, we may refer to Section 92C(1) of the Act, which reads as under :-

"92C.(1) The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely :—

- (a) comparable uncontrolled price method;*
- (b) resale price method;*
- (c) cost plus method;*
- (d) profit split method;*
- (e) transactional net margin method;*
- (f) such other method as may be prescribed by the Board."*

The other method of determination of ALP is defined in Rule 10AB as under:-

“10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.]”

Examining on the touchstone of above, we note that the method applied by the DRP doesn't fall in any of the methods prescribed in the Act or the Rule. The method applied by the DRP doesn't even fall under Section 92C(1)(f) as the other method defined in Rule 10AB describes the other method to be any method which takes into account the price which have been charged or paid for similar uncontrolled transaction under similar circumstances considering all the relevant facts.

We find that the DRP having agreed with the TPO that comparables and agreements submitted by the assessee are different and are not comparable, the DRP cannot wash his hands by picking up an arbitrary rate that since the royalty paid for trademark is 1%, the same rate is to be applied for royalty rate for technology license. The same is not at all based upon cogent reasoning and due analysis which can be said to have taken into account the price which have been charged or paid for similar uncontrolled transaction under similar circumstances concerning all the relevant facts.

In this regard, Hon'ble Bombay High Court in the case of Johnson & Johnson has held that *ad hoc* adjustment for Transfer Pricing is not

permissible. The Hon'ble jurisdictional High Court in this case while dealing with the issue of determination of arm's length price of royalty on estimation basis by the TPO held as under :-

“(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in section 92C of the Act read with Rule 10B of the Income Tax Rules, However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical knowhow has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical knowhow royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2% as claimed by the respondent assessee. This determination of ALP of technical knowhow royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal.”

Hence, from the plain reading of the relevant provisions and the ratio laid down by the Hon'ble jurisdictional High Court, it can be concluded that the law does not permit the TPO or DRP to determine the arm's length price on estimation or adhoc basis.

The learned Departmental Representative's plea in this regard is that since the authorities below have failed to follow the prescription of the Act and law, the matter should be remanded to them is not at all sustainable as we find that assessee has duly submitted the comparables and agreements and if the authorities below rejected the same, but failed to follow the prescription of Act, the duty cast upon them, the assessee cannot be put through the rigours of 2nd round of litigation without any fault of its own. In this regard we draw support from the above decision from Hon'ble Jurisdiction High Court which confirmed the order by ITAT similar to this case.

Accordingly, in the background of aforesaid discussion and precedents, we are of the considered opinion that assessee's grievance of *ad hoc* determination of arm's-length price for royalty paid by the TPO and the DRP succeeds. Accordingly, the ground raised by the assessee in this regard is allowed.

As we have already upheld the DRP action of sustaining the 1% rate of royalty for Assessment Year 2013-14 for the trademark, the Revenue's grounds against the DRP direction, in this regard to uphold the computation at Nil by the TPO fails in view of our discussion herein above.

Another issue raised is that DRP/AO erred in adding unpaid service tax payable on the receivables not collected by GEPIL as on 31 March 2010. That AO erred in not allowing deduction of service tax paid till 30 September 2010 i.e. due date of filing ROI

2010-11 Rs. 3.52 crores

2011-12 Rs. 2.42 crores.

This issue is covered in favour of the assessee by the ITAT decision in the case of G.E. Power India Ltd. (ITA No. 6960/Mum/2014 and other) for A.Y. 2008-09 & A.Y. 2002-03 wherein the Tribunal held as under :-

"We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Undisputedly, the amount in dispute represents service tax which remains to be paid by the assessee. It is the contention of the assessee that service tax is payable only on receipt from consumer of such service. It is observed that the Hon'ble Jurisdictional High Court in Tops Security Ltd. (supra) following its earlier judgment held that provision of section 43B of the Act does not impose liability to pay service tax before actual receipt of the fund in the account of the assessee. The Hon'ble Jurisdictional High Court held that liability to pay service tax into the treasury will arise only upon the assessee receiving the

fund and not otherwise. Further, in Knight Frank India Pvt. Ltd. (supra), the Hon'ble Jurisdictional High Court held that since the assessee did not claim any deduction on account of service tax payable, there can be no occasion to invoke provisions of section 43B of the Act. In the facts of the present case also, it is the contention of assessee that since it has not claimed any deduction on account of service tax payable, no disallowance under section 43B of the Act can be made. Respectfully following the ratio laid down by the Hon'ble Jurisdictional High Court in the aforesaid decisions, we delete the disallowance made by the assessee under section 43B of the Act. Ground is allowed."

Another issue raised is that AO erred in not allowing deduction of service tax on payment basis in current year which was disallowed u/s 43B in previous year (2010-11 Rs. 9.24 crores).

This is a factual issue. The AO is directed to reexamine the same in light of our order in above ground. In case the amount has been disallowed in the concerned assessment year for not payment, the assessee's ground deserves to succeed.

Additional ground :-

AO erred on facts and in law in making an addition of the transfer pricing adjustment to the book profits of the Appellant for the purposes of section 115JB of the Act, without appreciating that book profits of a company cannot be adjusted except as provided in Explanation 1 of Section 115JB(2), and transfer pricing adjustment is not one of the classes of adjustments provided in that Explanation. (2012-13 Rs. 59.27 crores).

Since the aforesaid additional ground is a legal issue we admit the same on the touchstone of Hon'ble Supreme Court decision in the case of National Thermal Power Co. Ltd. vs Commissioner of Income Tax on 4 December, 1996

(1998) 229 ITR 383. We find that this issue is to be decided in favour of the assessee on the touchstone of Hon'ble SC decision in Appollo Tyres (2002 255 ITR 273) and several decisions of Hon'ble Bombay High Court, following the same, wherein it is held that no adjustment in book profit is to be done unless mandated in the Act. Since, the Act in Explanation (1) of section 115JB(2) does not provide for any such adjustment, this issue is decided in favour of the assessee.

Another ground is that AO erred on facts and in law, in making an addition of the four-fifth expenditure disallowance relating to merger expenditure, to the book profits of the Appellant, for the purposes of section 115JB of the Act, without appreciating that book profits of a company cannot be adjusted except as provided in Explanation 1 of Section 115JB(2). (2012-13 Rs. 41 crores).

At the outset Id counsel of the assessee contended that she will not press this issue. Hence, this issue is dismissed as not pressed.

Another issue is short grant of tax deducted at source.

2012-13 Rs. 00.15 crores

2013-14 Rs. .0021 crores

These are factual issue the AO may examine the same.

Another issue is that AO erred in charging excess interest u/s 234C.

2013-14 Rs. 0.22 crores

This is consequential issue does not need any specific adjudication.

Revenue's appeal :

For A.Y. 2010-11 & 2011-12, the revenue is aggrieved that the DRP erred in holding that the adjustment should be reduced to the AE transaction only.

We have already dealt with the issue while dealing with assessee's appeal hereinabove. To recapitulate this issue is covered in favour of the assessee by the ITAT decision in assessee's own case for A.Y. 2006-07 in ITA No. 8670/Mum/2010, which was upheld by Hon'ble Bombay High court as reported in 88 Taxman.com 465 (Bom). Hence, Revenue's appeal stands dismissed.

In the result, the assessee's appeals are partly allowed, assessee's cross objection is dismissed and Revenue's appeals are dismissed.

Order pronounced under Rule 34(4) of ITAT Rules by placing the pronouncement list on notice board.

Sd/-

(AMRJIT SINGH)
JUDICIAL MEMBER

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/08/2020

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.

BY ORDER,

//True Copy//

PS

(Assistant Registrar)
ITAT, Mumbai