

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANJUNATHA.G, ACCOUNTANT MEMBER**

आयकर अपील सं./IT(TP)A No.: 79/CHNY/2018 &
ITA No.2797/CHNY/2019

निर्धारण वर्ष/Assessment Years: 2014-15 & 2015-16

Mos Metro India Pvt. Ltd.,
88/150, Dharma Towers,
Second Floor, Room No.9,
Nelson Manikam Road,
Choolaimedu,
Chennai – 600 094.

The ACIT,
vs. Corporate Circle 4(1),
Chennai.

PAN: AAHCM 5709N

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri K. Senguttuvan, Advocate &
Ms. Anu Viswanath, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Ms. D. Komali Krishna, CIT

सुनवाई की तारीख/Date of Hearing

: 10.05.2023

घोषणा की तारीख/Date of Pronouncement

: 17.05.2023

आदेश /ORDER

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee in IT(TP)A No.79/CHNY/2018 is arising out of the directions of the Dispute Resolution Panel, Bengaluru dated 05.09.2018. The assessment was framed by the DCIT, Corporate Circle 4(1), Chennai for the assessment year 2014-

15 u/s.143(3) r.w.s.92CA(3) r.w.s. 144C(5) of the Income Tax Act, 1961 (hereinafter the 'Act'), vide order dated 20.12.2017.

2. The first issue in this appeal of assessee is against the assessment order framed u/s.143(3) r.w.s. 144C(5) r.w.s.92CA(3) of the Act accepting the downward adjustment proposed by the TPO u/s.92CA(3) of the Act at Rs.22,63,64,802/- by rejecting one of assessee's reply and introducing four new companies by the TPO. For this, assessee has raised grounds Nos.2.1 to 2.3 which are argumentative, exhaustive and factual and hence, need not be reproduced.

3. Now before us, Id.counsel for the assessee only restricted his arguments on the exclusion of two companies namely KNR Constructions Ltd., and Patel Infrastructure Pvt. Ltd., as introduced by the TPO while carrying out TP study. The Id.counsel for the assessee first of all explained the facts of the case that MMS India was incorporated on 23.11.2011 with its registered office in Chennai. The company is a subsidiary of Mosmetrostroy (FZE), Dubai (MMS FZE). MMS FZE holds 99% of equity shares in MMS India. Gammon-OJSC MosMetrostroy, an unincorporated joint venture in India between Gammon India Ltd and Mosmetrostroy,

Russia was awarded two contracts of seven underground stations and associated tunnels covering an area of 8.7 Kilometers by Chennai Metro Rail Ltd., (CMRL) in FY 2012-13. The JV subcontracted a portion of contract relating to mosmetrostroy Russia to MMS India for carrying out work for the CMRL project. During FY 2013-14, MMS India was in its first full year of operations and was engaged in execution of the sub-contracted portion of CMRL project. The assessee, based on FAR analysis adopted CUP method as the most appropriate method for interest of compulsory convertible debentures and for other transactions had adopted TNMM method. The TPO disputed only the lease of TBMs for an amount of Rs.98,64,58,840/-. The TPO issued show-cause notice u/s.92C(3) of the Act and stated that once the assessee itself has selected as tested party and selected TNMM as the most appropriate method to benchmark its international transactions with its AE, the assessee used OP/OI as profit level indicators because the taxpayers costs are directly affected by the transfer prices it pays to its AE. By selecting the TNMM as the most appropriate method, the assessee has carried out a search in the prowess and capital ling databases and accordingly, search process resulted with 6 comparables with the mean operating margin of 2.93%. The taxpayer calculated its operating margin as 1.39 after treating the

following expenses as non-operating expenses 1. lease rentals at Rs.68,58,24,659/-, 2) bank charges at Rs.1,21,13,619 and 3) interest at Rs.6,31,51,267/-. The assessee first made submission that going by the nature of assessee which is in specialized and technical nature of assessee's contract i.e., digging tunnels for metro rails, there is no tested party in India exists hence, he itself selected as tested party for benchmarking its international transactions with its AE. Alternatively, assessee also provided 6 comparables with the mean operating margin of 2.93% but the TPO finally including 4 more comparables and excluding one comparable of the assessee carried out independent search for arriving at the net profit margin. The comparables arrived by TPO are

S.No.	Name of Comparable Companies	Margin
1.	Consolidated Construction Consortium Ltd.,	1.12
2.	Danieli India Ltd.	1.27
3.	Hindustan Construction Co.Ltd.	3.90
4.	J Kumar Infraprojects Ltd	3.04
5.	KNR Constructions Ltd.	6.98
6.	NCC Ltd.	1.47
7.	Patel Infrastructure Pvt. Ltd.	1.42
8.	SPML Infra Ltd.	0.96
9.	Tantia Constructions Ltd.	1.78
	Average	2.44

Now, the assessee only requested for consideration of KNR Constructions Ltd., and Patel Infrastructure Pvt. Ltd., included by TPO and confirmed by DRP, are to be excluded. Hence, we will deal

with these two comparables, whether these are to be excluded or to be included.

4. First, we will deal with KNR Constructions Ltd. We noted that the assessee has given the details of KNR Constructions that it is engaged in highway projects, irrigation and water management projects and urban water infrastructure management projects. It was contended before TPO by assessee that the company is in the broad category of construction and they are not involved in railway projects and more specifically metro rail projects. Accordingly, it was the plea of the assessee that KNR Constructions Ltd., cannot be a comparable with the assessee being engaged in carrying out of contract Chennai Metro Rail Ltd., project which is a specialized job of tunnel boring and tunnel boring is done through very high sophisticated and technical machines for which the assessee had taken on lease and that is the transaction under consideration for comparables. But we noticed that the TPO has gone into the financials of tunnel boring machine taken by assessee on lease but he has not made any comparable how the KNR Constructions Ltd., is comparable with the present assessee.

5. Coming to the DRP's order, the DRP has considered KNR Constructions Ltd., Patel Infrastructure Pvt. Ltd., and SPML Infra Ltd., which are included by Revenue / TPO while doing comparable study, which is decided by common order. Hence, we will deal with another comparable namely Patel Infrastructure Pvt. Ltd.

6. As regards to comparable used by Revenue / TPO of Patel Infrastructure Pvt. Ltd., this company is similar to KNR Constructions Ltd., whether it is involved in road and highway projects, building projects, bridge projects and irrigation & dam projects. This company also as KNR Constructions Ltd., is in the broad category of 'construction' and are not involved in railways project and more specifically metro rail project involving tunnel boring.

6.1 The DRP vide para 2.1.3 has retained the KNR Constructions Ltd., and Patel Infrastructure Pvt. Ltd., by observing as under:-

“2.1.3 Panel: From the above decisions it can be brought out that while making selection of the comparable, exact product comparability is not required. And comparables need not be from the same industry. Such requirement is in tune with the OECD guidelines and the United Nations TP Manual. Both guidelines advocate that under TNMM, only broad functional and product comparability is to be considered, as net margins are less influenced by differences in products and functions. Based on the above, it can be said that while using TNMM to benchmark the international transactions, there could be differences in product and in the

functions undertaken by the comparables as compared to the tested party. It envisages that the comparability under TNMM is more tolerant as compared to other methods and hence the comparables need to be broadly similar on functions, risks and assets. In view of the above, we agree with the approach adopted by the TPO. Out of four comparable objected by the assessee, as has been extracted at para 2.1.1 above, we find KNR Constructions, Patel Infrastructure and SPML Infra Ltd are in construction and infrastructure related activities and hence are comparable with the assessee company. However, we are of the view that Danieli India not being in the construction nor in the infrastructure related activities is not proper comparable. Hence AO/TPO is directed to exclude Danieli India and retain other three companies in the comparable set.

Aggrieved, now assessee is in appeal before the Tribunal.

7. Before us, the Id.counsel for the assessee made same submissions that these two companies are only engaged in highway projects, irrigation and water management projects and urban water infrastructure management projects. It was contended that though these companies are in broad category of construction they are not involved in any railway project or metro rail projects as is the case of the assessee. Hence, these two cannot be compared. One more interesting argument made by Id.counsel is that the assessee has no comparable in India being a specialized job i.e., digging or boring tunnel for the purpose of metro projects. When a query was put to Id.counsel that neither the TPO nor DRP has brought out how these two are compared with the assessee and without any discussion except the TNMM is selected by assessee as appropriate method

which gives power to TPO to consider the broad categories, no factual discussion is carried out. The Id.counsel on this stated that matter can be set aside to the file of the AO / TPO to reconsider these comparables.

8. On the other hand, the Id.CIT-DR argued that once assessee has adopted TNMM only broad category of construction is to be compared and it is not the case of the assessee that they are adopting CUP method for selection of comparables. Here, we agree with the Id.CIT-DR but we noted that there is no discussion by the TPO except the financials of the tunnel digging machine of the assessee the TPO has not discussed the nature of these two companies i.e., KNR Constructions Ltd., and Patel Infrastructure Pvt. Ltd., whether they are in tunnel boring or not, because even in broad category they have to compare with similarities. The assessee's nature of business is highly specialized and unique i.e., the contract for seven underground stations and associated tunnels which is a highly specialized contract work, hence as contended by Id.counsel for the assessee, these two comparables are to be considered by AO/TPO afresh by considering the factual details of these two comparables vis-à-vis the assessee. Hence, this issue of two comparables is set aside to the file of the AO/TPO.

9. The next issue in this appeal of assessee is assumption of transition from 'lease model' to 'asset model', we noted that though the assessee before TPO has taken this alternative ground for adjustment of depreciation assuming the ownership of lease machinery but this is not a fact. The assessee has paid lease rentals and he is not the owner of the lease machinery hence, this plea on this issue cannot be adjudicated by the lower authorities or by the Tribunal. Hence, this issue is dismissed.

10. The next issue in this appeal of assessee is as regards to the order of DRP and TPO erred in considering the bank charges as operating expenses / charges.

11. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee contended that the bank charges are to be considered as interest expenses because it is related to bank loans but the TPO and AO noted that the bank charges paid to the bank simpliciter will not assume the nature of interest payment and hence bank charges are treated by AO as operating expenses. The DRP also rejected the objection of the assessee. Aggrieved, now assessee is in appeal before the Tribunal.

11. Except repeating the same arguments, the assessee has not explained how that bank charges are interest in nature. The interest on bank loan or any loan is entirely different at fixed rate whereas bank charges are actually business expenditure and operating expenses because these bank charges are paid for administrative services provided by the banks for the purpose of business. Hence, we find no infirmity in the order of AO / TPO and that of the DRP. This issue of assessee's appeal is dismissed.

12. The next issue in this appeal of assessee is as regards to the order of AO/TPO proposing adjustment at entity level and not transaction wise. The TPO made adjustment by proposing at the entity level and not transaction wise. The DRP also confirmed the action of the AO by observing in para 5.6 as under:-

5.6 Panel: Thus, adjustment u/s 92CA in above example works out to Rs.10/-, which is the same as presumed above in the example in para 5.4. Now if the argument of the assessee is accepted then adjustment of only 37.50% of Rs 10 i.e. Rs 3.75/- can be made which is evidently not correct. So, this argument of the assessee is devoid of any merit and thus cannot be accepted. It is already held in earlier para that any impact on the basis of calculation of ALP by MAM (here TNMM) has to be considered as adjustment u/s 92CA and the same cannot be proportionately reduced by considering that a part of the purchases was from non-AE also. Whatever is the reduction in the margin of the assessee vis a vis comparables is on account of inflated purchases from AE and the same gets considered when ALP is calculated by applying TNMM. As regards assessee's reliance on decisions of Hon'ble High Courts and other Courts, the above factual matrix was not brought to the knowledge of such authorities and so those decisions cannot be applied to the case of the assessee. Further, in the decision of

High Court as quoted by the assessee, the appeal of the revenue was not allowed by the court by holding that substantial question of law does not arise. Thus, issue was not decided on merits. Considering above, the objection of the assessee is not accepted. The TPO is directed to adopt the ALP in the case of assessee in accordance with above i.e, without reducing the adjustment proportionately. Ground rejected.

Aggrieved, now assessee is in appeal before the Tribunal.

13. Before us, the Id.counsel for the assessee stated that the issue is covered in favour of assessee by the decisions of Hon'ble Bombay High Court in the case of CIT vs. Alstom Projects India Ltd., [2017] 394 ITR 141, CIT vs. Thyssen Krupp Industries India Pvt. Ltd., [2016] 381 ITR 413 and ITAT, Chennai in the case of Yongsan Automotive India Pvt. Ltd., vs. ACIT in ITA No.357/Mds/2017. The Hon'ble Bombay High Court in the case of Alstom Projects India Ltd., *supra*, has held as under:-

"We are in respectful agreement with the view of the Delhi High Court in Keihin Panalfa Ltd. (Supra). One must not loose sight of the fact that the transfer pricing adjustment is done under Chapter X of the Act. The mandate therein is only to redetermine the consideration received or given to arrive at income arising from for International Transactions with Associated Enterprises. This is particularly so as respect of transaction with non Associated Enterprises, Chapter X of the Act is not triggered to make adjustment to considerations received or paid unless they are Specified Domestic Transactions. The transaction with non-Associated Enterprises are presumed to be at arms length as there is no relationship which is likely to influence the price. If the contention of the Revenue is accepted, it would lead to artificial increase in the profits of transactions entered into with non Associated Enterprises by applying the margin at entity level which is not the object of Chapter X of the Act. Absence of segmental accounting is not

an insurmountable issue, as proportionate basis could be adopted as done by the Delhi High Court in Kelhin Panalfa Ltd.,”

As the issue is covered that transaction is to be taken as transaction wise and not at entity level, respectfully following the Hon'ble High Court decision, we direct the AO / TPO accordingly. This issue of assessee of assessee's appeal is allowed.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

ITA No.2797/CHNY/2019

15. This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-8, Chennai in ITA No.87/18-19 dated 06.08.2019. The assessment was framed by the ACIT, Corporate Circle 4(1), Chennai for the assessment year 2015-16 u/s.143(3) r.w.s. 144C of the Act vide order dated 31.12.2018.

16. There is two interconnected issues against the order of CIT(A) confirming the action of the AO in disallowing interest on custom duty amounting to Rs.2,08,58,279/- and interest on provident fund amounting to Rs.8,34,441/-.

17. None is present from assessee's side despite the fact that in earlier appeal in IT(TP)A No.79/CHNY/2018, Shri K. Senguttuvan and Ms. Anu Viswanath, Advocates were present on last date of hearing and they were informed on 04.05.2023 that we will take up these appeals including the present appeal and will decide the issue. Ld. Counsel Shri K. Senguttuvan, Advocate informed the Bench that he has already informed the assessee. Moreover, he stated that he is authorized to argue only IT(TP)A No.79/CHNY/2018 for assessment year 2014-15.

18. We have heard Id. CIT-DR and gone through the facts and circumstances of the case. The AO on verification of financial statement i.e., Item No.9 of Enclosure VII of the Profit & Loss Account noted that the assessee has claimed interest on custom duty of Rs.2,08,58,279/- and interest on EPF of Rs.8,34,441/-. According to AO, these charges are not regular taxes but due to delay of payment of taxes which are penal in nature. According to him, these expenses are not allowable expenditure u/s.36 of the Act. Hence, he disallowed these two expenses. Aggrieved assessee preferred appeal before CIT(A).

19. The CIT(A) noted from the detailed ledger extract filed by assessee in support of interest on EPF paid at Rs.8,34,441/- that the individual entries in the above ledger noted EPF penalty with interest paid for respective months of financial year 2014-15. He noted that the assessee has not submitted bifurcation of penalty and interest and hence, he considered the entire amount as penalty for violation of PF regulations and confirmed the disallowance.

20. Similarly, as regards to interest on custom duty debited to profit & loss account, the assessee company failed to file any evidences that the amount of Rs.2,08,58,279/- does not represent any penalty or not paid for any custom duty violation. Hence, he confirmed the disallowance. Aggrieved on both counts, assessee came in appeal before the Tribunal.

21. After hearing Id.CIT-DR, we noted that it is not clear from the facts whether the expenses allegedly claimed on account of interest on Provident Fund and Custom duty represents penalty or interest. The assessee neither before AO nor before CIT(A) filed any details and without details, it is not possible to adjudicate whether the payments are penal in nature or whether the payments are compensatory in nature. Hence, as the facts are not available and

even despite numerous opportunities assessee is not coming forward, we have no alternative except to remit this matter back to the file of the AO. In case the assessee files complete details, the AO will adjudicate the issue. In term of the above, the appeal of the assessee is allowed for statistical purpose.

22. In the result, the appeals filed by the assessee in IT(TP)A No.79/CHNY/2018 is partly allowed for statistical purposes and ITA No.2797/CHNY/2019 is allowed for statistical purposes.

Order pronounced in the open court on 17th May, 2023 at Chennai.

Sd/-

(मंजुनाथ. जी)
(MANJUNATHA.G)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)
(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 17th May, 2023

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त /CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.