आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

आयकर अपील **सं/ITA No.91/CTK/2023**

(**निर्धारण वर्ष /** Assessment Year : 2014-2015)

KSSIIPL VEL JV, VKC & Associates, Company Secretaries, D-38, LGF(L/S), South Extension, Part-II, New Delhi-110049	Vs	The ACIT, Circle-5(1), Bhubaneswar
PAN No. :AABAK 2765 L		

(**अपीलार्थी /Appellant**)	..	(**प्रत्यर्थी / Respondent**)

निर्धारिती की ओर से /Assessee by	:	Ms. Pooja Dhalwani, CA
राजस्व की ओर से /Revenue by	:	Shri Sanjay Kumar, CIT-DR
सुनवाई की तारीख **/ Date of Hearing**	:	29/08/2024
घोषणा की तारीख**/Date of Pronouncement**	:	29/08/2024

आदेश / O R D E R

Per Bench :

This is an appeal filed by the assessee against the order of the ld. CIT(A)-2, Bhubaneswar, passed in I.T. Appeal No.Bhubaneswar-2/10968/2017-18, for the assessment year 2014-2015.

2. Brief facts of the case are that the assessee is a Joint Venture of two constituents, namely, M/s KSS Petron Pvt. Ltd. (Formerly known as Kazstroy Service Infrastructure India Pvt. Ltd.) (in short KSSIIPL) and M/s Valecha Engineering Ltd.. The assessee was awarded a sub-contract from one SPV, namely, M/s Bhubaneswar Expressway Pvt. Ltd. for carrying out the engineering, procurement and construction work at Puri-Bhubaneswar Highway. The assessee has sublet the work to its one of the constituents, the AE i.e. M/s KSS Petron Pvt. Ltd. for execution of the same. During the year under appeal, total payments of

Rs.133,40,87,018/- was made to its constituents AE against the execution of the work out of total receipts of Rs.133,62,54,272/-. The return of income was filed on 30.09.2014 declaring total income at Rs.17,27,140/- and the assessment was completed at an income of Rs.22,01,30,901/- by making adjustments based on the order of TPO with regard to the transactions between the assessee and its AE under Arms Length Price (ALP) under domestic transaction as defined u/s.40A(2) of the Act. Besides AO also estimated the profit of the appellant. In the first appeal, the assessee got part relief, thus, the present appeal is filed before us for the adjustment made in domestic transaction price as made by the AO and uphold by the ld. CIT(A).

3. During the course of hearing the ld. AR of the assessee has relied upon the written submissions filed which reads as under :-

WRITTEN SUBMISSION

May it please your honour,

Brief facts:

Appellant is a joint venture entity, being jointly formed by KSS Petron KSSIIPL (formerly known as "Kazstroy service infrastructure India Pvt ltd) and Valecha Engineering limited. Both the venture partner are well established companies in the field of civil construction. The Appellant JV was also established with an objective to jointly undertake the civil construction project work viz. construction of roads, bridges, dams, engineering, procurement etc. by bringing the expertise of both its venture partners together.

Return of Income for the subject assessment year has been e-filed on 30.09.2014 declaring income of Rs. 17,27,140/-.

Assessment Proceedings:

The case of the appellant was selected for the scrutiny assessment and notices under section 143(2) & 142(1) of the Income Tax Act, 1961 were issued and served upon the appellant.

In the course of assessment proceeding a reference was made to the Transfer Pricing Authority under section 92CA of the Income

Tax Act, 1961 for tile computation of arm's length price in respect of the specified domestic transactions. The Transfer Pricing Authority re-computed the arm's length price of the payment made to KazStroy Service Infrastructure India Pvt Ltd. [presently known as KSS Petron Private Limited] for sub- contract services and made downward adjustment of Rs. 15,33,16,226/-.

Thereby, the assessment was completed vide order dated 29.12.2017 making the additions to the total income of the appellant on account of downward adjustment of Rs.15,33,16,226/ - in respect of specified domestic transaction with Associate Enterprise and addition of Rs. 6,50,87,535/ - on account of estimated net profit margin.

Being aggrieved by the said order the appellant had preferred the appeal before the Ld. Commissioner of Income Tax (Appeals)-2, Bhubaneswar, wherein the Ld. CIT(A) deleted the addition of Rs. 6,50,87,535/- on account of ad-hoc / estimated net profit margin.

Ground-wise submission of the appellant:

Basis the ground taken, the Appellant seeks to make following submissions:

- *Ground No.1 & 2 - Rejecting AE as a tested party:*

It is submitted that the Appellant is an unincorporated joint venture consisting of Kazstroy Service Infrastructure India Private Limited ('KSSIIPL') and Valecha Engineering Limited. KazStroy and Valecha bid jointly for a project of four laning of Bhubaneswar. The Appellant has been engaged by the contractor, Bhubaneswar Expressways Private Limited, for carrying out the engineering, procurement and construction work ("EPC" Contract). Thereafter, appellant entered into sub-contract with KSSIIPL for carrying out work related to the ECP Contract. Accordingly, KSSIIPL undertakes all the relevant functions in relation to the execution of the said project and the Appellant only acts as contractor and does not perform any other activity in relation to the said project.

Since the appellant does not perform any other function apart from sub- contracting the ECP Project, the appellant was unable to identify that there exist similar third party arrangements due to limited data available in public domain. Hence, due to lack of reliable data, the appellant cannot be selected as tested party for benchmarking the underlying transaction.

On the other side, KSSIIPL, which is involved in routine execution of engineering, procurement and construction of the projects and its comparable data is readily available in public domain. Accordingly, KSSIIPL has been taken as tested party and the result of KSSIIPL has been benchmarked taking the comparable companies engaged in execution of engineering projects.

However, the Ld. Transfer Pricing Officer ("Ld. TPO"), rejected the arm's length price calculated by the appellant following TNMM Method and interalia rejecting KSSIIPL as 'tested party' based on following observations:

a) Based on Functional, Assets and Risk Analysis [FAR Analysis], the appellant does not undertake any significant function and does not assume any business risk, whereas selected the AE, KSSIIPL, as the tested party who undertakes all functions and assume significant risks.
b) The 'tested party' should be the least complex of the transacting entities in terms of intensity of functions performed and risks assumed.

c) Hence, entity undertaking all functions and related risks should not be considered as tested party since, by virtue of their complex functional and risk profiles, their margins fluctuate heavily with the vagaries of the economy, thus making comparability analysis extremely difficult and unreliable.

d) Further, in selection of entity as a tested party, availability of reliable and authentic data requiring fewest adjustment should also be factored while undertaking arm's length analysis.

Accordingly, Ld. TPO, rejected the AE, KSSIIPL, as a tested party. Relevant para of the order of Ld. TPO, has been reproduced hereunder:

In the instant case, KSSIIPL's account has significant third paTh) transactions, whose profitability would have direct nexus on the profitability of KSSIIPL's transaction with the assessee. Any analysis which is based on the aggregate approach instead of transaction-by-transaction approach would vitiate the essence of transfer pricing analysis. The actual margin earned by KSSIIPL while transacting with the assessee would be difficult to verify and authenticate and will have always leave room for subjectivity with respect to consideration of actual total costs incurred and corresponding margin earned.

In this regards, appellant submit. that Rule 10B(1)(e) of the Income Tax Rules provides that while calculating arm's length price by TNMM, the net profit margin realised by the enterprise from an international transaction or a specified domestic transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base .

Accordingly, as per transactional net margin method, the tested party can be either the seller/service receiver or the buyer / service provider. In the former case, the tested financial indicator is generally the net profit on costs or the net profit on assets. In the

latter case, the tested financial indicator is generally the net profit on sales.

Further As explained in para 3.18 of the 2010 OECD Guidelines, the choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the less complex functional analysis.

Therefore, it is contended that the tested party is usually the participant in a transaction for which profitability can be ascertained most reliably and for which reliable data on comparable can be found. The tested party will also typically be the party with the least intangibles.

In the given case of the appellant, it is submitted that, the appellant performs very limited function in execution of the project, therefore it hasn't been able to identify similar third-party arrangement for comparison of transaction under consideration. Hence, appellant cannot be taken as tested party.

It seems to be no doubt that the entity with the least complex functions should be adopted as the tested party if reliable data for transfer pricing comparison is available. In the instant case of the appellant due to its limited functional profile and further it exists only for the limited purpose comprising of the single contract. It is highly subjective to use the financial data of the appellant for comparison of Arm's Length Margin.

Therefore, based on the above discussion, we submit that the Ld. TPO has wrongly rejected KSSIIPL (AE of the appellant) as tested party and treated appellant as tested party.

• *Ground No. 3 - Rejecting use of multiple year data for selection of comparable in determining the arm's length price:*

As per Rule 10B(4) of the Income Tax Rules, the data to be used in analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction shall be the data relating to the financial year in which the international transaction or the specified domestic transaction has been entered into.

Provided that data relating to a period not being more than two years prior to such financial year may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared.

Appellant submit that, according to the business cycle, industry profile and economic conditions of the appellant, a two-three years data is appropriate rather than the use of a single year data while analyzing the comparability of an uncontrolled transaction. Therefore, the appellant used average of three year's data to calculate operating margins of comparable companies. After that, arithmetic mean of such operating margins is used to arrive at arm's length price.

As per proviso to sub-rule 4 of rule 10B of the Rules, a taxpayer is required to use relevant financial year's data or 2 years' data prior to relevant financial year, as appropriate. / applicable in its/his/her case.

In addition to above, 2010 OECD Guidelines in para 3.75 to 3.79, provide further clarification / guidance for understanding relating to use of multiple year data.

The same are discussed hereunder:

Para 3.75 to 3.79 of the OECD Guidelines:

"3.75 In practice, examining multiple year data is often useful in a comparability analysis, but it is not a systematic requirement. Multiple year data should be used where they add value to the transfer pricing analysis. It would not be appropriate to set prescriptive guidance as to the number of years to be covered bt) multiple year analyses.

3.76 In order to obtain a complete understanding of the facts and circumstances surrounding the controlled transaction, it generally might be useful to examine data from both the year under examination and prior years. The analysis of such information might disclose facts that may have influenced (or should have influenced) the determination of the transfer price.

3.77 Multiple year data 'Will also be useful in providing information about the relevant business and product life cycles of the comparables. Differences in business or product life cycles may have a material effect on transfer pricing conditions that needs to be assessed in determining comparability. T71e data from earlier years may show whether the independent enterprise engaged in a comparable transaction was affected by comparable economic conditions in a comparable manner, or whether different conditions in an earlier year materially affected its price or profit so that it should not be used as a comparable.

3.78 Multiple year data can also improve the process of selecting third party comparables e.g. by identifying results that may indicate a significant variance from the underlying comparability characteristics of the controlled transaction being reviewed, in some

cases leading to the rejection of the comparable, or to detect anomalies in third party information.

3.79 The use of multiple year data does not necessarily imply the use of multiple year averages. Multiple year data and averages can however be used in some circumstances to improve reliability of the range. See paragraphs 3.57-3.62 for a discussion of statistical tools."

Here, appellant reiterate its contention that the purpose of using multiple year data is to ensure that the outcome for the relevant year is not unduly influenced by abnormal factors. In attempting to determine an arm's length outcome for international dealings or specified domestic transactions between associated enterprises, the results of anyone year may be distorted by differences in economic or market conditions and the features and operations of the enterprise affecting the controlled or uncontrolled dealings. Participants in an industry may not be uniformly affected by business and product cycles, and therefore differences between dealings may reflect differences in circumstances, not the effects of non-arm's length dealing.

Ld. TPO, in TP order stated that Rule 10B(4) mandate use of only contemporaneous financial data to benchmark the transaction and select the comparables. Against this, appellant contend that as discussed above proviso to Rule 10B(4) of the Rules provide use of relevant financial year's data or 2 years' data prior to relevant financial year if such data reveals facts that could have material effect on the determination of transfer prices in relation to the transactions being compared. Looking at the business model and business cycle of the appellant and comparables selected by the appellant in TP Documentation, the data may have been affected in vary sense from economic or market conditions or any other abnormal factors. Therefore, while selecting comparables it is appropriate to use data of more than one financial year.

From the above it is submitted by the appellant that the Ld. TPO as well as Ld . CIT(A) erroneously rejected use multiple year data and wrongly restrict the right given by the act for choosing option for use of multiple year data, wherever appropriate.

• Ground No. 4, 5 & 6 - Inappropriate selection of comparable in determining the arm's length price

In the order under section 92CA(3), Ld. TPO rejected KSSIIPL (AE of the Appellant) as tested party and treated the Appellant itself as tested party.

However, Ld. TPO while taking comparables, considered the comparables as given in the TP Documentation, as submitted by the appellant in the assessment proceedings. With regards, to the same, appellant contend that the comparables given in the TP

documentation and further taken by the Ld. TPO, are comparables for KSSIIPL (AE of the Appellant) and not comparables for KSSIIPL VEL JV, which the Ld. TPO treated as tested party.

Appellant further contend that all the companies included in the TP documentation and further taken by the Ld. TPO as comparables are engaged in the execution of engineering projects and are functionally similar to KSSIIPL.
Whereas, KSSIIPL VEL JV does not perform any function to execute the EPC Project but only acts as a mere facilitator for the EPC Project.

Accordingly, the companies chosen as comparables for KSSIIPL that are engaged in full execution of the EPC Project cannot be taken as comparables to KSSIIPL VEL JV. Hence, for taking KSSIIPL VEL JV as tested party, Ld. TPO had to identify comparables which are not performing any other function apart from the just acting as a project contractor.

Therefore it has been submitted by the appellant that the Ld. TPO erred in selecting comparables while calculating arm's length price taking KSSIIPL VEL JV as tested party.

In the Order, Ld. TPO, discussed regarding application of modified filters or criteria leading towards selecting proper comparables functionally similar to that of appellant.

Those are as follows:

a) Companies who have more than 25% of related party transactions, (sales as well as expenditure combined) of the operating revenues & Expenditure (combined) are excluded.

d) Companies having different financial year ending (i.e. not March 31,2014) or data of the company does not fall within 12 months i.e. 01-04-2013 to 31- 03-2014 are rejected.

b) Companies who have diminishing revenue / persistent loss for the period under consideration are excluded.

c) Companies having negative net worth are excluded.

Out of comparables selected by the appellant as per TP study report, following comparables has been accepted by the Ld. TPO on the basis of above filters:

Company	*OP/OC*
C & C Construction Limited	*11.27%*
Gillanders Arbuthnot & Co. Ltd.	*2.51%*
Hindustan Construction Company Ltd.	*13.34%*

JMC Projects (India) Ltd.	*8.50%*
Punj Lloiyd Ltd.	*6.41%*
U B Engineering Ltd.	*3.43%*
Tata Projects Ltd (segmental)	*9.03%*
Average Margin	*7.78%*

And, rejected following two comparables for the reasons cited by the Ld. TPO as under:

Company	*Reasons by Ld. TPO for rejection*
Consolidated Construction Consortium Ltd.	*The company having diminishing revenue / persistent loss for the period under consideration.*
Shriram EPC Ltd.	*The company having diminishing revenue / persistent loss for the period under consideration.*

Now, the Ld. TPO, in show cause notice proposed to treat above calculated Simple Arithmetical Mean of 7.78% as arm's length margin for comparison of underlying transactions.

In response to the notice appellant filed detailed reply on 08.08.2017 and submitted as under:

As per Rule 10B(2) of the Income Tax Rules, for the purposes of comparability of an International Transaction or a specified Domestic Transaction with an uncontrolled transaction as method specified in sub-rule 1 of rule 10B, shall be judged with reference to the following points:

i). The specific characteristics of the property transferred or services provided in either transaction;

ii). The functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

iii). The contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

iv). Conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

None of the points mentioned as per rule 10B(2), as discussed above, provide that the comparables should be rejected for the reason of diminishing revenue / persistent loss for the period under consideration. The filters selected by Ld. TPO should be out of the points/factors described in the rule. However, Ld. TPO created filters from outside the scope of the act and rejected two comparables for the reason that they suffered loss in the period under consideration.

Appellant further like to submit regarding functions/activities performed by Consolidated Construction Consortium Ltd. & Shriram EPC Ltd. I

Consolidated Construction Consortium Ltd:

As per the financial data and annual report available in public domain of this company and on perusal of the revenue from operations and other factors, it can be seen that the company is engaged in providing services similar to the tested party i.e. AE of the Appellant. Hence, the company is an integrated turnkey construction service provider having pan India presence with expertise in construction design, engineering, procurement, construction and project management and also provide construction allied services such as Mechanical & Electrical, Plumbing, Fire Fighting, Heating, ventilation and air conditioning, interior fit out services and glazing solutions.

Shriram EPC Limited:

From perusal of the financial data and annual report for the year under consideration, it is clear that the company is engaged in providing services similar to the tested party i.e. AE of the Appellant. Therefore, Company provides end-to-end solutions to engineering challenges, offering multi- disciplinary design, engineering, procurement, construction and project management services.

Based on above, it is clear that the reason given by the Ld. TPO is not true and the rejection is solely based on the factor that the above two companies suffered loss in the year under comparison. Further the criteria of rejecting comparables as listed out in rule 10B(2) of the Rules, do not discuss/ provide as while selecting comparables, reference shall be made to the profitability or loss factor. Hence, rejecting comparables merely on the basis of the fact that they incurred loss in the year under comparison is unlawfull and should reversed.

In addition to above, however, while passing order, Ld. TPO revised his search process and identified additional corn parables that passes through all the filters listed in show cause notice. These are reproduced hereunder:

Company	*PLI (OP/OR)*
Ashoka Highways (Durg) Ltd.	*38.00*
OB Infrastructure Ltd.	*35.72*
Essel Infraprojects Ltd.	*25.53*
IRB Infrastructure Ltd.	*22.39*
JKM Infra Projects Ltd.	*14.58*
J Kumar Infraprojects Ltd.	*14.41*
GVR Infra Projects Ltd.	*14.35*
Max Infra India Ltd.	*11.67*
PBA Infrastructure Ltd.	*10.04*

(Table - 2)

With respect to the above, appellant contend that, once the comparables have been identified in the TP Documentation and also accepted by the TPO in first show cause notice issued, there after revision of search process and identification of new comparables is intended only to create hardship on the appellant. Further, no details regarding how the search process carried out and no backup of the comparables selected has been provided by the Ld. TPO to the appellant. In this situation the appellant has relied on the information available from public domain and contended as under:

<u>Ashok Highways (Durg) Ltd.:</u>

The company is engaged in providing service in relation to design, engineering, finance, construction of four lane duel carriageway road from end of Durg bypass to Chattisgarh/ Maharashtra Border which is a part of Raipur - Nagpur section of NH-6 (presently NH-53) in the State of Chattisgarh [consisting section from Km 322.400 to 405.000] and operation and maintenance of the same for entire concession period of 20 years on Built, Operate and Transfer (BOT) Toll basis in [an 2008. Commercial operation date of the project falls in the year 2012.

From the above, it is submitted that the business model of the company is not similar to that of the tested party i.e. the appellant since the above company operate on Built, Operate and Transfer (BOT) Toll basis and had revenue from the source which is different from the source of revenue of the tested party. Therefore, this cannot be selected as comparables for computing arm's length margin for comparison of underlying transaction.

Further, the appellant contends that the new set of comparables selected by Ld. TPO [as mentioned in Table 2 above] are very

much high and inflationary. The arm's length margin should be representative of the normal profit margin under normal market and economic situation of the comparable entities. Therefore, arm's length price computed by the above high and inflationary margin is wrong and hardship on the appellant.

• Ground no. 7 - This ground is general in nature.

It is submitted accordingly.

4. It is further submitted by the ld. AR of the assessee that in this case the assessee has worked out the Arms Length Price by taking the AE M/s Kazstroy Service Infrastructure India Pvt. Ltd. (KSSIIPL) as tested party, however, the TPO has rejected the ALP calculated by the assessee and replaced the assessee as the tested party for working out the ALP by following TNMM method which was also followed by appellant. The TPO also rejected the use of multiple year data selection for comparable and held that only contemporaneous financial data could be taken to bench mark the transaction and select the comparable without following the procedure as per Rule 10B(4) of the Act. It was the submission that the TPO has taken seven comparables out of 9 taken by the appellant and no working whatsoever was given to the appellant for adding five new comparables to work out the arms length price. It is, thus, submitted that the action of the TPO in applying pick and choose method for selection of the comparables without any back up should be rejected.

