

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (L) NO.1757 OF 2019
WITH
NOTICE OF MOTION NO.735 OF 2019
IN
INCOME TAX APPEAL (L) NO.1757 OF 2019**

Jacob Engineering India Pvt. Ltd.Appellant

V/s.

Asst. Commissioner of Income Tax, 10(2)(1)Respondent

WITH

WRIT PETITION NO.2195 OF 2019

Jacob Engineering India Pvt. Ltd.Petitioner

V/s.

Income Tax Appellate Tribunal & Ors.Respondents

Mr. Percy J. Pardiwalla, Senior Advocate a/w. Mr. Niraj Sheth i/b. Mint and
Conferees for appellant/petitioner.

Mr. Akhileshwar Sharma for respondent/respondents-Revenue.

**CORAM : K.R.SHRIRAM, &
AMIT B. BORKAR, JJ.**

DATED : 11th OCTOBER 2021

P.C.:

NOTICE OF MOTION NO.735 OF 2019

1 Heard the counsel and also considered the pleadings before us.

The delay is condoned.

2 Notice of motion accordingly stands disposed.

INCOME TAX APPEAL (L) NO.1757 OF 2019

3 The appeal pertains to Assessment Year 2010-2011. Appellant

carries on business, *inter alia*, of engineering design consultancy, process engineering, supervision services and project services in the field of chemicals, petrochemicals, fertilizers, cement, pharmaceuticals etc. Appellant's case was referred to Deputy Commissioner of Income Tax 8 (1) for assessment under Section 92CA(1) of the Income Tax Act, 1961 (the said Act). During the course of the transfer pricing assessment proceedings, the Transfer Pricing Officer (TPO) challenged the comparables adopted by appellant and in the process rejected some comparables identified by appellant as well as proposed addition of new companies in the comparable set. The TPO passed an order under Section 92CA(3) of the Act proposing an adjustment of Rs.24,27,65,921/- to the income of the assessee. A final assessment order dated 16th April 2014 came to be passed whereby a sum of Rs.24,27,65,921/- was finally added to the income of appellant.

4 Appellant filed an appeal against this assessment order before Commissioner of Income Tax (CIT) raising various grounds. For ease of reference, the grounds are reproduced hereinbelow :

Ground 1 – The learned Assessing Officer (AO)/Transfer Pricing Officer (TPO) erred in assessing the total income of the Appellant at Rs.52,31,19,87/- as against income of Rs.28,03,01,078/- computed by the Appellant.

Ground 2 – The learned Assessing Officer (AO)/Transfer Pricing Officer (TPO) erred in making transfer pricing adjustment of Rs.24,27,65,921/- to the total income of the Appellant.

Ground 3 – The learned AO/TPO erred in rejecting/disregarding the comparability analysis of the Appellant presented in its transfer pricing document.

Ground 4 – The learned AO/TPO has erred in rejecting/disregarding audited segmentals maintained by the appellant.

Ground 5 – The learned AO/TPO has erred in observing that the computerized timesheet maintained and submitted by appellant cannot be relied on.

Ground 6 – The learned AO/TPO erred in rejecting the Internal Transactional Net Margin Method (Internal TNMM) and adopting the External TNMM method as the most appropriate method for benchmarking the international transactions undertaken by the Appellant.

Ground 7 – The learned AO has erred in computing the profitability of Appellant at entity level.

Ground 8 – The learned AO/TPO has erred in rejecting Accuspeed Engineering Design Service limited and Cades Digital Private limited and M N Dastur Company Limited as comparable companies without cogent reasons.

Ground 9 – The learned AO/TPO has erred in considering following companies as comparable

- Engineers India Limited*
- Rites Limited*
- Wapcos Limited*

The CIT (A) passed an order dated 29th February 2016 by which ground nos.1 and 2 were disposed as general in nature, ground no.3 was decided in favour of Revenue and ground nos.4 to 7 were considered as academic in nature and dismissed. Ground nos.8 and 9 were decided in favour of appellant.

5 Ground nos.8 and 9, which were held in favour of appellant, are relevant to this appeal. To provide with the background, the AO/TPO had proposed rejection of 1)M N Dastur company Limited 2) Accuspeed Engineering Design Service Limited and 3) Cades Digital Private Limited, i.e., comparable companies selected by appellant. Further the AO/TPO also proposed inclusion of high margin Government companies in the

comparable set such as 1) Engineers India Limited 2) Rites Limited and 3) Wapcos Limited. As both Ground Nos.8 and 9 were ruled in favour of appellant and according, a clean order was passed with NIL adjustment, in favour of appellant.

6 Given the above, respondent filed an appeal against the above CIT (A) order with ITAT on the following grounds including against ground numbers 8 and 9 of appellant referred to above. Ground nos.2 to 5 of respondent's appeal are reproduced below :

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

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

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

7 In response to the same, appellant filed the following cross objections with ITAT stating that the AO/TPO erred in objecting to the order of the CIT (A) on the ground that :

Acceptance of companies selected by Assessee as comparables

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

2. the Hon'ble CIT (A) accepted M/s. Accuspeed Engineering Design Services Limited (Accuspeed) as a comparable company even though the turnover of Accuspeed is allegedly 125 times lower than that of the Assessee and its operational parameteres hence is not comparable to the Assessee.

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

Rejection of companies considered as comparables by the AO/TPO

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

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

8 The ITAT by an order dated 10th January 2018 held, *inter alia*,
as under :

“We heard the parties on this issue. We noticed that the question whether the government companies can be taken as comparables or not was considered by the Co-ordinate bench in assessee’s own case in AY 2008-09 and the tribunal has held the government companies cannot be taken as comparables. For the sake of convenience we extract below relevant portion of the order passed by the Co-ordinate Bench in assessee’s own case :

11. The first contention of the assessee (sic. is) that the Government Companies should not have been taken as comparable as per the following decisions :

(a) CIT Vs. Thyssen krupp Industries India Pvt. Ltd. (2016) (68 taxmann.com 248) (Bom)

(b) ACIT Vs. Chemtex Global Engineers P Ltd. (2013) (35 taxmann.com 351) (Mum ITAT)

(c) International SOS Services India P Ltd. Vs. DCIT (2016) (67 taxmann.com 73) (Delhi ITAT)

(d) Bechtel India Pvt. Ltd. Vs. DCIT (ITA No.1478/Del/2015)

In the case of Thyssen krupp Industries India Pvt. Ltd., the TPO had included M/s. Engineers India Ltd. a Government company. The Tribunal excluded the same with the observation that the Engineers India Ltd. could not be considered to be comparable for the reason that the contracts between Public Sector undertakings are not driven by profit motive along but other consideration also weight in such as discharge of social obligations etc. Identical view has been expressed in other cases also. The view taken by the Tribunal was not found fault with by the Hon'ble Bombay High Court.

12. In the instance case, the comparables viz., Engineers India Ltd. and Water and Power Consultancy Ltd. are Government Companies. Accordingly, consistent with the view taken in the cases referred to preceding paragraph, we hold that the Government Companies cannot be taken as comparable.

We notice that the view taken by Ld. CIT (A) is in accordance with the view taken by the Tribunal in the assessee's own case. Accordingly, we do not find any reason to interfere with his order passed on this issue and accordingly we uphold the same.

7. With regard to remaining grounds urged by the revenue the learned AR submitted that even if other grounds of the revenue are decided in favour of revenue the same would not result in making any addition since the adjustment would fall within tolerance range of 5%.

8. We heard learned Department Representative. From the submissions made by learned AR, we notice that the adjudication of other grounds would be academic in nature, since according to learned AR even if those grounds are decided in favour of the Revenue, the same would not result in any addition. In the view of the same, without deliberating on those grounds we decide them in favour of Revenue."

9 Mr. Pardiwalla submitted that during the hearing, with regard to Department's grounds of appeal, the Tribunal inadvertently ruled grounds 2, 3 and 5 in favour of the Department without evaluating the

merits of the case or giving an opportunity to the assessee to argue the same, despite the fact that it was clearly represented by the assessee that the said grounds were academic in nature in light of the earlier proceedings. Mr. Pardiwalla further submitted that during the course of hearing, appellant's representative argued that government companies should be excluded from the set of comparable companies, mentioning that identical issue was considered in appellant's own case for Assessment Year 2008-2009 wherein the issue was decided in appellant's favour. Accordingly, for Assessment Year under consideration, viz., Assessment Year 2010-2011 also government companies should be held to be excluded from the comparable set. Mr. Pardiwalla submitted that during the hearing, appellant also stated that if government companies were excluded, i.e., ground no.4 and 5 of the cross objection granted in favour of the assessee, the other grounds, i.e., ground nos.1, 2 and 3 of the cross objection, would be of no consequence given that the said grounds were already held in favour of the assessee by the CIT. The five grounds are reproduced in paragraph 7 above.

10 Mr. Pardiwalla further submitted that during the hearing, the Department representative did not press its own grounds of appeal, i.e., Accuspeed Engineering Design Service Limited, Cades Digital Private Limited and M.N. Dastur Company, which are subject matters of ground nos.2, 3 and 5 mentioned above in paragraph 6 and appellant accordingly was not given an opportunity to counter argue them. Mr. Pardiwalla

submitted that the Tribunal, however, in its order inadvertently has recorded *“From the submissions made by learned AR, we notice that the adjudication of other grounds would be academic in nature, since according to learned AR even if those grounds are decided in favour of the Revenue, the same would not result in any addition. In the view of same, without deliberating on those grounds we decided them in favour of Revenue”*.

11 Mr. Pardiwalla submitted that during hearing appellant had merely mentioned that the other grounds are of no consequence since the said grounds were already held in favour of the assessee by the CIT (A) and the Department representative, during the hearing, did not press on its own ground of appeal on Accuspeed Engineering Design Service Limited, Cades Digital Private Limited and M.N. Dastur Company and appellant accordingly was not given an opportunity to counter argue them. Mr. Pardiwalla submitted that even if the grounds were to be decided in favour of the Department, a reasonable opportunity of hearing appellant should be granted to them. Mr. Sharma submitted that the order of the ITAT is very clear and there is no merit on what Mr. Pardiwalla submitted.

12 Having heard both the counsel and having considered the writ petition as well as the appeal, which are listed together, in our view, the interest of justice will be met and no prejudice will be caused to any party if the order impugned in this appeal is quashed and set aside and the ITAT is

directed to hear the parties to the extent of considering ground nos.1, 2 and 3 of the cross objections filed by appellant against Department's grounds and also ground nos.2, 3 and 5 of the Department's appeals which are also quoted above and pass such order on merits as the ITAT may deem fit.

13 We clarify we have not made any observation on the merits of the matter.

14 Appeal and writ petition both disposed.

(AMIT B. BORKAR, J.)

(K.R. SHRIRAM, J.)