

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER**

**ITA No.3700/M/2016
Assessment Year: 2010-11**

ACIT-10(2)(1), R.No.216-A, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Worley India Pvt. Ltd. (Formerly known as Jacobs Engineering India Pvt. Ltd.), Ramkrishna Mandir Road, Kondivita, Andheri (East), Mumbai – 400 059 PAN: AAACH0456J
(Appellant)		(Respondent)

**CO No.36.M/2017
(Arising out of ITA No.3700/M/2016)
Assessment Year: 2010-11**

M/s. Worley India Pvt. Ltd. (Formerly known as Jacobs Engineering India Pvt. Ltd.), Ramkrishna Mandir Road, Kondivita, Andheri (East), Mumbai – 400 059 PAN: AAACH0456J	Vs.	ACIT-10(2)(1), R.No.216-A, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Niraj Sheth, A.R. &
Ms. Gunjan Kakkad, A.R.

Revenue by : Dr. Yogesh Kamat, D.R.

Date of Hearing : 19 . 10 . 2022

Date of Pronouncement : 31 . 10 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

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

2. This is a remand matter vide order dated 11.10.2021 passed by the Hon'ble Bombay High Court in ITA(L) No.1757 of 2019 along with writ petition No.2195 of 2019, which is to the following effect:

“12. Having heard both the counsel and having considered the writ petition as well as the appeal, which are listed together, in our view, the interest of justice will be met and no prejudice will be caused to any party if the order impugned in this appeal is quashed and set aside and the ITAT is directed to hear the parties to the extent of considering ground nos.1, 2 and 3 of the cross objections filed by appellant against Department's grounds and also ground nos.2, 3 and 5 of the Department's appeals which are also quoted above and pass such order on merits as the ITAT may deem fit.”

3. Appellant ACIT-10(2)(1), Mumbai (hereinafter referred to as the Revenue) and the cross objector M/s. Worley India Pvt. Ltd. (Formerly known as Jacobs Engineering India Pvt. Ltd.) (hereinafter referred to as the assessee) by filing the present appeal and cross objections sought to set aside the impugned order dated 16.04.2014 passed by the Assessing Officer (AO) inconsonance with the order passed by the Dispute Resolution Panel (DRP) dated 22.01.2014, order passed by Transfer Pricing Officer (TPO) under section 92CA(3) dated 22.01.2014 under section 143(3) read with section 144C(3) read with section 144B of the Income Tax Act, 1961 (for short 'the Act') qua the assessment year 2016-17 on the grounds inter-alia that :-

Grounds of Revenue:

“(1) On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the adjustment to ALP made by the AO/TPO.

(2) On the facts and in the circumstances of the case, the CIT(A) has erred in accepting the comparable M/s Accuspeed Engineering Design Services Limited ignoring the fact that its turnover was 125 times lower than that of the assessee company and its operational parameters would, therefore, be not comparable to that of the assessee company.

(3) On the facts and in the circumstances of the case, the CIT(A) has erred in accepting M/s Cades Digitech Private Limited as a comparable by relying on the subsequent year information, even though, the assessee had negative net worth in the relevant year and it was, therefore, not comparable to the assessee company.

(4) On the facts and in the circumstances of the case, the CIT(A) has erred in rejecting the comparable companies M/s Engineering India Limited, M/s Rites Limited and M/s WAPCOS Limited taken by the A.O./T.P.O. solely for the reason that these were Government companies, without appreciating the fact that these companies were functionally similar in all aspects to the assessee company and that these were professionally managed companies.

(5) In the facts and circumstances of the case and whether the CIT(A) had erred in directing to include M.N. Dastur & Company as a comparable without appreciating the TPO's Findings that the said comparable was in multifarious activities including taking premises on rent and giving it for rent, but at the same time segmentals for each activity was not available?

(6)The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.

(7)The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”

Grounds of Assessee:

“Acceptance of companies selected by Assessee as comparables

1. the Hon'ble CIT (A) accepted M/s Cades Digitech Private Limited ('Cades Digitech') as a comparable company by allegedly relying on subsequent year information, even though the net worth of the Company for AY 2010-11 was negative.

2. the Hon'ble CIT (A) accepted M/s Accuspeed Engineering Design Services Limited ('Accuspeed') as a comparable company

even though the turnover of Accuspeed is allegedly 125 times lower than that of the Assessee and its operational parameters hence is not comparable to the Assessee.

3. *the Hon'ble CIT (A) accepted M/s M. N. Dastur & Company (P) Limited ('MNDC') as a comparable company even though MNDC was allegedly engaged in multifarious activities, including taking and giving of premises on rent and that the segmental accounts were not available for MNDC.*

Rejection of companies considered as comparables by the AO/TPO

4. *the Hon'ble CIT (A) rejected M/s Engineers India Limited ('EIL'), M/s Rites Limited ('Rites') and M/s WAPCOS Limited ('WAPCOS'), considered as comparable by the AO/TPO, on the mere contention that the said were Government Companies*

5. *Without prejudice to point 4 above, erred in not appreciating that the Assessee is engaged in providing low end basic and detailed engineering services to its AE, while the nature of services rendered by the aforesaid companies are high end/ non comparable services, with significant R&D activities in case of EIL.*

Rejection of internal TNMM analysis prepared based on audited segmental accounts

6. *erred in rejecting/ disregarding the comparability analysis of the Assessee presented in its transfer pricing documentation, wherein a detailed economic analysis has been undertaken to benchmark impugned international transaction.*

7. *erred in rejecting the Internal Transactional Net Margin (Internal TNMM) of 14.29% earned by the Assessee in the AE segment vis-a vis 5.59% in the non AE segment by providing said services, and adopting the External TNMM method as the most appropriate method, for benchmarking the international transaction undertaken by the Assessee.*

Without prejudice to the above, on the facts and in the circumstances of the case as well as in law, the learned AO/ TPO:

Rejection of internal TNMM analysis prepared based on audited segmental accounts

8. *erred in rejecting/ disregarding the audited segmental accounts maintained by the Assessee on the grounds that computerized timesheets maintained and submitted by the Assessee cannot be relied on*

Rejection of audited segmental results and following an entity level approach

9. *erred in making an addition of Rs 24,27,65,921, being transfer pricing adjustment on account of rejection of segmental accounts of*

the Appellant and in determining the arm's length price of the international transactions pertaining to provision of engineering support services, using entity level approach.

+/- 5 percent range .

10. erred in not providing the benefit of the variation/ reduction of 5 percent from the value of the international transaction as provided in proviso to section 92C(2) of the Act, while determining the arm's length price;

The respondent craves, to consider each of the above grounds of cross objections without prejudice to each other and craves, leave to add, alter, delete or modify all or any of the above grounds of cross objections.”

4. Briefly stated facts necessary for adjudication of the issues at hand are: the tax payer is engaged in providing engineering consultation services in the field of chemicals, petrochemicals, fertilizers, cement, pharmaceutical and allied industries. The equity capital of the assessee company is held by Jacobs Engineering Ltd., UK and Jacob Engineering Inc, USA.

5. During the year under consideration the tax payer entered into international transaction with its Associate Enterprise (AE) as under:

Nature of international transactions	Amount in Rs.	Method used for benchmarking
Engineering services rendered	98,58,79,127	TNMM
Engineering services availed	10,48,42,224	TNMM
Software license charges	9,43,48,928	At cost
Overhead Support Charges	4,32,95,745	At cost
Reimbursement of expenses	52,456,330	NA (at actuals)
Recovery of expenses	21,029,913	NA (at actuals)

6. Assessee in order to benchmark international transactions applied internal Transactional Net Margin Method (TNMM)

analysis by comparing the net margin earned from AE as well as non AE and has earned an operating profit margin of 14.29% in case of AE transactions vis-à-vis operating profit margin of 5.59% in case of non AE transactions and thereby found its transactions at arms length. However, the Ld. Transfer Pricing Officer (TPO) rejected the segmental profitability statement prepared by the assessee based on which internal TNMM analysis was undertaken and directed the assessee to undertake external TNMM analysis by conducting a fresh search for comparable companies in public data base. Then the assessee carried a fresh search, taken 5 comparables namely; M/s. Accuspeed Engineering Design Services Limited, M/s. Cades Digitech Private Limited, M/s. M. N. Dastur & Company (P) Limited, M/s. Simon India Limited & M/s. TCE Consulting Engineers Limited, having arithmetic mean at 8.45% as against 14.29% of assessee's own margin thus again found its international transactions at arms length.

7. However, the Ld. TPO rejected 3 of the comparables namely M/s. Accuspeed Engineering Design Services Limited, M/s. Cades Digitech Private Limited, M/s. M. N. Dastur & Company (P) Limited and by introducing new comparables finally taken six comparables having arithmetic mean of 32.52% and thereby proposed the adjustment on account of arms length price as under:

“Computation of Arm's Length Price:

The internal segment have already been rejected, therefore, the only available margin is at entity level which is 9.26%. Using entity level margin and the audited figure of revenue, the cost base has been worked out. This has been done with a view to restrict the adjustment only on AE transactions. The assessee's margin is adopted at 9.265% which is less than the margin of comparables at 32.52%. Thus, the arm's length margin is considered to be 32.52% and the ALP is computed as follows:

<i>Arm's length mean margin</i>	<i>32.52% on cost</i>	
<i>Operating Income</i>	<i>A</i>	<i>1,14,02,43,491</i>
<i>Entity Level Profit</i>	<i>B</i>	<i>9.26%</i>
<i>Operating Cost</i>	<i>C=A/(1+B%)</i>	<i>1,04.36,23,160</i>
<i>ALP Margin</i>	<i>D</i>	<i>32.52%</i>
<i>ALP</i>	<i>E=C*(1+D)</i>	<i>1,38,30,09,412</i>
<i>Difference between ALP and the Transfer Price</i>	<i>E-A</i>	<i>24,27,65,921</i>

Therefore, assessee suffers a transfer pricing adjustment of Rs. 24,27,65,921/- u/s 92CA(3) of the IT Act, 1961.”

8. Assessee carried the matter before the Ld. CIT(A) by way of challenging the order passed by Ld. TPO who has partly allowed the appeal filed by the tax payer by rejecting the 3 comparables taken by Ld. TPO namely; M/s. Engineers India Ltd., M/s. Rites Ltd. and M/s. WAPCOSE Ltd. and consequently arithmetic mean of comparables comes down to 9.21% which is lower than assessee's own margin of 14.92%, hence found the international transaction undertaken by the assessee with its AE at arms length. Feeling aggrieved Revenue has come up before the Tribunal by way of filing present appeal challenging the inclusion of M/s. Accuspeed Engineering Design Services Limited, M/s. Cades Digitech Private Limited, M/s. M. N. Dastur & Company (P) Limited and also sought inclusion of government company namely M/s. Engineers India Ltd., M/s. Rites Ltd. and M/s. WAPCOSE Ltd. The assessee has also filed cross objections against the appeal filed by the Revenue.

9. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower

Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

10. During the transfer pricing proceedings the Ld. TPO finally selected six comparables by applying external TNMM with OP/OC (PLI) as the profit level indicator as the most appropriate method (MAM) which are as under:

<i>S. No.</i>	<i>Name of the Company</i>	<i>Operating margin on operating costs (%)</i>
1.	<i>Chemtex Global Engineers Pvt. Ltd.</i>	<i>13.05%</i>
2.	<i>Engineers India Ltd. (Consultancy & Engineering Projects segment)</i>	<i>62.14%</i>
3	<i>Rites Ltd (Consultancy Services segment)</i>	<i>28.93%</i>
4	<i>Simon India Limited</i>	<i>17.62%</i>
5	<i>TCE Consulting Engineers Limited</i>	<i>23.72%</i>
6	<i>WAPCOS Ltd (Consultancy & Engineering Projects segment)</i>	<i>49.67%</i>
<i>Arithmetic Mean</i>		<i>32.52%</i>

11. Then the Ld. CIT(A), in appeal deleted 3 comparables selected by the Ld. TPO namely M/s. Engineers India Ltd., M/s. Rites Ltd. and M/s. WAPCOSE Ltd. and finally accepted six comparables with arithmetic mean at 9.21% which is lower than tax payer's own margin of 14.92% making assessee's international transactions at arms length. Final comparables chosen after order passed by the Ld. CIT(A) are as under:

Comparable Accepted		
Accuspeed Engineering Design Services Ltd. (herein after referred as 'Accuspeed')	-1.03%	