5. It was further submitted that two comparables were rejected by creating filters from outsides the scope of the Act and solely due to the reasons that they had suffered losses. It was also submitted that TPO has revised the search process and identified certain new comparables only to harass the assessee.

6. Regarding the comparables added by the TPO, the ld. AR specially drew our attention to the one company M/s Ashoka Highways (Durg) Ltd. of which the operating margin of 38% was considered for computing the average PLI. According to the ld. AR the business module of the company is not similar to that of the appellant as that company has already completed the construction in preceding year and in the year under consideration it was engaged in the business of toll operation where the profit margin is high. Therefore, this company cannot be selected as comparable for computing ALP margin. The ld. AR, therefore, submitted that the ALP computed by the TPO and confirmed by the ld. CIT(A) deserves to be deleted and the ALP computed by the assessee should be accepted.

7. On the other hand, ld. CIT-DR supported the order of the ld. TPO as well as the ld. CIT(A) and filed a detailed submission which reads as under :-

> ***Written Submissions on behalf of the Respondent***
>
> *Most Respectfully Showeth;*
>
> *Most humbly, it is submitted that in respect of the above-mentioned appeal, the appellant has filed written arguments dated 25.07.2024. In this regard, in addition to the observations and findings made by the Ld TPO, Ld Assessing Officer and the Ld CIT(A) which findings are vehemently relied in support, the following further submissions in support of the additions to the total income of the appellant made by the Ld. Assessing Officer, are also placed on record for kind consideration by the Hon'ble Bench.*
>
> *Submissions in respect of Gr Nos 1 & 2 of the appeal:*
>
> *Apart from challenging the downward adjustment amounting to Rs 15,33,16,226/ made by the Ld TPO/ AO to the value of specified domestic transaction with Associated Enterprise, the appellant has*

also challenged rejection of treating Associated Enterprise as 'Tested party" for examining compliance with Arm's length standard of the specified domestic transaction by the Ld TPO. In this regard, the Ld TPO has assigned detailed reasons in Para 4 of the show cause Notice dated 24.07.2017 which are relied in support.

It is also submitted that for determination of "Arm's length Price' of the specified domestic transactions, the appellant has chosen TNMM as the most appropriate method (MAM). So far as the selection of Most appropriate method is concerned, Ld TPO accepted the selection of TNMM as appropriate method and also accepted the PLI selected by the assessee in its transfer pricing study, which is Operating Profit/ Operating Revenue. Manner of application of TNMM for determining the Arm's length price has been provided under Rule 10B (1)(e) of the Income Tax Rules, which reads as under:

"Rule 10B. *(1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:*

(e) Transactional net margin method, by which,

(i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

Further, Sub Rule 2 & 3 of Rule 10B provides;

"Sub Rule (2)- For the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

(c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;

(d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets', overall economic development and level of competition and whether the markets are wholesale or retail.
Sub Rule (3) - An uncontrolled transaction shall be comparable to an international transaction if;

(i) none of the differences, if any, between the transactions being compared, or between the 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

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.

From the bare perusal of Rule 10B(1)(e) it could be seen that in applying TNMM, the very first step involves computation of net profit margin realised by the enterprise from the specified domestic transaction which is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base. Ld TPO has rightly observed that application of TNMM by selecting the Associated party as Tested party made by the assessee is flawed. Since, the AB i.e KSSIIPL has significant third-party transactions, the net profit margin computed by the assessee of the AE is not the net profit realised by the AE from specified domestic transactions but is the net profit of its entire business operations which include specified domestic transactions as well as third party transactions. Net profit margin of the AE from specified domestic transactions is not the same as net profit margin of the AE from its entire business activity. Appellant has not submitted as to how the net profit margin of the AE computed by him corresponds to the net profit margin from

specified domestic transactions as provided under Rule 10B (1)(e) (i) of the Income Tax Rules.

Further, it is now settled position of law that entity having least complex FAR analysis is to be considered as 'Tested party'. OECD TP guidelines 2017 too stipulate that the tested party should be the least complex entity. As per para 3.18 of the OECD TP guidelines "the choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e., it will most often be the one that has the less complex functional analysis".

Hon'ble Madras High Court in the decision dated 04.02.2021 in T.C A.No.996 of 2018 in the case of M/s.Virtusa Consulting Services Private Limited, Vs The Deputy Commissioner of Income Tax, Company Circle 5 (2), ,Chennai held as under:

"20. Now, we move on to consider the issue as to whether the assessee has to be taken as tested party for the purpose of determination of ALP or by applying the least complex theory, the AE outside the Country has to be taken as tested party. The Tribunal while considering the said question proceeded to examine the scheme of transfer pricing as provided under the Act. It referred to section 92B which defines 'International transaction', section 92A which defines 'Associated Enterprise Rule 10D which deals with the most appropriated method for determination of ALP and Rule 10B(1)(e) which provides the method for determination of ALP by adopting TNMM After referring to these statutory provisions, the Tribunal would observe that the main object is to compute the net profit margin realised by the enterprise from the international transaction; the comparison shall be with regard to the transaction of unrelated enterprise from comparable uncontrolled transaction. Thus the Tribunal opined that the net profit margin of the enterprise shall be computed in the international transaction by comparing comparable uncontrolled transaction. The Tribunal noted the definition of Enterprise as defined in section 92F(iii) and reading the said provision along with Rule 10B(l)(e) of the Rules, the Tribunal held that the net profit margin of the Enterprise which is in India, has to be determined by applying the Transfer Pricing Regulations. The Tribunal was largely guided by the decision of the Mumbai Tribunal in Aurionpro Solutions Limited, wherein it was held that the tested party for the purpose of determination of ALP is always the assessee and not the AE.

21. The assessee had referred to the decision of the Delhi Tribunal in Ranbaxy Laboratories Limited which was distinguished by observing that the said decision had proceeded on the basis of OECD guidelines. The Tribunal further went on to observe that the determination of least complex party and functions performed by the AE outside the Country are not available on record and it is not

known the amount of risk assumed by AE and its capital employed and the complexity of the functions performed by it. It is further observed that in the absence of any such documentation with regard to assumption of risk, complex functions, the capital employed, etc., the decision in Ranbaxy Laboratories Limited cannot be applied in the case of the assessee unless it is established with material evidence that the AE outside the Country performed least complex operation with a minimum risk. The Tribunal further has observed that the assessee miserably failed to establish functional risk assumed by the AE and in the absence of any material on record with regard to the risk assumed by the AE, the assessee has to be taken as tested party for the purpose of transfer pricing adjustment. Thus, the assessee was non-suited on the ground that they have failed to establish functional risk assumed by the AE outside the Country. This finding appears to be factually incorrect as could be seen from the grounds raised before the Tribunal as well as the grounds which were canvassed before the TPD and specifically raised in the objections filed before the DRP.

22. The Tribunal had distinguished the decision in Ranbaxy Laboratories Limited on the ground that the Delhi Bench of the Tribunal has proceeded on the basis of the OECD guidelines. However, we find in paragraph 25 of the judgment of the Tribunal the principles that emerge in selection of tested party has been culled out wherein it has been held that the tested party normally should be the least complex party to the controlled transaction and that there is no bar for selection of tested party either local or foreign party and neither the Act nor the guidelines on transfer pricing provides so and the selection of tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustment. Therefore, we do not agree with the reasons given by the Tribunal for not considering the decision in Ranbaxy Laboratories Limited'

In the case of Ranbaxy Laboratories Ltd. v.Add/. CITin ITA No. 2146 of 2007 in the decision dated 22-1-2008, Hon'ble ITAT Delhi held;,

"5B ..... The tested party normally should be the party in respect of which reliable data for comparison is easily and readily available and fewest adjustments in computations are needed. It may be local or foreign entity i.e. one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties i.e. taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party. But where comparable almost comparable, controlled and-uncontrolled transactions or entities are available, it may not be right to eliminate them from consideration because they look to be complex. If the taxpayer wishes to take foreign AE as tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration. "

Kolkata Bench of the Hon'ble Tribunal m Development Consultants Pvt Ltd. v. Dy. CIT 92008) SOT 455 (Kol) held;

" We agree with the view that in order to determine the most appropriate method for determining the arm's length price, it is first necessary to select the 'tested party' and the tested party will be the least complex of the controlled taxpayer and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. "

Appellant has submitted that the appellant does not perform any other function apart from subcontracting the ECP project, the appellant was unable to identify that there exist similar third-party arrangements due to limited data available in public domain. Hence due to lack of reliable data, the appellant cannot be selected as tested party for benchmarking the underlying transaction. Submissions of the appellant are not correct as the appellant and its AE both are engaged in similar activities. Subcontract services availed by the appellant to its AE are the same as are provided by the appellant to Bhubaneswar Expressway Private Ltd i.e civil construction services. It does not make much difference whether services to Bhubaneswar Expressway Private Ltd have been provided by the appellant directly or have been provided through subcontracting to its AE. The nature of the services remains civil construction services and not of providing or availing subcontract services as is being canvassed by the appellant.

Thus, selection of Associated Enterprise by the appellant as 'Tested Party' fails all the tests laid down under the statute as well as by various courts. The AE is neither the least complicated nor, it is possible to precisely identify the net profit margin realised by the AE from the specified domestic transaction. On the contrary, there is no disputing the fact that least complex functions have been performed by the appellant as compared to its AE and net profit margin from specified domestic transaction realised by the appellant can be deduced with full accuracy as the entire profit earned by the appellant is the profit realised from specified domestic transactions alone.

From the financials of the AE it can be seen that during the relevant financial year, revenue of the AE from operations have been declared at INR 1010.45 cr, whereas the revenue of the AE from specified domestic transaction is only INR 133.40 Cr. Thus, revenue from specified domestic transaction constitute a mere 13% of Gross revenue of the AE. Therefore, from the Net profit margin of the AE , net profit margin accruing to the AE from Specified domestic transaction can not be deduced.

In view of the above, it is submitted that selection of AE as 'Tested party' has been rightly rejected by the Ld TPO and rightly so upheld by Ld CIT(A) which may please be confirmed.

Submissions in respect of Gr No 3-

The appellant has taken multiple year data of the comparables selected by it for determining the Arm's length PLI. Weighted mean of the profit margins of the comparables for the relevant financial year and 2 preceding years has been taken by the appellant as net profit margin (after making working capital adjustments) of the comparable. This has been done by the appellant for all the comparables selected by the appellant. In this regard it is submitted that provisions of sub Rule 4 of Rule 10B as it stood at the relevant point of time read as under:

" Rule 10B (4)- The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into :

Provided that data relating to a period not being more than two years prior to such financial year may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared."

The appellant has not given any rationale for taking multiple year data for all the comparables. The appellant has merely reiterated the provisions which provide for use of multiple year data. However, use of multiple year data is not automatic but only in certain specified conditions. Since, the appellant has not given any reason for choosing multiple year data, the TPO has rightly rejected multiple year data when cotemporaneous data was very much available and no reasons whatsoever for choosing multiple year data have been specified by the appellant in respect of any of the comparables. Sub Rule 4 to Rule 10 of the Income Tax Rules prescribes for adoption of multiple year data only when such data reveals facts which could have an influence on the determination of transfer price in relation to the transactions being compared. Mere submission of the appellant that data may have been affected in vary sense from economic or market conditions or any other abnormal factors, clearly shows that no case has been made out by the appellant for adoption of multiple year data.

It is also submitted that even the proviso to Rule 1 OB(4) is not applicable for transactions entered into after 01.04.2014 as the Rule 10B(4) was amended and proviso was made absolutely inapplicable. Thus, it is evident that even prior to 01.04.2014, the intention of the legislature was to consider only contemporaneous data for the purpose of examining compliance with arm's length standards, however certain leeway was provided for using data of 2 preceding years under certain specified conditions. However, at no point of time, the use of multiple year data was made absolute law as has been treated by the appellant. Since, existence of conditions precedent for taking multiple year data into account has not been

demonstrated at any stage of proceedings, either before TPO or before AO or before the Ld CIT(A) or in the present proceedings, the use of multiple year data has to be disapproved. Therefore, the related ground of appeal of the appellant deserves to be dismissed. It is prayed accordingly.

Submissions in respect of Gr No 4, 5& 6

In these grounds, the appellant has challenged the rejection of comparables namely, Consolidated Construction Consortium Ltd and Shriram EPC Limited by the Ld TPO.

In the written submissions, the appellant has submitted that both the comparables namely Consolidated Construction Consortium Ltd and Shriram EPC Limited, chosen by the appellant have been rejected by the Ld TPO for the following reasons;

Submissions of the appellant in this regard are completely false as is evident from the reasons given by the Ld TPO in his order at pg 12 which reads as under:

"The company having diminishing revenue/persistent loss for the period under consideration"

"Shriram EPC Ltd- The company is involved in design and implementation of turnkey environmental projects like water and sewage treatment plants, underground drainage system, water distribution etc. Hence the company is engaged in dissimilar activity.

Consolidated Construction Consortium Ltd- The Company is engaged in dissimilar activity. On the basis of data available in public domain this can also clear that the function of the company is not similar to the function of tested party;

" CCCL ,professionalism is a combination of competence, technology, skill and dedication, unified and strengthened by a code of ethics. It is this special professionalism that has won for us many prestigious projects in a variety of market segments and encourages us to aim for greater challenge all the time."

Therefore, contention of the appellant that the 2 comparable have been rejected for the reason of diminishing revenue/persistent loss is not correct. Evidently, the comparables have been rejected for functional dissimilarities. Therefore, order of the Ld TPO be upheld on this issue also. It is prayed accordingly.

So far as the ground related to the selection of new comparables by TPO is concerned, in the written arguments, the appellant has submitted that once the comparables have been identified in the TP documentation and also accepted by the TPO in the first show cause notice issued, there after revision of search process and

identification of new comparables is intended only to create hardship on the appellant. The appellant has further submitted that no details regarding how the search process carried out and no backup of the comparables selected has been provided by the Ld TPO.

Submissions of the appellant in this regard are without any basis. The selection of fresh comparables was done by the Ld TPO by following the due procedure and by providing adequate opportunity to the appellant. Ld TPO in his order at Pgs 10-11 has elaborately discussed all the objections raised by the appellant in this regard.

It is also submitted that all the fresh comparables selected by the Ld TPO were identified by the appellant but were rejected on some or the other pretext. In this regard reference can be made to the comparables search report of the appellant which is part of the TP documentations enclosed in the paper Book by the appellant, The details of comparables selected by the TPO and corresponding entry in the search report carried out by the appellant is tabulated as under:

Sr No	Name of the New Comparable	Reference in search report of the assessee
1.	Ashoka Highway (Durg) Ltd	Sr No 499 (Accept reject matrix Pg 9, PB Pg 86)
2.	JKM Infra Projects Ltd	Sr No 2625 (Accept reject matrix Pg 42, PB Pg 119)
3.	J Kumar Infraprojects Ltd	Sr No 2629 (Accept reject matrix Pg 42, PB Pg 119)
4.	Max Infra Ltd	Sr No 3416 (Accept reject matrix Pg 55, PB Pg 132)
5	PBA infrastructure Ltd	3994 Sr No 3994 (Accept reject matrix Pg 64 PB Pg 141)

Thus, it is evident that submissions of the appellant in this regard are totally false and misleading. All these comparables were identified by the appellant himself in the search database. Filters applied by the appellant are same in respect of comparables selected by the appellant and the TPO. These comparables were rejected by the appellant for identical reason i.e 'functionally different". Ld TPO at Pg 11 of the order has mentioned as to how the comparables are not functionally different. It may not be out of place to mention here that in all 9 other functionally similar comparables were identified by the Ld TPO and after considering in detail the submissions of the appellant 4 comparables were dropped on finding functional dissimilarity. The appellant has not mentioned as to how the observations of the Ld TPO in this regard are not correct. So far as allegation of the appellant that no details regarding search process and no backup of the comparables selected by TPO has been provided, is concerned, it is evident that all comparables are coming from the search carried out by the appellant only and back up of the comparables are already with the

appellant as appellant could not have rejected them without looking into back up documents. Thus, all the allegations of the appellant are baseless and misleading. It is therefore submitted that addition of fresh comparables to the list of comparables selected by the appellant which have been accepted by the TPO, is very much in accordance with law and has rightly been upheld by the Ld CIT(A).

It is therefore submitted that computation of Arm's length PLI at 11.60% which is calculated as under, has been made by the Ld TPO strictly following the statutory provisions of the Income Tax Act and Rules mad thereunder which has rightly been confirmed by the Ld CIT(A).

Sr No	Comparable	PLI (Operating profit/operating cost)
1	C & C Construction Ltd	11.27%
2	Gillanders Arbuthnot & Co Ltd	2.51%
3	Hindustan Construction Company Ltd	13.34%
4	JMC Projects (India) Ltd	8.50%
5	Punj Lloyd Ltd	6.41%
6	U B Engineering Ltd	3.43%
7	Tata Projects Ltd (Segmental)	9.03%
8	Ashoka Highway (Durg) Ltd	38.00 %
9	JKM Infra Projects Ltd	14.58%
10	J Kumar Infraprojects Ltd	14.41%
11	Max Infra Ltd	11.67
12	PBA infrastructure Ltd	10.04%
	Average PLI 143.19/12	11.93% (computed by TPO at 11. 60%)

It is therefore submitted that Arms' length price of the specified domestic transaction has been rightly computed by the Ld TPO at 118,12,48,776/ against the transaction value of Rs 133,40,87,018/ resulting into downward adjustment of Rs.15,33,16,226/ which has rightly been confirmed by the Ld CIT(A). Thus, the appeal of the assessee being devoid of merits deserves to be dismissed in entirety.

8. Ld. CIT-DR further submitted that the TPO has taken comparables from the TP Study Report of the appellant itself. He further submitted that during the course of hearing before the TPO the assessee in reply to show cause notice dated 16.08.2017 has submitted an alternative working wherein total 11 companies were selected for comparison, according to

which the PLI was worked out at 5.45% as against the operating margin of 7.99 percentage of the AE.

9. As per ld CIT DR choosing the AE an tested party is not proper since out of AE's gross revenue of Rs.1010.44 crores, only Rs.133.40 crores comes from specified domestic transaction which is approximately 13% of gross revenue. Thus net profit margin of AE from specified domestic transaction cannot be deduced.

10. The ld. CIT-DR further submitted that the assessee has made an error of comparing the operating margin of its AE as against the operating margin of the appellant who has declared profit of only Rs.16,67,143/- on the gross income of Rs.133,62,93,497/- i.e 0.12%. He further submitted that the TPO has already accepted 7 companies out of the 11 companies taken by the assessee for computing ALP in addition to new five companies which are in the same line of business and were deliberately ignored by the assessee while making working of ALP, therefore, he prayed for the confirmation of the adjustment in specified domestic transaction made by the TPO and confirmed by the ld. CIT(A).

11. In rejoinder, the ld. AR reiterated that the TPO has introduced five new comparables including M/s Ashoka Highways (Durg) Ltd. which has very high operating profit of 38% and is in the business which is not comparable with the business of the assessee and submitted that the new comparables as added by the TPO are misleading and should be ignored.

12. On the other hand, ld. CIT-DR submitted that the comparables have been selected out of the TP study report filed by the appellant only and

back up of the comparables are already with the appellant since it is based on its own working. Thus, all the allegations of the appellant are baseless and misleading and no fresh comparables were selected by the TPO, therefore, the order of the TPO is liable to be upheld.

13. We have considered the rival submissions and perused the material available on record. At the outset, it is seen that the appellant joint venture formed with primary object of construction of roads, bridges, dams etc. The work was awarded to it by M/s Bhubaneswar Expressway Pvt. Ltd. as EPC contract. The work was sublet to one of the JV partners M/s KSSIIPL, who has been expertise in this field and almost entire receipts from the principals were transferred to the AE for the execution of the work and the appellant has disclosed a very meager net profit on the gross receipts of Rs.133.62 crores. From the TP study report, it is seen that the appellant has taken its AE as the tested party and after applying the filters has worked out the average PLI at 7.78% and by observing that the average margin of its AEs is 7.99%, has not made any adjustment with regard to specified domestic transaction carried out between the appellant and its AE. The AO has referred the matter to TPO who vide its order dated 06.10.2017 u/s.92CA(3) of the Act, though has worked out the ALP of the TNMM method which has also been adopted by the assessee however, has changed the tested party from its AE M/s KSSIIPL to the appellant as the tested party. The reasons for such change as has been observed in para 4 of the show cause notice dated 24.07.2017, as referred in TPO order reads as under :-

4.0 On perusal of the TPSR submitted, section 4.2.3 & 4.2.4 elaborates the functions performed by the assessee and its related party i.e KSSIIPL. Based on perusal of the same, it can be inferred that KSSIIPL performs the following critical functions as part of transaction with assessee

Strategic management functions

Corporate services

Functional specification and requirement analysis

Project management; and

Quality control

On the other hand, the assessee is only engaged in limited project management activity. Further, it has been provided that KSSIIPL also assumes most of the business risks critical to business operation with assessee i.e business risks , utilization risks and service liability risks. The only risks which presumably is assumed by assessee is credit risks which is also passed on to KSSIIPL. Hence , based on the functional and risk analysis submitted by assessee, it can be squarely conducted that all critical functions and related business risks are assumed by KSSIIPL.

Based on the above functional and risks analysis, the assesse as part of the TPSR has considered KSSSIIPL as the tested party to conclude on the arm's length nature of the assessee's payment transaction. In doing so, the assessee himself has contradicted in undertaking appropriate analysis. On the one hand, it has been detailed that assessee does not undertake any significant function and also does not assume any business risks however, has erred in selecting KSSIIPL as the tested party who undertakes all functions and assume significant risks ie. entrepreneur profile.

It is an accepted law that the 'tested party should be the least complex of the transacting entities, Le., the simpler entity in terms of intensity of functions performed and risks assumed. Accordingly, the tested party would also earn routine but steady return. As a general rule, entity undertaking all functions and related risks should not be considered as tested party since, by virtue of their complex functional and risk profiles, their margins fluctuate heavily with the vagaries of the economy, thus making comparability analysis extremely difficult and unreliable.

The assessee has also undertaken a detailed analysis to map owner of the functions and corresponding risks however, has gone astray in selecting the tested party for arm's length analysis.

Further, in addition to selection of entity having least complex operation in terms of functional, asset and risks analysis, availability of reliable and authentic data requiring fewest adjustment should also be factored while undertaking arm's length analysis. In the

instant case, KSSIPL's accounts has significant third party transactions, whose profitability would have direct nexus on the profitability of KSSIIPL's transaction with the assessee. Any analysis which is based on the aggregate approach instead of transaction-by-transaction approach would vitiate the essence of transfer pricing analysis. The actual margin earned by KSSIIPL while transacting with the assessee would be difficult to verify and authenticate and will have always leave room for subjectivity with respect to consideration of actual total costs incurred and corresponding margin earned.

Considering the above fact, the undersign rejects KSSIIPL as tested party and considers assessee who is undertaking very limited functions and precisely no risks and whose financial data are available requiring fewer or no adjustment for undertaking arm's length analysis.

14. Thereafter the TPO identified certain more comparables and rejected few comparables out of the comparable taken by assessee by providing the reasons in para 8 of show cause notice dated 24.07.2017, which reads as under :-

8.0 Now, the undersigned proceed to select the comparable after necessary examination of the comparables stated in the TP document and by undertaking search in ACE Database. Though the assessee adopted certain filters in TPSR, after careful study, it is found that the following modified filters or criteria may lead towards selecting proper comparables functionally similar to that of the taxpayer:

Companies who have more than 25% related party transactions, (sales as well as expenditure combined) of the operating revenues & expenditure (combined) are excluded.

Companies who have diminishing revenues/persistent losses for the period under consideration are excluded.

Companies having negative net worth are excluded.

Companies having different financial year ending (i.e. not March 31, 2014) or data of the company does not fail within 12 month period i.e. 01-04-2013 to 31-03-2014 are rejected

15. Thereafter the TPO has accepted the seven comparables out of nine taken by the assessee and proposed to introduce seven more comparables out of the comparable search report of the assessee from

TP study report. Thereafter the TPO vide notice dated 16.08.2017 has again refined the comparables and identified certain other comparables and total 9 comparables were proposed as additional comparables for computing the ALP. After considering the assessee's submission, finally TPO vide para 5 of the order has taken 7 comparables from assessee's working of ALP and further 5 comparables were introduced which are as under :-

A. Comparables selected by the assessee and accepted by the TPO

Company	*OP/OC*
C & C Construction Limited	*11.27%*
Gillanders Arbuthnot & Co. Ltd.	*2.51%*
Hindustan Construction Company Ltd.	*13.34%*
JMC Projects (India) Ltd.	*8.50%*
Punj Lloiyd Ltd.	*6.41%*
U B Engineering Ltd.	*3.43%*
Tata Projects Ltd (segmental)	*9.03%*
Average Margin	*7.78%*

B. Comparables selected by the TPO :

Company	*OP/OR(%)*
Ashoka Highways (Durg) Ltd.	*38.00*
JKM Infra Projects Ltd.	*14.58*
J Kumar Infraprojects Ltd.	*14.41*
Max Infra India Ltd.	*11.67*
PBA Infrastructure Ltd.	*10.04*
Average PLI	*17.74%*

16. The TPO has worked out the PLI at 11.60% according to which adjustment of Rs.15,33,16,226/- was proposed by the TPO. From the perusal of the TPO's order and the submission made by the assessee, we find that there was no error in the order of the TPO to the extent of holding that the appellant should be the tested party.

17. The AE has significant third party transaction and in the TP study report assessee has compared the average PLI with overall operating margin of AE and no operating margin from the specified domestic transactions carried with the appellant was worked out. This is clear violation of Rule 10B(e) in IT Rules 1962. Moreover, tested party should be the one which has less complex Financial analysis. In the instant case, appellant has only worked for his principal and no services were rendered for any other party. On the contrary, AE has gross revenue of 1010.45 crore, out of which only 133.40 crore was from specified domestic transactions, which is approx. 13% of gross revenue, thus having more complex financial analysis. Therefore, we are in agreement with the TPO in choosing the assessee as the tested party.

18. For this, we rely upon the judgment of the Hon'ble Madras High Court in the case of M/s Virtusa Consulting Services Private Limited Vs. The DCIT, Circle-5(2), Chennai, rendered in T.C.A.No.996 of 2018, dated 04.02.2021, wherein the Hon'ble Court has observed as under :-

> *"20. Now, we move on to consider the issue as to whether the assessee has to be taken as tested party for the purpose of determination of ALP or by applying the least complex theory, the AE outside the Country has to be taken as tested party. The Tribunal while considering the said question proceeded to examine the scheme of transfer pricing as provided under the Act. It referred to section 92B which defines 'International transaction', section 92A which defines 'Associated Enterprise Rule 10D which deals with the most appropriated method for determination of ALP and Rule 10B(1)(e) which provides the method for determination of ALP by adopting TNMM After referring to these statutory provisions, the Tribunal would observe that the main object is to compute the net profit margin realised by the enterprise from the international transaction; the comparison shall be with regard to the transaction of unrelated enterprise from comparable uncontrolled transaction. Thus the Tribunal opined that the net profit margin of the enterprise shall be computed in the international transaction by comparing*

comparable uncontrolled transaction. The Tribunal noted the definition of Enterprise as defined in section 92F(iii) and reading the said provision along with Rule 10B(l)(e) of the Rules, the Tribunal held that the net profit margin of the Enterprise which is in India, has to be determined by applying the Transfer Pricing Regulations. The Tribunal was largely guided by the decision of the Mumbai Tribunal in Aurionpro Solutions Limited, wherein it was held that the tested party for the purpose of determination of ALP is always the assessee and not the AE.

21. The assessee had referred to the decision of the Delhi Tribunal in Ranbaxy Laboratories Limited which was distinguished by observing that the said decision had proceeded on the basis of OECD guidelines. The Tribunal further went on to observe that the determination of least complex party and functions performed by the AE outside the Country are not available on record and it is not known the amount of risk assumed by AE and its capital employed and the complexity of the functions performed by it. It is further observed that in the absence of any such documentation with regard to assumption of risk, complex functions, the capital employed, etc., the decision in Ranbaxy Laboratories Limited cannot be applied in the case of the assessee unless it is established with material evidence that the AE outside the Country performed least complex operation with a minimum risk. The Tribunal further has observed that the assessee miserably failed to establish functional risk assumed by the AE and in the absence of any material on record with regard to the risk assumed by the AE, the assessee has to be taken as tested party for the purpose of transfer pricing adjustment. Thus, the assessee was non-suited on the ground that they have failed to establish functional risk assumed by the AE outside the Country. This finding appears to be factually incorrect as could be seen from the grounds raised before the Tribunal as well as the grounds which were canvassed before the TPD and specifically raised in the objections filed before the DRP.

22. The Tribunal had distinguished the decision in Ranbaxy Laboratories Limited on the ground that the Delhi Bench of the Tribunal has proceeded on the basis of the OECD guidelines. However, we find in paragraph 25 of the judgment of the Tribunal the principles that emerge in selection of tested party has been culled out wherein it has been held that the tested party normally should be the least complex party to the controlled transaction and that there is no bar for selection of tested party either local or foreign party and neither the Act nor the guidelines on transfer pricing provides so and the selection of tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustment. Therefore, we do not agree with the reasons given by the Tribunal for not considering the decision in Ranbaxy Laboratories Limited'

19. With regard to the assessee's contention that no break up and other working was provided with respect to the additional comparable identified by the TPO, we see that the TPO has picked up those comparables only from the TP Study report provided by the assessee for which necessary break up must be available with the assessee. Further before applying such comparables an opportunity was also provided through show cause notice to the assessee. Therefore, we find no error in the order of the TPO in not providing such break up analysis to the assessee which infact was already available with it.

20. Another ground taken by the appellant is with regard to the rejection of use of multiple year data for selection of comparables in determining the Arm's length price. In this regard we first refer Rule 10B(4) which provide the data that could be used for making analysis. The Rule 10B(4) reads as under :-

> ***Determination of arm's length price under Section 92C.***
>
> ***Rule 10B(4)*** *The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction shall be the data relating to the financial year (hereafter in this rule and in rule 10CA referred to as the 'current year') in which the international transaction or the specified domestic transaction has been entered into :*
>
> ***Provided*** *that data relating to a period not being more than two years prior to the current year may also be considered if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared:*
>
> ***Provided further*** *that the first proviso shall not apply while analysing the comparability of an uncontrolled transaction with an international transaction or a specified domestic transaction, entered into on or after the 1st day of April, 2014.*

21. From the TP study report, nowhere the appellant is able to satisfy us as to why one year i.e. current year data is not appropriate. In other words merely saying that according to business cycle, industry profile and economic conditions of the appellant, three years data is more appropriate without specifically pointing out us to how all these factors effects adversely if only current year data is taken. Moreover, statute also restricts the use of multiple year data for the specified domestic transactions carried out on or after 1.4.2014. In view of these facts we are in fully agreement with TPO of that only current year data is to be considered for analysis.

22. Now, coming to the last contention that TPO has wrongly rejected few comparable taken by the appellant and the additional comparables taken by the TPO are not qualified to be compared as they were engaged in the separate line of business or having other financial activity. From the details filed by the appellant, we find that TPO has taken five additional comparables and except M/s Ashoka Highways (Durg) Ltd., the other comparables are qualified for selection as comparables and no plausible explanation was given by the assessee as to why they could not considered for computing ALP.

23. While rejecting two comparables taken by the assessee, TPO at 12 of order has provided specific reason for the same with reads as under:-

> *"Shriram EPC Ltd- The company is involved in design and implementation of turnkey environmental projects like water and sewage treatment plants, underground drainage system, water distribution etc. Hence the company is engaged in dissimilar activity.*

> *Consolidated Construction Consortium Ltd- The Company is engaged in dissimilar activity. On the basis of data available in public domain this can also clear that the function of the company is not similar to the function of tested party;*
>
> *" CCCL, professionalism is a combination of competence, technology, skill and dedication, unified and strengthened by a code of ethics. It is this special professionalism that has won for us many prestigious projects in a variety of market segments and encourages us to aim for greater challenge all the time."*

24. Before us, Ld. AR submitted that reasons for rejection of these comparables by TPO was “the company having diminishing revenue/persistent loss for the period under consideration”. However, from the reasons given by TPO as reproduced above, we find that TPO has very categorically observed that these two comparables were not engaged in similar line of trade as of the tested party. Thus this contention of the assessee is devoid of any merits and rejected.

25. With regard to inclusion of M/s Ashoka Highways (Durg) Ltd. as comparable for computing the ALP, we find force in the argument of ld. AR that during the year under appeal, of which operating margin has been taken by the TPO, the company was engaged in the business of toll operation as it has received the project completion certificate in preceding year and no construction activity on toll road was carried during the year. Further it is an admitted fact that margin from the toll operation is always be higher, therefore, the said comparable cannot be included for working of the ALP.

26. In view of above discussion and conclusion, we are of the view that ALP as computed by the TPO in the present facts and circumstances of the case is fair and reasonable to the extent of 11 comparables except

M/s Ashoka Highways (Durg) Ltd. who has operating margin of 38% from toll operation business. Accordingly, we direct the AO to exclude the company M/s Ashoka Highways (Durg) Ltd. from the list of comparables and recompute the adjustment to be made in specified domestic transaction based on the average PLI for remaining 11 comparables as taken by the TPO.

27. With this observations, ground Nos.1 to 4 are dismissed and ground Nos.5&6 are set aside to the file of ld. AO to recompute the ALP as per directions given in para 26 above.

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

Order dictated and pronounced in the open court on 29/08/2024.

Sd/-	**Sd/-**
(GEORGE MATHAN)	**(MANISH AGARWAL)**
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य/ **ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 29/08/2024

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   KSSIIPL VEL JV,
   VKC & Associates,
   Company Secretaries, D-38, LGF(L/S), South Extension,
   Part-II, New Delhi-110049
2. प्रत्यर्थी / The Respondent-
   The ACIT, Circle-5(1), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(**Assistant Registrar**)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack