THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri C.N. Prasad

I.T.A. No. 7194/Mum/2012
(Assessment Year 2008-09)

M/s. Jacobs Engineering India Private Limited Jacobs House Ramkrishna Mandir Road Kondivita, Andheri East Mumbai-400 059.	Vs.	DCIT Range 8(2) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN No. AAACH0456J

Assessee by	Shri Sunil Lala
Department by	Shri Shahi Saanjay Kumar
Date of Hearing	7.4.2017
Date of Pronouncement	17.5.2017

O R D E R

Per B.R. Baskaran(AM)

The assessee has challenged the order dated 19-10-2012 passed by the assessing officer in pursuance of directions given by the Dispute Resolution Panel (DRP) u/s 144C(5) of the Act and it relates to the assessment year 2008-09. The assessee is aggrieved by the decision of DRP/AO in confirming the order of TPO with regard to the Engineering services rendered by it.

2. The facts relating to the above said issue are discussed in brief. The assessee is engaged in the business of providing Engineering consultancy services in the field of Chemicals, Petrochemicals, Fertilisers, Cement, Pharmaceuticals and allied industries. The major portion of Equity capital of the assessee company is held by M/s Jacobs Engineering Ltd, U.K and M/s Jacobs Engineering Inc., USA. During the year under consideration, the assessee had carried out international transactions with its Associated Enterprises (AE) located

in USA, Netherlands, U.K., Belgium, Singapore, Finland, France, Canada and Hong Kong. The issue urged before us relates to the Engineering Services rendered by the assessee to its AEs.

3. The assessee followed TNMM method to benchmark the international transactions entered with its AEs. The assessee carried out "Internal TNMM" analysis by comparing the net margin earned from contracts with AEs and non-AEs. As per the working of the assessee, it has earned Net margin of 25.41% from the transactions entered with AEs and 16.98% from the transactions entered with Non-AEs.

4. The assessee also compared margin under TNMM method with external comparables. As per the workings of the assessee, the external comparable have made an operating profit margin of 26.43% as against the profit of 25.41% reported by the assessee. The assessee has submitted that the difference is within the tolerance limit of +/- 5%.

5. Accordingly it was submitted before the TPO that the transactions have been carried out with AEs at arms length price. The assessee had identified ten comparables by searching using key words like "Products/Rawmaterials", Technical consultancy and engineering services, Services and consultancy, Civil engineering works, Technical services, Other consultancy, Business activity.
The ten comparable companies identified by the company are:-

(1) Agrima Consultants International Ltd
(2) Artefact Project Ltd (earlier known as Artefact Software and Finance Ltd)
(3) Engineers India Ltd
(4) L & T – Sargent & Lundry Limited
(5) L & T Ramboll Consulting Engineers Limited

(6) Mahindra Consulting Engineers Ltd
(7) Mahindra Engineering Design and Development Company Limited
(8) Telecommunications Consultants India Ltd
(9) Vardaan projects
(10) Water & Power Consultancy services Ltd

It is pertinent to note that the comparable M/s Agrima Consultants International Ltd was not identified through search process, but the assessee took the same as a comparable case from the AY 2007-08, as it was considered as final comparable in that year. We notice that the assessee had used multiple year data to arrive mean average of 16.23% (Page 112 of the paper book). Subsequently it revised the same by adopting single year date and arrived at arithmetic mean of 26.43% (Page 126 of paper book).

6. The TPO did not accept internal TNMM for the reasons discussed in page 9 of his order and hence proceeded to examine the working of external TNMM.

7. The TPO noticed that the turnover of the comparables identified by the assessee starts from Rs.1.00 crore, while the turnover of the assessee was Rs.259 crores. The TPO took the view that the comparable companies should be comparable in terms of size, function, asset and risk. Hence the TPO took the view that the comparable companies selected by the assessee should be examined by applying turnover filter. Accordingly the TPO applied "turnover filter" of 1/4th and 4 times of the turnover of the assessee company in order to examine the comparables selected by the assessee. Accordingly he identified that the following companies would fail in "turnover" test:-

(1) Agrima Consultants International Ltd
(2) Artefact Project Ltd (earlier known as Artefact Software and Finance Ltd)
(3) L & T – Sargent & Lundry Limited

(4) L & T Ramboll Consulting Engineers Limited

(5) Mahindra Consulting Engineers Ltd

(6) Telecommunications Consultants India Ltd

The TPO also noticed that the Related Party Transactions was more than 25% in the case of "L & T – Sargent & Lundy Limited". In respect of Telecommunications Consultants India Limited, the TPO noticed that it is not functionally comparable.

8. It is pertinent to note that the TPO rejected the following comparable companies without assigning any reason:-

(1) Mahindra Engineering Design and Development Company Limited

(2) Vardaan projects

9. The TPO accepted the following comparable companies:-

(1) Engineers India Ltd

(2) Water & Power Consultancy services Ltd

The TPO noticed that the assessee has rejected comparable companies named M/s TCE Consulting Engineers Limited and M/s TOYO Engineering India Ltd for want of sufficient segmental information. Since the data relating to the above said companies were available at the time of assessment proceedings, the TPO proposed to include both the companies, but finally included only M/s TCE Consulting Engineers Limited. Thus the TPO identified following three companies as final set of comparables:-

(1) Engineers India Ltd

(2) Water & Power Consultancy services Ltd

(3) TCE Consulting Engineers Ltd

The arithmetic mean average of the operating profit/Operating Cost of above said comparables worked out to 35.28%, while the OP/OC of the assessee worked out to 25.41%. Accordingly the TPO proposed an addition of Rs.10,32,61,426/-.

10. The assessing officer passed the draft assessment order in conformity with the order passed by the TPO. The various objections raised by the assessee before DRP were rejected by the DRP. Hence the final assessment order came to be passed by the AO by making addition of RS.10.32 crores, stated above. Aggrieved, the assessee has filed this appeal before us.

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

(a) CIT Vs. Thyssen Krupp Industries India P 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 Thuseen Krupp Industries India P 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 weigh 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 instant 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.

13. The next contention of the assessee is that the two comparables, viz., M/s L&T Sargent & Lundy Limited and M/s Telecommunications Consultants India Ltd should be taken as comparables. We have noticed earlier that the TPO has excluded the above said two companies by applying turnover filter of 1/4th or 4 times of turnover of the assessee. In case of L& T Sargent & Lundy Limited, the TPO has rejected on more ground, being Related Party Transactions was more than 25%.

14. The contention of the assessee is that the TPO has arbitrarily fixed the turnover filter at 1/4th to 4 times, while the Tribunal is consistently adopting the turnover filed at 1/10th to 10 times. In this regard, he placed reliance on the following case laws:-

(a) ACIT Vs. McAfee Software India P Ltd (TS-136-ITAT-2016 (Bang))
(b) DCIT Vs. Shipara Technologies Ltd (TS-1041-ITAT-2016)(Bang)
(c) DCIT Vs. Cypress Semniconductors Technology P ltd (TS-144-ITAT-2017)(Bang)
(d) CIT Vs. Ketera Software India P Ltd (TS-139-ITAT-2017 (Bang)
(e) DCIT Vs. Nvidia Graphics P Ltd (TS-1089-ITAT-2016)(Bang)
(f) Evry India P Ltd V DCIT (TS-76-ITAT-2017)(Bang).

We notice that the co-ordinate bench is consistently accepting the turnover filter at 1/10th to 10 times of turnover. Hence there is merit in the contentions of the Ld A.R that the turnover filter of 1/4th to 4 times adopted by TPO was arbitrary in nature. Accordingly we direct the AO/TPO to adopt turnover filter at 1/10th to

10 times of turnover of the assessee and accordingly re-examine the comparables.

15. The TPO had rejected the L & T Sargent & Lundy Limited on more ground that the Related Party Transactions was more than 25%. The contention of the assessee is that the TPO has wrongly included "Infrastructure charges" in the transactions, since the same is mere recovery of overhead charges and it does not involve any profit element. According to Ld A.R, if it is excluded then the Related Party transaction would be well within the criteria of 25%. We find merit in the said contentions of the also. The "Infrastructure and overhead recoveries" is mere reimbursement of expenses incurred by a group concern on behalf of the assessee and hence the same should not be considered as a commercial transaction involving profit element. Accordingly we direct the AO to exclude "Infrastructure and overhead recoveries" while computing the percentage of Related party transactions.

16. The TPO had rejected Telecommunications Consultants India Ltd by observing that the same is not functionally comparable to the assessee company. However, it is the contention of the assessee that the same is accepted as a comparable in the earlier year and also in the subsequent year. Accordingly he submitted that the TPO was not justified in rejecting the same in the current year only. In this regard, the Ld A.R placed his reliance on the following case laws:-

(a) Temasek holdings Advisors India P Ltd (2016)(67 taxmann.com 221)(Mum ITAT)

(b) Temasek Holdings Advisors India P Ltd Vs. DCIT (2013)(38 taxmann.com 80)(Mum ITAT)

(c) DCIT Vs. Temasek Holdings Advisors India P Ltd 92014)(47 taxmann.com 311)(Mum ITAT)

Since the above said company has been accepted as a comparable in the earlier year and subsequent year in the assessee's own case, consistent with the view taken by the co-ordinate bench, we hold that the TPO was not justified in rejecting the same during the year under consideration.

17. In view of the foregoing discussions, we are of the view that this issue requires fresh examination in the light of discussions made supra. Accordingly we restore this issue to the file of AO with the direction to finalise the comparables in accordance with the discussions made supra.

18. In the result, the appeal of the assessee is treated as allowed.

Order has been pronounced in the Court on 17.5.2017.

Sd/-	Sd/-
(C.N. PRASAD)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 17/5/2017

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS