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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.739/Mum/2022
(A.Y. 2017-18)

Thermax Babcock & Wilcox Energy Solutions Limited, Dhanraj Mahal, 2nd Floor, Chhatrapati Shivaji Maharaj Marg Near Regal Cinema, Colaba, Mumbai - 400039	Vs.	Deputy Commissioner of Income Tax, Circle 2(3)(1) National Faceless Assessment Centre, Delhi Room No. 552, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:AADCT5273A		
Appellant	..	Respondent

Appellant by :	Dhanesh Bafna a/w Ms. Chandni Shah, Riddhi Maru & Tejal Saraf
Respondent by :	Anil Sant

Date of Hearing	08.03.2024
Date of Pronouncement	04.04.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee is directed against the order passed by the ld. CIT(DRP-2) Mumai-2 for A.Y. 2017-18. The assessee has raised the following grounds before us:

"Transfer Pricing Grounds

Ground No. 1

On the facts and in the circumstances of the case and in law, the Learned AO/DRP have erred in rejecting the economic analysis conducted by the Appellant in its transfer pricing (TP) study report and consequently, making a TP adjustment of INR. 99,96,72.076 to the income of the Appellant on the ground that the international transactions pertaining to the sale of project and services

are not at arm's length and part of the depreciation claimed by the company on the technical know-how fees should be treated as NIL

Prayer

The Appellant prays that the aforesaid TP adjustment pertaining to international transaction of sale of project and services and depreciation claimed on technical know-how fees be deleted

Ground No. 2

On the facts and in the circumstances of the case and in law, the Learned AO/DRP have erred in.

2.1 Disallowing the depreciation of INR. 2,03,72,076 claimed by the Appellant on the technical know- how fees which was capitalized in the books of accounts for AY 2011-12 and subsequently. computing the arm's length price of technical know-how as NIL.

2.2 Not appreciating the commercial and economic circumstances under which the payment of technical know-how fees was made to its associated enterprises and the benefits accruing to the Appellant over the period of amortization

2.3 Passing the order with a pre-determined mind set to disallow the depreciation claimed on the technical know-how fees without fresh application of mind and without giving due cognizance to the submission made during the proceedings and thereby completely relying on the approach followed by the Revenue Department in earlier years.

Prayer

The Appellant prays that the TP adjustment on account of disallowance of depreciation on the technical know-how fees amounting to INR 2.03,72.076 be deleted

Ground No. 3

On the facts and in the circumstances of the case and in law, the Learned AO/DRP have erred in enhancing the income of the Appellant by INR 97,93,00,000 by treating the provision made for loss on impairment of assets as operating in nature and thereby holding that the international transactions of the Appellant pertaining to the sale of project and services its Associated Enterprises are not at arm's length.

Prayer

The Appellant prays that the provision made for impairment of assets should be treated as non- operating in nature

On the facts and in the circumstances of the case, the Learned AO/DRP have erred in considering "interest income and interest expenses incurred by the Appellant as operating in nature. In doing so the Learned AO/DRP recomputed the operating margin of the Appellant and made TP adjustment of INR 97,93,00,000 by holding that the international transactions of the Appellant

pertaining to the sale of project and services to its associated enterprises is not at arm's length

Prayer

The Appellant prays that 'interest income and interest expenses should be considered as non- operating in nature for the purpose of computing the operating margin of the appellant

Ground No. 5

On the facts and in the circumstances of the case, the Learned AO/DRP have erred in rejecting certain functionally comparable companies selected by the Appellant in its TP Study Report for AY 2017-18 solely on the ground of fluctuating margins.

Prayer

The Appellant prays that the comparable companies identified by the Appellant in its TP study report should be considered for the purpose of conducting comparability analysis.

Ground No. 6

On the facts and in the circumstances of the case, the Learned AD/DRP has erred in not allowing the economic adjustment on account of difference in level of working capital of the Appellant and that of the comparables companies while determining the arm's length price of international transactions of sale of project and services.

Prayer

The Appellant prays that the economic adjustment for the difference in working capital should be allowed

Ground No. 7

On the facts and in the circumstances of the case, the Learned AO/DRP have erred in not allowing the economic adjustment on account of difference in level of capacity utilization of the Appellant and that of comparable companies while determining the arm's length price of international transactions of sale of project and services.

Prayer

The Appellant prays that the economic adjustment for the difference in capacity utilisation should be allowed

Corporate Tax Grounds

Ground No. 8

On the facts and in the circumstances of the case and in law, the Learned AO/DRP have erred in

8.1 Enhancing the income of the Appellant by INR 1,07, 18.54,148 under section 56(2)(viib) of the Act without appreciating the facts of the case vis-à-vis the applicability of the section.

8.2 Upholding the enhancement of INR 1,07,18 54,148 under section 56(2)(viib) of the Act, although the provisions of section 56(2)(viib) of the Act cannot be invoked in the fact of the present case

8.3 Rejecting the method of valuation adopted by the Appellant and adopted a different method for the purposes of determining the Fair Market Value ('FMV) of shares even though it is at the option of the Appellant to choose the method of valuation as per the provisions of section 56(2)(viib) of the Act read with rule 11UA of the Income-tax Rules, 1962

Prayer

The Appellant prays that the addition made under section 56(2)(viib) of the Act is bad in law and deserves to be deleted.

Ground No. 9

On the facts and circumstances of the case and in law, the Learned AO/DRP have erred in

9.1 Disallowing an amount of INR 9,72,450 under section 36(1)(va) read with section 2(24)(x) of the Act towards employees provident fund and ESIC contribution which was deposited before the due date of filing of return of income.

9.2 Upholding that the amended law is applicable to the facts of the present case even though the amended law is applicable prospectively i.e from 01.04.2021

Prayer

The Appellant prays that the disallowance made under section 36(1)(va) r.w.s 2(24)(x) of the Act is unwarranted and deserves to be deleted

Ground No. 10

On the facts and circumstances of the case, and in law, the Learned AO/DRP have erred in disallowing interest paid of INR 3,16,643 under section 201(1A) of the Act on account of delayed payments of taxes deducted at source

Prayer

The Appellant prays that the disallowance made under section 201(1A) of the Act is unwarranted and deserves to be deleted

Ground No. 11

On the facts and circumstances of the case, and in law, the NFAC has erred in initiating penalty

proceedings under section 270A of the Act.

Prayer

The appellant prays that the Ld AO be directed to drop penalty proceedings initiated against the Appellant under section 270A of the Act.

Ground No. 12

On the facts and circumstances of the case, and in law, the NFAC has erred in initiating penalty proceedings under section 271AA of the Act.

Prayer

The appellant prays that the Ld AO be directed to drop penalty proceedings initiated against the Appellant under section 271AA of the Act."

2. Fact in brief is that return of income filing nil income was filed on 31.11.2017. The assessee as a joint venture between Thermax Limited (TL) and Babcock & Wilcox India Holding (BWH) was incorporated on 26.06.2010 to manufacture subcritical boilers and supercritical boilers. The case was subject to scrutiny assessment and in order to determine the arm's length price in relation to international transactions entered into by the assessee with the associate enterprises the assessing officer referred the case to the Transfer Pricing Officer u/s 92CA(1) of the Act. The TPO passed order dated 27.01.2021 u/s 92CA(3) of the Act and proposed Arm's Length Price (ALP) adjustment of Rs.99,96,72,076/- on account of international transactions of the assessee. The assessing officer issued the draft assessment order dated 12.04.2021 u/s 143(3) r.w.s 144C of the Act after considering the TPO order. The total income of the assessee was computed as Rs. Nil under normal provisions and income/loss u/s 115JB at (-) Rs.395,02,13,243/-.

3. Aggrieved, the assessee filed objection before the DRP. The DRP has rejected the objection filed by the assessee vide order u/s 144C(5) of the Act dated 28.01.2022. Further facts of the case are discussed while adjudicating the ground of appeal filed by the assessee as follows:-

Ground No.1: This ground is general in nature therefore not required any adjudication.

Ground No. 2: Transfer Pricing (TP) adjustment in respect of depreciation clamed on technical know fees capitalized in AY 2011-12:

4. During the course of assessment the assessing officer noticed that assessee had capitalized Rs.30,43,17,000/- in respect of technical know how fees paid over 5 years based on the License Agreement dated 18.08.2010 entered into between BWPGG and the assessee. During the course of assessment proceedings for the assessment year 2011-12 the TPO made an adjustment of Rs.30.43 crores to the income of the assessee by treating ALP of transaction at nil. However, the Dispute Resolution Panel held that since assessee had claimed depreciation and not the full amount in books of account, therefore, the adjustment made by the TPO was restricted to the amount depreciation claimed by the assessee. During the year under consideration the assessee has claimed depreciation of Rs.203,72,076/- therefore, the DRP restricted adjustment to the said amount of depreciation.

5. During the course of appellate proceedings before us at the outset the ld. Counsel submitted that issue on identical fact has been decided in favour of the assessee in assessment year 2011-12 by the ITAT, Mumbai vide ITA No. 1735/Mum/2016.

On the other hand, ld. D.R is fair enough to could not controvert that impugned issue has been decided in favour of the assessee by the ITAT as referred above.

6. Heard both the sides and perused the material on record. With the assistance of ld. Representative we have perused the decision of the ITAT. The relevant part of the decision is reproduced as under:

"26. Considered the rival submissions and material placed on record, we observe that the assessee (JV) was formed by the groups viz, Thermax Ltd and B&W. These two group are engaged in the power generation and suppliers of various types of boilers to the Indian entities. Thermax Ltd customizes the requirements of the Indian entities and habitually buys various types of boilers from B&W Group for this purpose. In the earlier occasion, TL has acquired the quotation for acquiring the technical knowhow from the B&W group to manufacture of super critical and sub critical boilers in India for a lumpsum fees of USD 7.6 millions. As per the new industry policy of the government of India and in order to take the benefit of government policy, they formed a joint venture and based on the policy requirement, they formed the joint venture, in the form of mutual investment in the ratio of 51:49 between the groups. Based on the above joint venture, they entered into new agreement to supply the technology knowhow to the assessee, they renegotiated the transfer of technology knowhow in the new agreement and agreed for the reduced license fees of USD 6.5 millions payable in the five equal installments.

27. Based on the above developments, both the entities become associated entities as per the definition of Sec 92C of the Act. The transaction with the assessee company becomes reportable international transactions and they have submitted the transfer pricing study report and have to bench mark the same. While doing so, they have adopted the CUP method by considering the earlier agreement with the B&W group as comparable with the present agreement with the assessee. This method of adoption of earlier agreement under CUP method was rejected by the authorities below and treated the ALP as nil. After considering the submissions and treatment by the tax authorities below, we are of the opinion that both the proposed methods are not proper for the reason that there is requirement for transfer of technology from B&W group by referring to the first agreement of transfer of technology between the groups, however it was not materialize but it shows that there is requirement of transfer of technology to the Indian entity i.e., TL. In our view, the first agreement proposed between the groups are indication that the requirement to transfer the relevant technology in India for the highly technical knowhow of critical and subcritical boilers to manufacture the same in India. This proposed agreement may be considered for justification of requirement but cannot be used as a tested transaction for the transfer of technology in the newly formed joint venture, since in this case, the character of ownership has changed, there involves the mutual benefit, wherein the interest of both the groups are involved. It is difficult to consider the share holder activities / interest in this transaction, as there is no material submitted before us like whether there is capital investments made by both the groups or mere transfer of technology between them. As such, we are of the opinion that there is certainly requirement of such transfer of technology from the B&W group to the Indian entities ie., to either Thermex Ltd or to the J/V (Assessee). With the above conclusion, we are of the view that the same proposed agreement cannot be used for the CUP method as tested transaction considering the fact that the offer was to Indian entity and present agreement to transfer the technology to the assessee are two different offers with the two different commercial objects between the groups. Secondly, there was no bench mark made for the first proposal/agreement. Even though these transactions are unique in itself, still, the bench marking has to be done for the commercial and organizational purpose keeping in mind the aspect of controlled transaction. If we consider the uniqueness of the transaction, all the international transactions are different and unique in itself. Therefore, we reject the method proposed by the assessee.

28. At the same time, we are also not in favor of the treatment by the tax authorities that the transaction is considered as international but the ALP for payment of technical fees as NIL. As discussed above, there is requirement and necessity to transfer the technical knowhow and there has to be bench marked as per one or more of the accepted method proposed in the section 92C of the Act and relevant rules. Therefore, we are inclined to remit this issue back to the file of AO/TPO to bench mark the same as per the accepted methods prescribed in the Act after giving opportunities of being heard to the assessee. Even the assessee is directed to submit the TPSR after adopting one or more of the accepted method of determining the ALP. Accordingly, the grounds raised by the assessee are allowed for statistical purpose."

Following the decision of the ITAT as referred above we remit the issue back to the file of the AO/TPO for the purpose of benchmarking the same as directed in the order of the ITAT. Therefore, ground no. 2 is allowed for statistical purpose.

Ground No. 3 to 7: TP adjustment in respect of the international transaction pertaining to sale of project and services to the Association Enterprise (AE):

7. The assessing officer noticed that during the year under consideration the assessee had entered into the following transactions with its associate enterprises:

Transaction	*Method adopted*	*Profit level Indicator (PLI)*	*Amount in Rs.*
Sale of Goods	*TNMM*	*Operating profit/Operating cost (OP/TC) [TC refers to operating cost]*	*2,74,28,91,516*
Consultancy Services availed towards rework charges on site.	*Do*	*Do*	*18,01,68,181*
Consultancy services obtained.	*Do*	*Do*	*28,66,027*
Technical Services provided	*Do*	*Do*	*18,70,487*
Reimbursement of expenses to the AE	*Do*	*Do*	*3,41,47,975*

The submission filed by the assessee pertaining to arm's length price of the transaction were analyzed by the TPO with reference to arm's length nature of the inter-company transactions between M/s Thermax

Babcock & Wilcox Energy Solutions Pvt. Ltd. (TBWES) and its AEs and gave the following findings:-

> *"1. That TNMM (Transactional Net Margin Method) is considered as the most appropriate method for substantiating the ALP for international transactions entered by assessee with its AES.*
>
> *2. That TBWES is selected as the tested party for the purposes of this analysis.*
>
> *3. For the purpose of manufacturing activities of TBWES, Operating Profit/Operating cost (OP/OC) has been selected to reliably measure the expense of the tested party that uit would have earned had it dealt with uncontrolled parties at arm's length.*
>
> *4. As per Transfer Pricing Study Report (TPSR), the assessee computed PLI (Profit Level Indicator) and submitted the same before the TPO. The said computation is available in the order u/s 92CA(3) of the IT Act, 1961 dated 27- 01-2021 of the TPO from Page No.5 to 9, which has been formed a part and parcel of the present assessment order and marked as 'Annexure-A. For the sake of brevity and to avoid repetition of facts, the same is not being typed here. For details, reference to the said annexure may please be made.*
>
> *5. The industry capacity utilization as per RBI publication is 70% whereas TBWES's capacity is 20.80%. This leads to increased fixed overheads costs which warrant adjustment as worked out in column (d) in the table available in the order u/s 92CA(3) of the IT Act, 1961 dated 27-01-2021 of the TPO from Page No.5 to 9, which has been formed a part and parcel of the present assessment order and marked as "Annexure-A,*
>
> *6. During TP assessment proceedings in this regard, specific query was raised and the assessee was asked vide notice u/s 92CA(2)/92D(3) on 03-02-2020 and 22-12-2020. The assessee also submitted its reply on 11-11-2020. The relevant extract thereof is available in the order u/s 92CA(3) of the IT Act, 1961 dated 27-01-2021 of the TPO from Page No.9 to 25, which has been formed a part and parcel of the present assessment order and marked as Annexure-A. For the sake of brevity and to avoid repetition of facts, the same is not being typed here. For details, reference to the said annexure may please be made."*

8. After considering the submission made by the assessee the TPO has not agreed with the submission of the assessee for the following reasons.

