

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 2218 OF 2013**

Commissioner of Income Tax-3
Mumbai

.. Appellant

v/s.

M/s. Thyssen Krupp Industries India Pvt. Ltd.

.. Respondent

Mr. Ashok Kotangale a/w Ms. Padma Divakar for the appellant
Mr. Madhur Agarwal a/w Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 28th MARCH, 2016.

PC.

1. This appeal under Section 260-A of the Income Tax Act, 1961 (the Act) impeaches the order dated 22nd February, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. This appeal raises the following questions of law for our consideration :-

(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in treating M/s. Gillanders Arbuthnot & Co. Ltd. as a comparable ?

(b) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in excluding the case of M/s.

Engineers India Ltd. from the list of comparables ?

(c) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in allowing the payment of Royalty of Rs.4,29,03,966/- by holding that any payment made with the approval of RBI has to be considered as being at Arm's Length Price ?

3. Brief Fact :-

(a) The respondent assessee is engaged in the business of providing turnkey services for design, manufacture, supply, erection and commissioning of sugar plants, cement plants, bulk material handling etc. In executing turnkey projects, the respondent assessee were either manufacturing the equipments or sourcing them from various vendors including from its Associates Enterprises (AEs). During the assessment year 2008-09, the respondent assessee had imported equipments from its AEs aggregating to Rs.23.48 crores and also exported equipments to its AEs aggregating to Rs.82.23 crores. The respondent assessee benchmarked these international transactions by adopting Transactional Net Margin Method (TNMM) as the most appropriate method to arrive at its Arms Length Price (ALP).

(b) The respondent assessee had selected the following four comparables as benchmark to determine its ALP :-

Sr. No.	Comparables	Operating Profit Margin for F.Y. 2007-08 OP/TC
1	Mcnally Bharat Engg. Co. Ltd.	6.93%
2	Walchandnagar Industries Ltd.	6.35%
3	Tata Projects	3.51%
4	Gillanders Arbuthnot & Co. Ltd. (Engineering Division)	5.97%
	Average	5.69%

(c) The Transfer Pricing Officer (TPO) dropped M/s. Gillanders Arbuthnot & Co. Ltd. from the list as one of the comparables, on the ground that it was primarily engaged in manufacture of Cotton and manmade fibre yarn and trading in saleable tea. Further, it was not engaged in execution of turnkey projects. Moreover, the TPO added Engineers India Ltd. and Sriram EPC to the list and benchmarked the ALP on the basis of the following six comparables as under :-

Sr. No.	Company	OP/TC%	OP/Sales%
1	Tata Projects	4.98	4.74
2	Walchandnagar Inds.	11.74	10.5
3	Mcnally Bharat	11.92	10.65
4	Engineers India Ltd.	14.17	12.42
5	TRF Ltd.	20.85	17.25
6	Sriram EPC	12.69	11.26
	Average	12.72	11.13

(d) On the basis of the TPO order, the Assessing Officer passed a draft assessment order dated 11th November, 2011 determining the

profit level indicator of operating profit / total cost at 12.72% making an adjustment of Rs.6.72 crores to determine the respondent assessee's ALP. The respondent assessee filed its objections to the draft assessment order before the Dispute Resolution Panel (DRP). The DRP by its directions dated 30th July, 2012 reduced the adjustment from Rs.6.72 crores to Rs.5.10 crores. Consequent to above, the Assessing Officer passed a final Assessment Order dated 25th September, 2012.

(e) Being aggrieved, the respondent assessee carried the issue in appeal to the Tribunal. By the impugned order, the Tribunal held that M/s. Gillanders Arbuthnot & Co. Ltd. be included in the list of the comparable and M/s. Engineers India Ltd. be dropped from the list of comparables to arrive at the ALP of the respondent's International Transactions.

4. Re. question (a) :-

(a) The grievance of the respondent assessee before the Tribunal was that M/s. Gillanders Arbuthnot & Co. Ltd. which was included in the list of comparable submitted by the respondent assessee to the TPO, was dropped on the ground that it was primarily in the business of cotton and man made fiber yarn. The respondent assessee led evidence in the form of Annual report of M/s. Gillanders Arbuthnot & Co. Ltd.

which indicates that it was engaged not only in trading activities but also had an Engineering Division, which was engaged in the business of turnkey project. The impugned order of the Tribunal records the fact that the total revenue of M/s. Gillanders Arbuthnot & Co. Ltd. from its Engineering Division was Rs.74.17 crores. The impugned order of the Tribunal records the fact that the TPO had erroneously proceeded on the basis that M/s. Gillanders Arbuthnot & Co. Ltd. was not engaged in execution of turnkey project business.

(b) Moreover, the impugned order also records the fact that the segment level Revenue from the Engineering Segment by M/s. Gillanders Arbuthnot & Co. Ltd. being at Rs.74.17 crores was much more than the respondent assessee's uncontroverted filter of Rs.25 crores for the purposes of being selected as a comparable.

(c) This aforesaid finding of the Tribunal in the impugned order is a factual finding and the Revenue has not been able to show that the same is incorrect and / or perverse.

(d) In the above view, the view taken by the Tribunal is a reasonable view. This is so the TPO had erroneously proceeded on the basis that M/s. Gillanders Arbuthnot & Co. Ltd. were not engaged in the business of executing turnkey projects.

(e) Thus, question (a) as framed does not give any rise to any

substantial question of law. Hence, not entertained.

4. Re question (b) :-

(a) The grievance of the respondent assessee before the Tribunal was that M/s. Engineers India Ltd. has been erroneously introduced as a comparable by the TPO for determining the ALP of the respondent assessee's International Transactions. The impugned order of the Tribunal records the fact that the Engineering India Ltd. is a Government Company and its annual report indicates that a substantial part of its revenue in execution of turnkey projects arose out of executing projects of public sector undertakings. In the circumstances, the impugned order of the Tribunal holds that the Engineers India Ltd. could not be considered to be comparable for the reason that contracts between Public Sector undertakings are not driven by profit motive alone but other consideration also weigh in such as discharge of social obligations etc. Thus, it is not comparable. Moreover, from the annual report, it is clear that the revenue earned in executing turnkey project for other public sector undertakings was much more than the filter of 25%, which has been applied by the TPO in his order under Section 92CA(3) of the Act, while taking TRF Ltd. as a comparable on the ground that its related party transaction was not in excess of 25% of

its total turnover. Thus, applying consistent filter of 25% or less of related party transaction alone to be considered comparable, Engineers India Ltd. could not be considered to be comparable.

(b) We find that the view taken by the Tribunal in the impugned order is a reasonable and possible view. Nothing has been shown which would justify our interference in the impugned order of the Tribunal excluding Engineers India Ltd. from the list of comparables.

(c) In the above view, question (b) as framed also does not give rise to any substantial question of law. Thus, not entertained.

6. The appeal is admitted on the substantial question of law at question no. (c).

7. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

8. To be heard along with Income Tax Appeal No. 2201 of 2013.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)