Cades Digitech Pvt. Ltd. (herein after referred as 'Cades')	5.50%	
MN Dastur & Co. Pvt. Ltd. (herein after referred as 'MN Dastur')	-3.59%	
Simon India Ltd.	17.62%	
TCE Consulting Engineers Ltd.	23.72%	
Chemtex Global Engineers Pvt. Ltd.	13.05%	
Arithmetic mean of comparables accepted by Ld CIT(A)	9.21%	

12. Undisputedly, external TNMM as MAM with OP/OC as profit level indicator applied by the tax payer to benchmark its international transactions as suggested by the Ld. TPO during the transfer pricing proceedings has been finally accepted by Ld. TPO/CIT(A). After giving effect to the order passed by the Ld. TPO/Ld. CIT(A) the AO made adjustment on account of arms length price to the tune of Rs.24,27,65,921/- and thereby added the same to the income of the assessee.

13. The Ld. D.R. for the Revenue/appellant has challenged the comparable of the tax payer included by the Ld. CIT(A) namely; M/s. Accuspeed Engineering Design Services Limited, M/s. Cades Digitech Private Limited, M/s. Rites Ltd. and M/s. WAPCOSE Ltd. as comparable taken by the AO/TPO. Appellant also challenged inclusion of M/s. M. N. Dastur & Company (P) Limited as comparable to benchmark the international transaction undertaken by the assessee with its AE during the year under consideration.

14. Now we would examine the suitability of comparable companies selected/rejected by the Ld. CIT(A) as challenged by the appellant/Revenue one by one.

COMPARABLES SOUGHT TO BE EXCLUDED BY THE APPELLANT

1. M/s. Accuspeed Engineering Design Services Limited (Accuspeed)

15. The Ld. D.R. for the Revenue challenging the inclusion of Accuspeed drew our attention towards page 3 of the Ld. TPO wherein he has duly recorded the reasons for not accepting Accuspeed as comparable on the ground of huge difference in turnover as the Accuspeed has turnover of Rs.2.61 crore vis-à-vis assessee's turnover of Rs.258.33 crores.

16. We have perused the order passed by the Ld. CIT(A) who has retained this comparable by relying upon the case of Technology India Pvt. Ltd. (supra) by returning following findings:

“Based on the submission and the hearing with the Appellant, it is observed that the Appellant has employed a scientific methodology to find comparable companies and had applied turnover as one of the elimination criteria while conducting the search, wherein companies that having turnover of less than INK 1 crore were rejected. The turnover of Accuspeed Engineering Design Services Limited is INR 2.61crores and hence passes the turnover criteria.

Further the TPO had rejected Accuspeed Engineering Design Services Limited, stating that the company had a low turnover and hence was not comparable to that of the Appellant. In this regard, placing reliance on the judicial precedents of Ness Technologies India Private Limited vs DCIT (ITA no.943/Mum/2015), wherein it has been held that the comparable selected by the Assessee should not be rejected merely because of low turnover if the company is functionally comparable to that of the Assessee. Thus merit is found in the contention of the Appellant and the same should be considered as a comparable.”

17. Since Accuspeed is functionally comparable vis-à-vis the tax payer low turnover of Accuspeed vis-à-vis assessee cannot be a ground for its rejection as a comparable particularly when Accuspeed passes the turnover criteria laid down by Ld. TPO himself. So we find no reason to interfere into inclusion of

Accuspeed in the final set up comparable for benchmarking the international transactions. Further, we find that Hon'ble Bombay High Court upheld the inclusion of Accuspeed as valid comparable in assessee's own case for A.Y. 2010-11.

2. M/s. Cades Digitech Private Limited (CDPL)

18. To exclude CDPL as comparable Ld. D.R. for the appellant/Revenue again relied upon the findings returned by Ld. TPO who has rejected this company on ground of negative net worth and observed that CDPL as an accumulated loss in A.Y. 2010-11.

19. The Ld. CIT(A) retained this comparable by returning following findings:

“Based on the submission and the hearing with the Appellant, it is observed that, Cades was rejected by the TPO on the ground that the company has a negative networth. The Appellant submitted that the company had achieved a positive net worth in the subsequent year and that the TPO had erred in placing reliance on the financial data of only one year and doubted the ability to continue as going concern. Merit is found in the contention of the Appellant, that the Cades is functionally similar. The same is considered as a comparable company to the Appellant”

20. The Ld. A.R. for the tax payer contended that under section 10B(4) data of the same financial year should be taken but not for PLI purpose. The Ld. CIT(A) has taken next year data to see if it is a running concern. So rejecting any comparable company on the basis of financial data of only one year is not permissible because the assessee has achieved positive growth in the subsequent year. Further, we find that Hon'ble Bombay High Court upheld the inclusion of CDPL as valid comparable in

assessee's own case for A.Y. 2010-11. So again we find no ground to interfere into the inclusion of CDPL as comparable.

3. M/s. M. N. Dastur & Company (P) Limited (MN Dastur)

21. Ld. D.R. by referring to para 13 of the Ld. TPO sought to exclude MN Dastur as a comparable on the ground that MN Dastur is also doing other activities like taking premises on rent and giving it on rent as well but no segmental accounts have been provided.

22. However, the Ld. CIT(A) retained MN Dastur as comparable by returning following findings:

“Based on the submission and the hearing with the Appellant, it is observed that, M/s. M. N. Dastur & Company (P) Limited was rejected by the TPO on the ground that the segmental data is not available. The Appellant has made a plea that major portion of the total revenue is arising out of the comparable activity of engineering services. Perusal of the Annual report indicates that the company is functionally similar to the Appellant. Further, as per the Annual Report 99.87 percent of the revenue arises out of the Engineering Consultancy services. Hence the same is considered as a comparable company.”

23. The Ld. CIT(A) as well as Bench has perused the annual reports which show that the assessee is functionally similar vis-à-vis MN Dastur and 99.87% of revenue arises from Engineering Consultancy Services. Further, we find that Hon'ble Bombay High Court upheld the inclusion of MN Dastur as valid comparable in assessee's own case for A.Y. 2010-11 and since then there is no change in the business model of the assessee. Hence, we find no ground to exclude MN Dastur from the final set of comparable.

COMPARABLE SOUGHT TO BE INCLUDED:

M/s. Engineers India Ltd., M/s. Rites Ltd. and M/s. WAPCOSE Ltd.

24. Aforesaid comparables have been rejected by Ld. CIT(A) on the ground inter-alia that Engineer India Ltd. incurs significant R&D expenditure of about Rs.11,00,00,000/- vis-à-vis nil R&D activities of taxpayer; and that as per annual report Engineer India Ltd. is a government company having preferential treatment in running its business.

25. Similarly, Ld. CIT(A) excluded Rites Ltd. on ground of functional dissimilarity because Rites Ltd. has on its panel a large number of experts whose services can be drawn with short notice whereas assessee is a routine provider of Engineering Design and Drawing Services. So Rites Ltd. having complex form of functioning with technical expertise cannot be a functionally comparable vis-à-vis tax payer; and that assessee is also a government undertaking having preferential treatment from the government segment to promote its business.

26. The Ld. CIT(A) also excluded M/s. WAPCOSE Ltd. as a comparable on ground of its functional dissimilarity being engaged in consultancy services for water resources, power and infrastructure product and has successfully completed consultancy assignments for about 50 countries. We have examined and verified all these facts from annual report. Moreover, M/s. WAPCOSE Ltd. is a government company having preferential benefits from the government and its undertaking to promote its business.

27. Suitability of M/s. Engineers India Ltd., M/s. Rites Ltd. and M/s. WAPCOSE Ltd. being government companies have already been examined by the co-ordinate Bench of the Tribunal in Thyssen Krupp Industries India Pvt. Ltd. in IAT No.6460/M/2012 and ACIT vs. M/s. Chemtex Global Engineers P. Ltd. in ITA No.3590/M/2010 as unsuitable comparable vis-à-vis routine engineering and design service provider.

28. So we are of the considered view that these companies having been engaged in big ticket government projects of 10CL and have also completed 50 international assignments and on the basis of preferential treatment given to them, they cannot be suitable comparables vis-à-vis tax payer who is a routine provider of Engineering Design Services. So the Ld. CIT(A) has rightly excluded these companies from the final set of comparables for benchmarking international transactions.

29. So far as question as to deciding the cross objection filed by the tax payer is concerned, during the course of argument the Ld. A.R. for the tax payer has not pressed the same, hence the same are dismissed having not been pressed.

30. In view of what has been discussed above appeal filed by the appellant/Revenue and cross objection filed by the tax payer are hereby dismissed.

Order pronounced in the open court on 31.10.2022.

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 31.10.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.