> *"1. It was mainly contended that since core business operation of the assessee is manufacturing of boilers and not lending/borrowing of funds, the interest cost is not related to the core business operations of the assessee. That entire borrowings went into creation of fixed assets including land, building, plant and machinery. On capitalization of such assets, the interest cost is*

claimed as revenue expense in the P&L account. That calculating operating costs require only that add up, the expense that make up annual fixed cost and variable costs. Fixed costs are the expense, the business incurs even if it does not sell any goods or services. That common fixed costs include rent of office. production and retail space, utilities, salaries and benefits of administrative staff, taxes, fees for licenses, professional certifications, bank charges, interest and depreciation. Variable costs are expenditure directly related to poroducing and selling goods or services. Examples of variable costs are marketing expenses, sales, commissions, shipping, raw materials and direct labour.I n the instant case, considering the overall nature of assessee's business and its activities, the interest cost incurred is, therefore, required to be considered in computing operating cost.

2. The assessee also relied on the definition of 'operating expense' provided in the Safe Harbor Rules u/r 10TA(J) of IT Rules introduced w.e.f. 04-02-2015, which specifically excludes 'interest cost in computing operating expenses. This argument of the assessee has been found to be placed out of context since the Safe Harbour Rules are limited to certain classes of business or professions like contract R&D services, Core Auto Components, Corporate guarantee, generic pharma drugs, ITeS, Intra Group Loans, KPO services, Non-Core Auto Components, Software Development Services which are mostly manpower intensive services and are with insignificant risks. On the other hand, the assessee is into the business of manufacturing of sub-critical boilers and supercritical boilers which nowhere fits into such eligible business or profession as specified in the Safe Harbour Rules. Therefore, this contention of the assessee has been found to be not acceptable.

3 The assessee also stated that Global guidance in the form of the OECD guidelines and the UN TP Manual provide for exclusion of interest cost from the computation of operating costs. In this regard, it is worthwhile to state that the assessee selectively picked and chose certain lines from the above guidelines without linking it to the nature of assessee's own business. It is also pertinent to note that Para B.3.3 of UN TP Manual relied upon by the assessee states that "Often, and depending on the facts and circumstances, the analysis are based on the net return (the earning determined before interest and tax and extraordinary items i.e. EBIT) realized by various companies engaged in a particular line of business. Thus, it is evidence that the OCED guidelines and the UN TP Manual recognize the fact that, the interest cost need not be excluded in very business uniformly for computing operating expenses. Therefore, this argument of the assesse is found to be farfetched and not acceptable.

4. The assessee also relied upon various judicial precedents wherein it has been held that 'interest cost should be treated as non-operating while computing the NPI. These cases relied upon by the assessee are mostly related to trading and distribution or Professional Services activities. Therefore, the ratio of such cases is not applicable to the assessee's case and placing reliance on such citations will be in violation of the provisions of Rule 10B(4) of IT Rules. The fact that the transfer pricing study is highly fact based and it differs from case to case and that all the factors in Rule 10B have to be considered for every case and every year independently and that a particular pattern decided in a different case for different set of facts and for different years cannot be adopted as such to the instant assessee, which would be violative of the specific provisions contained in Rule 10B.

5. The assessee without prejudice to its submissions also provided PLI working after considering adjustment for unutilized capacity of the assessee capacity utilization adjustment and adjustment pertaining to difference in the level of working capital working capital adjustment. In working out the capacity utilization adjustment, the assessee considered the industry average of 70% As against the industry average of 70%, the assessee claimed its capacity utilization to be at 20.80%. This industry average is based on quarterly order books, inventories and capacity utilization Survey which is carried out by RBI on a quarterly basis as a basis to identify the capacity utilization levels prevailing in the manufacturing industry. In this regard, it is pertinent to note that the assessee is comparing the entire manufacturing industry against its own case. Under the Transfer Pricing, provisions for comparability purpose, the factors effecting PLI of the comparable companies needs to be compared with that of the assessee and not the entire industry. The comparison done by the assessee for seeking adjustment for capacity utilization is totally against the basic tenets of the Transfer Pricing provisions. Without prejudice to this, the industry average arrived at also includes the assessee and hence there is no separate adjustment required in this case. Accordingly, the assessee's contention on adjustment towards capacity utilization is found to be not acceptable as the same is without considering appropriate case based facts and also against the legal provisions under the IT Act and Rules.

6. It has also been noticed that the assessee also included asset impairment cost of Rs.130.27 crores in the depreciation scheduled but excluded from operating cost for working out PLI for the year under consideration. This is a part and parcel of depreciation in the asset value which is consistently considered as operating expense by the assessee as well as revenue. Thus, there is no justifiable reason for excluding this item from operating expenses and assessee's explanation is silent on this aspect. Further, impairment is a non- cash expense that is reported under the operating expenses section of the income statement. Any non-cash income or expense included in the operating profit is eliminated by adjustments made under the operating activities section of cash flow statement. Furthermore, an operating expense is any expense incurred as part of normal business operations. Depreciation represents the periodic, scheduled conversion of a fixed asset into an expense as the asset is used during normal business operations. Since the asset is part of normal business operations, depreciation is considered an operating expense. However, depreciation is one of the few expenses for which there is no associated outgoing cash flow. The reason is that cash was expended during the acquisition of the underlying fixed asset, there is no further need to expend cash as part of the depreciation process unless it is expended to upgrade the asset. Thus depreciation is a non-cash component of operating expenses as is also the case with amortization and impairments."

9. The TPO noticed that assessee has also included asset impairment cost of Rs.130.27 crores in the depreciation scheduled but excluded from operating cost for working out PLI for the year. The TPO observed that impairment was a non cash expenses that was reported under the operating expenses section of the Income Tax statement. The TPO also

observed that any non-cash income or expenses incurred in the operating profit is eliminated by adjustment made under the operating activities section of cash flow statement. The TPO further observed that impairment expenses is an accounting expense recognize on the basis of which a permanent reduction in asset value is justified in books of account compare the recoverable amount of the assets at the end of the reporting date as per certain impairment conditions or factors. The TPO further observed that if impairment loss is recognized in the income statement, the net profit will decrease and there will be lesser outflow towards income tax obligation which is more or less in cash. He also stated that impairment loss are although without any cash movement, it can decrease the tax liability of the enterprise in an indirect manner. He further stated that the contention of the assesse that it has an option to write back in case realizable value of asset increases has no merit as far as the current years determination of the profitability is concern. The TPO further stated that making working capital adjustment is to determine the point in time at which the receivable, inventory and payable should be compared between the tested party and the comparable. The assessee has not proved the specific point of time but use averages of working capital over the year. The TPO has given a finding that the activity utilization and working capital adjustment were not allowable in assessee's case for PLI working. The TPO has also observed that under TNMM while using multiple year data, reasonable adjustment are required to be made as mandated under Rule 10B(1)(e) of I.T. Rules. The TPO has also observed that under the provision of Rule 10B(2) comparability of international transaction with uncontrolled transaction has to be judged with reference to functions performed, asset employed, reason assumed and the conditions prevailing in the market, in which respective parties to the transaction operate including geographical locations and size of market loss and

government orders enforce, cost of labour and capital market, overall economic development and level of computation and whether the markets are wholesale or retail. Rule 10B(3) further provides that an uncontrolled transaction shall be comparable to international transactions if none of the differences, if any, between the transaction being compared or between enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in or the profit arising from such transactions in the open market or any reasonably accurate adjustment can be made to eliminate the material effects of such difference. Thus Rule 10B(2)(d) mandates to consider the market condition, the geographical location, the size of the market, cost of labour, overall economic development and level of competition. The TPO further observed that the profits of these companies, as per assessee's submission and updated margins are fluctuating and thus have been excluded from the list. After excluding two companies from the comparable list, the revised range and mean PLI of comparable has been worked out by the TPO in his order u/s 92CA(3) of the Act 1961 dated 27.01.2021. After excluding the two companies from the comparable list, the revised rent and mean PLI of comparable was tabulated as under:

Sr. No.	Company Name (Note 2)	OP/TC			
		FY 2016-17	FY 2015-16	FY 2014-15	Average
1	T D Power Systems Ltd. Project Business	-6.71%	3.98%	1.74%	0.08%
2	Tata Projects Ltd.	2.75%	2.19%	2.78%	2.58%
3.	Tema India Ltd.	3.46%	3.15%	3.14%	3.25%
4.	Technofab Engineering Limited	4.35%	3.29%	2.74%	3.44%
5.	Gillanders Arbuthnot & Co.Ltd. – Engineering Division	2.73%	-0.81%	8.17%	3.64%
6.	Anand Projects Ltd.	0.25%	4.50%	3.61%	3.70%
7.	Walchandnagar industries ltd.	10.92%	3.83%	0.17%	4.00%
8.	Kilburn Engineering Limited	9.16%	6.32%	4.18%	6.67%
9.	Thyssenkrupp Industries India Pvt. Ltd.	6.25%	9.72%	7.71%	8.07%
10.	High Ground Enterprise Limited	7.36%	8.98%	8.97%	8.28%
11.	Power Mech Project Ltd.	8.22%	9.36%	8.40%	8.67%
Count					11
Mean					4.673%

35th percentile	3.64%
Median	3.70%
65th percentile	4.00%

I. Computing the arm's length range/price of the broadly comparable independent companies:

The comparables Arm's Length range thus works out to 3.64% to 4.00% with a median of 3.70%. The assessee's PLI works out to (-) 28.34%. Accordingly the assessee's transactions with AEs are not at Arm's Length Price and there is a variance of 32.04% requiring Arm's Length Price adjustment

J. Carrying out adjustment for differences between enterprises, as required:

The comparables Arm's Length range worked out to 3 64% to 4.00% with a median of 4.00% The assessee's PLI is (-) 28.34%. Accordingly the assessee's transactions with AEs are not at Arm's Length Price and there is a variance of 32.04% requiring Arm's Length Price adjustment which is worked out as under

Particulars	*Amount in INR Crores*
Sale of project and services to AE's	*305.65*
Assessee's profit by applying PLI of (-) 28.34%	*(-) 86.62*
Assessee's profits by applying Comparable PLI of 3.70%	*11.31*
ALP adjustment made	*97.93*

Accordingly an ALP adjustment of Rs.97,93,00,000/- is made to the transactions of Sale of project and services to AE's The AO may initiate penalty proceedings U/s.271AA and 270A of the Act in respect of the above adjustments.

As regards the Technical Services provided, Provision for rework charges on site paid, and Reimbursement of expenses to the AE the above ALP is not applied in view of provisions of section 92(3) of the Act.

(Adjustment - Rs.97,93,00,000/-)"

As proposed by the TPO the assessing officer passed draft assessment order on 12.04.2021 and made proposed adjustment of Rs.97,93,00,000/- to the income return in respect of sale of project and services to the associate enterprises.

10. The DRP vide order u/s 144C(5) of the Act dated 28.01.2022 has dismissed the objection filed by the assessee. Therefore, the assessing officer has passed final assessment order u/s 143(3) r.w.s 144C(13) of the Act on 23.02.2023 and made the proposed adjustment of Rs.97,93,00,000/- to the income of the assessee.

11. During the course of appellate proceedings before us the ld. Counsel submitted that assessee has a state of art production facility at Satara, Maharashtra with a capacity to manufacture 3000 MW of super critical of sub-critical boilers annually. The assessee commenced commercial production in December 2013 and suffered continued losses since inception on account of low demand, intense competition and fewer committed orders which resulted in low capacity utilization of its assets. The ld. Counsel further submitted that in order to mitigate the impact of such market conditions on the assessee's business during the year under consideration, the assessee has sub-contracted some portions of its projects i.e designing and manufacturing, certain components and machineries to its associate enterprises. It is further submitted that in view of above factors the assessee's capacity utilization during the year under consideration was only 20.80%. In view of the facts and circumstances the assessee has recorded an impairment loss of Rs.130.27 crores by impairing its assets in the books of account as per the relevant Indian accounting standard applicable for impairment of assets. The ld. Counsel further submitted that said impairment loss was not claimed in the return filed by the assessee as the same was an accounting treatment reflecting loss which was capital in nature. The ld. Counsel also submitted that for computing PLI margin earned from international transaction with its associate enterprise, the said loss amount has been considered as non-operating item since the same was a reduction in the book value of assets recognized on account of exceptional market conditions as per accounting standard and same

was not incurred regularly in the normal course of business. The ld. Counsel submitted that TPO was erred in treating the impairment loss of Rs.130.27 crores as an operating expenses. He submitted that impairment loss has to be treated as non-operating in nature as the same has resulted in reduction in value of assets which was capital in nature and not a regular expenditure/loss incurred in regular gross of business. The assessee has also placed reliance on the following pronouncements:

"1. Imsofer Manufacturing India (P) Ltd. vs. DCIT [121 taxmann.com 209 (Delhi Trib.)]

2. Jewel Consumer Care Pvt Ltd vs. DCIT [ITA No. 3197/Ahd/2010 (Ahmedabad. Trib)]

3. DIAB Core Materials Pvt. Ltd vs. DCIT [ITA No. 2176/Chny/2017 (Chennai. Trib.)

4. DHR Holding India (P.) Ltd vs. JCIT [133 taxmann.com 519 (Delhi. Trib.)]

The ld. Counsel contended that working capital adjustment should be granted to the assessee on account of difference in working capital between the assessee and the comparable companies. He further submitted that a suitable adjustment on account of capacity utilization for benchmarking the transaction should also be considered because assessee has operated at a capacity of 20.80% during the year under consideration compared to capacity utilization for industry on an average which was 70%.

On the other hand, the ld. D.R supported the order of lower authorities.

12. Heard both the sides and perused the material on record. The TPO has considered impairment loss as operating in nature by considering the same similar to the depreciation, however, the assessee's submission was that impairment loss of asset was arised out in exceptional circumstances to record a reduction in the fair value of asset and same was in the nature of capital loss and it was not recurring

nature of capital loss. We have perused the judicial pronouncements referred by the ld. Counsel in the case of Imsofer Manufacturing India (P) Ltd Vs. DCIT, Circle 11(1) (2020) 121 taxmann.com 209 (Delhi – Trib) wherein it is held that provision for impairment of assets being not an operating expenses and same was to be excluded while calculating profit level indicator. The relevant operating part of the extract of the decision is reproduced as under:

> *"7. We have carefully considered the orders of the authorities below There is no dispute that the machinery purchased by the assessee was lying in capital work in progress. It is also not in dispute that the treatment given by the assessee is in line with the accounting standard issued by the ICAI. In our considered opinion a provision for impairment of assets is not a depreciation charge nor amortisation of fixed assets but it is a provision made to the carrying amount of the fixed assets which is reversible in nature. Moreover section 92(1) of the Act requires that any income arising from an international transaction/allowance for any expenses shall be computed having regard to arms length price In our considered view impairment of assets cannot be related as international transaction of the assessee Further the provision for impairment of assets is not regular business expenditure since it is not recurring in nature and is not related normal business operation and hence not in the nature of operation expenses, therefore, in our considered opinion the same cannot be treated as operating expenditure for the calculation of PL1 of the assessee We accordingly disc the AO/TPO to exclude provision of impairment of assets as operating expenditure. This ground accordingly is allowed."*

We have also perused the decision of ITAT Ahmedabad in the case of M/s Jewel Consumer Care P. Ltd. Vs. DCIT-1(2) vide ITA No.3197/Ahd/2010 dated 29.08.2022 wherein after following the decision of Delhi ITA in the case of Imsofer Manufacturing India (P) Ltd Vs. DCIT, Circle 11(1) (2020) 121 taxmann.com 209 (Delhi – Trib) as referred above it was held that impairment loss was not operating expenditure. The relevant part of the decision is as under:

> *7. We have heard the rival contentions of both the parties and perused the materials available on record. The issue before us revolves to the extent whether the impairment loss claimed by the assessee is non-operating expenditure, therefore the same should be excluded while working out the PLI of the assessee company. In this regard we note that there various orders of the Tribunal wherein the impairment loss has been considered as non-operating. The Delhi Tribunal in the case of M/s Imsofer Manufacturing India (P) Ltd Vs DCIT reported in 121 taxmann.com 209 has held as under:*

> *"7. We have carefully considered the orders of the authorities below. There is no dispute that the machinery purchased by the assessee was lying in capital work in progress. It is also not in dispute that the treatment given by the assessee is in line with the accounting standard issued by the ICAI. In our considered opinion a provision for impairment of assets is not a depreciation charge nor amortisation of fixed assets but it is a provision made to the carring amount of the fixed assets which is reversible in nature. Moreover section 92(1) of the Act requires that any income arsing from an international transaction/allowance for any expenses shall be computed having regard to arms length price. In our considered view impairment of assets cannot be related as international transaction of the assessee. Further the provision for impairment of assets is not regular business expenditure since it is not recurring in nature and is not related normal business operation and hence not in the nature of operation expenses, therefore, in our considered opinion the same cannot be treated as operating expenditure for the calculation of PLI of the assessee. We accordingly direct the AO/TPO to exclude provision of impairment of assets as operating expenditure. This ground is accordingly allowed."*
>
> *7.1 Admittedly, all the details were furnished by the assessee before the TPO with respect to the impairment loss which can be verified from the details submitted by the assessee, placed on page 243-244 of the paper book. Thus, in view of the above, we are of the considered opinion that the impairment loss being non-operating expenditure should be excluded while working out the PLI of the assessee company. Thus the ground of appeal of the assessee is allowed."*

We have also considered the decision of ITAT Chennai in the case of DIAB Core Materials Pvt. Ltd. Vs. DCIT vide ITA No. 2176/Chny/2017 wherein after following the decision of Delhi ITAT in the case of Imsofer Manufacturing India (P) Ltd Vs. DCIT, Circle 11(1) as referred supra it is held that impairment loss has to be treated as non-operating expenditure and the same are to be excluded while computing assessee's PLI. On the similar proposition we have also gone through the decision of ITAT Delhi in the case of DHR Holding India (P) Ltd. Vs. JCIT (2021). After considering the aforesaid facts and judicial findings we consider that impairment loss is to be treated as non operating expenditure and same is not to be taken into consideration while computing profit level indicator in the case of the assessee. Therefore, ground no. 3 is allowed.

Ground No. 4 & 5: Since, we have allowed ground no. 3 therefore, ground no. 4 & 5 become infructuous and the same is not required any adjudication and the same stand dismissed.

Ground no. 6: In respect of working capital adjustment:

13. During the course of appellate proceedings before us the ld. Counsel has only referred page no. 474 of the paper book wherein only the information pertaining to weighted average unadjusted OP/TC were provided. No evidence of submitting of any calculations for adjusted margins before the lower authorities is submitted before us. Further during the course of appellate proceeding before us the ld. Counsel has not brought any material in support of difference in working capital adjustment between the assessee and the comparable companies, therefore, this ground of appeal of the assesse stand dismissed.

Ground No. 7: Capacity adjustment utilization:

14. During the course of appellate proceeding before us the ld. Counsel submitted that assessee had operated at a capacity of 20.80% during the year under consideration whereas the capacity utilization for industry on an average was 70% which was at higher than the assessee, therefore, the assessee submitted that suitable adjustment on account of capacity utilization for benchmarking the transaction may be provided. In this regard, the assessee has referred the decision of ITAT Kolkata in the case of DCIT Vs. Kyocera CTC Precision Tools Pvt. Ltd. vide 233/Kol/2022 wherein held that capacity utilization adjustment is permissible adjustment versus comparables. Since, capacity utilization by the assessee during the year under consideration at 20.80% was not in dispute compared to the capacity utilization for industry of an average which was 70% therefore following the decision of the ITAT as referred above we direct the AO to make a suitable adjustment for

capacity utilization. Therefore, ground no. 7 of the appeal is allowed for statistical purposes.

Ground No. 8: Additions u/s 56(2)(viib) of the income Tax Act, 1961 (the Act) on issue of equity shares to the existing shareholders:

15. The TPO reported that assessee was a 51:49 joint venture between Thermex Limited and Babcock & Wilcox India Holding Inc. The assessee has issued share to its joint venture partner as under:

Number of shares	*Face Value (INR per share)*	*Premium (INR per share)*	*Total (Rs.Per share)*	*Total amount (INR)*
A	*B*	*C*	*D=B+C*	*E=A*D*
17,27,88,700	*10*	*0*	*10*	*172,78,87,000*

For the fresh issue of share capital the assessee has relied on valuation report issued by the valuer dated 27.01.2016. DCF method was used for such valuation wherein production for F.Y. 2016 to 2023 were used to arrive at value per equity share at Rs.8.31. It was found from the said valuation report that till F.Y. 2020-21 there was negative cash flow and there was multi fold increase in cash flow for next two years without any justifiable reasons for such projections. Even for F.Y. 2016 to 2018 also there was actual negative cash flow which substantially varies from projection therefore TPO was of the view that DCF method used was not reliable and it did not give accurate or approximately accurate value for shares allotted. The TPO has worked out fair value/book value per share as on 31.03.2016 to Rs.4.04 per shares by applying net asset value method. However, the assessee company has allotted shares at Rs.10 per share to the non-resident subscribers which was the associate enterprise therefore difference of excess amount received by the assessee as worked out by the TPO i.e Rs.5.96 per shares was taxed u/s 56(2)(viib) of the Act in the hands of the assessee company by making addition of Rs.107,18,54,148/-.

16. The AO passed draft assessment order on 12.04.2021 after making proposed addition as recommended by the TPO.

17. The assessee filed objection before the DRP and DRP has dismissed the objection filed by the assessee. Thereafter the assessing officer passed the final assessment order on 23.02.2023 after making additions as proposed by the TPO as discussed above.

18. During the course of appellate proceedings before us the ld. Counsel submitted that assessing officer has not provided any opportunity of hearing and tax the amount as determined by the TPO. He further submitted that Sec. 56(2)(viib) is not attracted in the case of the assessee since equity shares were issued at a face value of Rs.10 and this section attracts only where shares are issued for a consideration exceeding the face value of share. The ld. Counsel also contended that the method adopted by the assessee for valuation share as per DCF method was rejected by the TPO/AO without any reason. The ld. Counsel also submitted that associate enterprise has invested in the share capital issued by the assessee and this is capital transaction which is not subject to any jurisdiction and scope of adjustment to be made by the TPO.

On the other hand, the ld. D.R supported the order of lower authorities.

19. Heard both the sides and perused the material on record. We consider that this is the case where the associate enterprise has invested in the share capital of the assessee company at the face value of Rs.10 per share. We find that TPO has not brought on record the reason for making such adjustment when the assessee has issued the share at face value and the justification for applying provision of Sec. 56(2)(vib) of the Act was also not considered by the TPO. In view of the above facts and circumstances we find merit in the submission of the

assessee and find that there is no ground and reason for making the impugned adjustment on account of issuing of equity shares by the assessee to its associate enterprise at face value of share issued. Therefore, this ground of appeal of the assessee is allowed.

Ground No. 9: Disallowance u/s 36(1)(va) of the Act:

20. This ground was not pressed due to smallness of amount therefore the same stand dismissed.

Ground No. 10: Interest on delayed payment of tax deducted at source (TDS):

21. During the course of assessment the assessing officer noticed that in the tax audit report the auditor has reported that assessee has paid interest on delayed payment of TDS. The assessing officer has disallowed the interest on delayed payment of TDS by stating that same was not allowable expenditure u/s 37 of the Act.

22. During the course of appellate proceedings before us the ld. Counsel submitted that interest on delayed payment is allowable expenditure and in this regard he referred the decision of ITAT in the case of Resolve Salvage & Fire India (P) Ltd. Vs. DCIT (2022) 139 taxmann.com 196 (Mumbai – Trib.)(2022) and ITAT Chennai in the case of Stup Consultants Pvt. Ltd. Vs. ACIT, Range 3(3) vide ITA No. 5827/Mum/2012.

On the other hand, the ld. D.R supported the order of lower authorities.

23. Heard both the sides and perused the material on record. We find that coordinate bench of the ITAT in the case of Resolve Salvage & Fire India (P) Ltd. Vs. DCIT (2022) 139 taxmann.com 196 (Mumbai – Trib.) held that interest paid on delayed payment of TDS u/s 201(1A) would be compensatory in nature and thus, was to be allowed as deduction.

Respectfully following the decision of coordinate bench as referred supra, this ground of appeal that interest paid on delayed payment of TDS u/s 201(1A) is allowable deduction is allowed.

Ground No. 11 & 12: Initiation of penalty u/s 270A & 271AA of the Act:

24. Both these grounds are premature at this stage therefore the same stand dismissed.

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

Order pronounced in the open court on 04.04.2024

Sd/-	Sd/-
(Vikas Awasthy) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 04.04.2024
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.