

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH “C”, PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.537/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

|                         |     |                                                                                                                                                                                                |
|-------------------------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ACIT, Circle 9,<br>Pune | Vs. | M/s. Hyundai Construction<br>Equipment India Private Limited<br>Plot No.A-2, Chakan MIDC, Phase-II,<br>Chakan-Talegaon Road, Village-<br>Khalumbre, Tal-Khed, Pune – 410501<br>PAN: AABCH8756Q |
| Appellant               |     | Respondent                                                                                                                                                                                     |

ITA No.584/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-------------------------|
| M/s. Hyundai Construction Equipment<br>India Private Limited<br>Plot No.A-2, Chakan MIDC, Phase-II,<br>Chakan-Talegaon Road, Village-<br>Khalumbre, Tal-Khed, Pune – 410501<br>PA N: AABCH8756Q | Vs. | ACIT, Circle 9,<br>Pune |
| Appellant                                                                                                                                                                                       |     | Respondent              |

Assessee by  
Revenue by

Shri M.P. Lohia  
Shri Avadesh Kumar

Date of hearing

03-06-2021

Date of pronouncement

04-06-2021

आदेश / ORDER

PER R.S.SYAL, VP :

These cross appeals - one by the assessee and the other  
by the Revenue - are directed against the final assessment

order dated 29.01.2016 passed by the Assessing Officer (AO) u/s.143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2011-12.

2. The assessee has raised two additional grounds, which read as under:

***Ground of appeal 8 – Following incorrect methodology for computing capacity utilization adjustment***

*The learned AO erred in granting capacity utilization adjustment by considering only depreciation as fixed cost instead of following the methodology prescribed in Hon'ble Mumbai ITAT's ruling in case of Petro Araldite Private Limited [(2014) 160 TTJ 319 (Mumbai Trib)] which is affirmed by Hon'ble Bombay High Court and which is further considered in Appellant's own case for AY 2009-10 and AY 2010-11.*

***Ground of appeal 9 – Recomputation of losses to be carried forward in case resultant transfer pricing adjustment is less than voluntary adjustment offered in turn of income***

*The Appellant requests your Honors to direct the learned AO/TPO to recompute losses to be carried forward in case resultant transfer pricing adjustment after adjudication of all other grounds of appeal is less than voluntary transfer pricing adjustment offered in return of income.*

3. The Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT* (1998) 229 ITR 383 (SC) has observed that "the purpose of the assessment proceedings before the

taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item". Answering the question posed before it in affirmative, their Lordships held that on the facts found by the authorities below, if a question of law arises (though not raised before the authorities) which has bearing on the tax liability of the assessee, the Tribunal has jurisdiction to examine the same. Having gone through the subject matter of the additional grounds taken by the assessee, it is apparent that the same raises a pure question of law. We, therefore, admit the same and will take up for adjudication at the appropriate stage.

4. The ld. AR did not press ground Nos.1, 2, 4 and 5 taken in the Memorandum of appeal. Out of the three assailed comparables mentioned in the ground No.3, the ld. AR pressed

only two comparables, namely, BEML and JCB India. The grounds are, therefore, dismissed as not pressed.

5. The issue raised through ground No.3 of the assessee's appeal is in the realm of transfer pricing adjustment in the Manufacturing segment of the assessee. Succinctly, the factual matrix of the case is that the assessee has been engaged in the manufacture and distribution of heavy earthmoving equipments and parts. Return was filed declaring total income at Nil. The assessee reported certain international transactions in Form No.3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of international transactions. In the instant appeal, we are concerned with the international transactions under the Manufacturing segment consisting of Import of raw materials/components at Rs.2,13,83,58,162; Payment for technology/know-how at Rs.46,81,000; and Payment for technical fees/royalty at Rs.3,35,91,074. The assessee applied the Transactional Net Marginal Method (TNMM) as the most appropriate method for demonstrating the above three international transactions, under the overall Manufacturing

activity, to be at ALP. The assessee computed its own Profit Level Indicator (PLI) of OP/Revenue at 0.5176% and the average adjusted PLI of the comparables at 2.48%. The difference between 2.48% and 0.5176% was voluntarily offered as transfer pricing adjustment amounting to Rs.7,93,92,988. The TPO computed the assessee's PLI under the Manufacturing segment at 0.2212% as against the average PLI of final four comparables at 8.3027%. The amount of adjustment was worked out at Rs.34,55,09,967. Since the assessee had already offered a sum of Rs.7.93 crore as *suo motu* transfer pricing adjustment, the TPO proposed further adjustment of Rs.26,61,16,979. The assessee assailed the draft order incorporating the above adjustment before the Dispute Resolution Panel (DRP). After giving effect to directions given by the DRP, the AO made an addition of Rs.9,12,61,487 in the final assessment order, against which the assessee has come up in appeal before the Tribunal.

6. The assessee seeks exclusion of two companies from the list of comparables drawn by the TPO, namely, Bharat Earth Movers Limited and JCB India Limited. The other

comparable, namely, Telco, apart from the one comparable chosen by the assessee, namely, Action Construction Equipment Limited, is not in dispute. We will deal with the two comparables challenged before the Tribunal *ad seriatim*.

I. Bharat Earth Movers Limited

7. The TPO included this company in the list of comparables. The assessee objected to its inclusion on the ground that it was functionally different and further it was a government company with fixed customer base. Following his order for the A.Y. 2010-11, the TPO included this company in the list of comparables. No reprieve was allowed by the Dispute Resolution Panel (DRP). The assessee has come up before the Tribunal.

8. After considering the rival submissions through Virtual Court and the relevant material on record, it is found as an admitted position that BEML is a government company. The Mumbai Bench of the Tribunal in *ThyssenKrupp Industries India Private Limited vs. Addl. CIT (ITA No.6460/Mum/2012)*, vide its order dated 27.02.2013 excluded Engineers India Ltd., *inter alia*, on the ground that it was a Government company

and profit motive can never be a relevant consideration in the Government undertakings. This order passed by the Tribunal was assailed by the Revenue before the Hon'ble Bombay High Court. Vide its judgment dated 28.03.2016, the Hon'ble Bombay High Court has refused to admit the questions of law on this aspect of the matter. Further, the Delhi Bench of the Tribunal in *International SOS Services India P. Ltd. vs. DCIT* (ITA No.1631/Del/2014) vide its order dated 08.12.2015, followed the decision of the Mumbai Bench of the *Thyssen Krupp Industries India Private Limited vs. Addl. CIT* (supra) and ordered to exclude Apitco Ltd. on the ground of it being a Government company. The Revenue preferred appeal against the order. The Hon'ble Delhi High Court, vide its judgment dated 30.05.2017, refused to admit any question of law arising from this aspect of the matter. Still further, the Mumbai Bench of the Tribunal in another decision in *Shell India Markets Pvt. Ltd. vs. ACIT* (ITA No.193/Mum/2013), vide its order dated 10.12.2014, ordered to exclude Rites Ltd. and WAPCOS LTD. (Seg) on the same reasoning that these were Government Undertakings. The above discussion boils down

that a Government Undertaking cannot be considered as comparable.

9. It is still further observed that the TPO went on to include this company in the list of comparables by following his view canvassed for the A.Y. 2010-11. The assessee agitated such order of the earlier year before the Tribunal. Vide order dated 11.06.2019, the Tribunal in ITA No.565/PUN/2015 and 644/PUN/2015 upheld the exclusion of BEML, being a government company, from the list of comparables. A copy of such order has been placed at page 310 onwards of paper book. In view of the above position, we hold that the authorities below were not justified in including BEML in the list of comparables. We, therefore, direct to exclude it from the final tally of comparables.

## II. JCB India Limited

10. The TPO proposed to include this company in the list of comparables. The assessee objected to its inclusion by urging that the financial data of JCB India Limited for the relevant year was not available at the time of making the Transfer pricing report and further that this company was also involved



in rendering Design services. The TPO observed that the assessee itself included this company in the list of comparables for the immediately preceding assessment year. Since the financial data of this company for the relevant year was available at the time of finalizing the transfer pricing proceedings, he included it in the schedule of comparables. The assessee remained unsuccessful before the DRP, which has brought it before the Tribunal.

11. Having heard rival submissions and gone through the relevant material on record, it is seen that one of the reasons taken up by the assessee to avoid the inclusion of JCB India Ltd. was the non-availability of its data for the year under consideration at the time of preparing Transfer pricing study report. Such data became available at the time of the transfer pricing proceedings and the TPO has taken cognizance of the same for the purposes of inclusion. Thus, the objection does not survive any more.

12. The assessee also argued for the exclusion of JCB India Ltd. on the ground of an extraordinary financial event of amalgamation taking place during the year. We have scanned

through the Annual report of the company. The factum of amalgamation of JCB Manufacturers Limited with the JCB India Limited has been taken note at page 42 of Annual report under point No.11, mentioning that JCB Manufacturing Limited amalgamated with JCB India Limited under the Scheme becoming effective June 23, 2010 (the effective date) *operative retrospectively from April 1, 2009*, the appointed date as per the Scheme. It is further mentioned in the report that: *“Accordingly, all the assets, liabilities and reserves of the transferor company as on April 1, 2009 were recorded by the company at their respective amounts.”* From the above narration of the factual panorama about the amalgamation of JCB Manufacturer Limited with JCB India Limited, it is crystal clear that though the Scheme of amalgamation became effective from 23.06.2010, but it operated retrospectively from 1.4.2009 when all the assets, liabilities and reserves etc. of transferor's company were transferred to the books of accounts of JCB India Limited on 01.04.2009. Thus, the date of the amalgamation and transfer of assets and liabilities of JCB Manufacturers Limited with JCB India Limited, being,

1.4.2009 falls in previous year relevant to the A.Y. 2010-11. As against that, we are instantly dealing with the A.Y. 2011-12. When these facts were confronted, the ld. AR fairly conceded the point. As the extraordinary financial event of amalgamation happened in the preceding year and got recorded in the books of accounts in such preceding year itself, the company cannot be removed from the list of comparables for the current year on this sole reason, if it is otherwise functionally similar.

13. The next contention of the ld. AR was about the functional dissimilarity of JCB India Limited. He submitted that the assessee had international transactions under the Manufacturing segment and also the trading segment. Both the segments were separately benchmarked by the assessee and the TPO did not dispute the correctness of the ALP determination of the Trading segment. The ld. AR submitted that JCB India Limited was engaged in Manufacturing, Trading and Design services and the accounts were maintained on a combined basis and, as such, the TPO went wrong in

considering JCB India Ltd. as comparable on entity level with the lone Manufacturing segment of the assessee.

14. A feeble attempt was also made to canvass that even the products under the Manufacturing activity of JCB India Ltd. were different from that of the assessee. It was stated that the Ballabgarh unit of JCB was involved in manufacturing Backhoe Loaders, whereas the Pune unit was into manufacturing Excavators. The ld. AR submitted that the assessee was engaged only in the manufacture of Excavators. When asked to state the functional differences between Backhoe Loaders and Excavators, the ld. AR failed to point out any. It is common knowledge that backhoe loader is a species of the overall genus of excavators though relatively lower-priced. Backhoe loaders and excavators are broadly similar products. Unlike the Comparable Uncontrolled Price method (CUP) where product similarity is a *sine qua non*, the TNMM recognizes broader similarity of the products/services in international transaction and the comparable uncontrolled transactions. Thus, we jettison this contention advanced on behalf of the assessee.

15. Now we espouse the next argument of the Id. AR about JCB India Ltd. having both Manufacturing and Trading activities in a combined manner, thereby rendering it functionally different from the assessee involved only in the Manufacturing activity under this segment. We have gone through the Annual report of JCB India Limited. Note No.13 gives particulars of Opening stock, Purchases, Sales and Closing stock for each class of goods dealt with by the company. Sale of the Manufactured products is Rs.4272.90 crore (quantity 23200) and that of the Trading products is Rs.7.56 crore (quantity 58). It is clear from these figures that the Trading sale of JCB India Ltd. is only 0.17% of the Manufacturing sale. The Id. AR submitted that the company was also rendering Design services and the amount of such service charges is Rs.7.90 crores. Thus Service charges constitute 0.18% of the Manufacturing sale. Both the Trading sale and Service charges account for just 0.35% of the Manufacturing sale.

16. Ordinarily, a Manufacturing sale cannot be compared either with Trading sale alone or a combination of Trading and

Manufacturing sales. This rule holds true when there is a regular and considerable Trading activity. It can be seen that the assessee's own Manufacturing turnover for the year is Rs.404.49 crore as against the Trading turnover of Rs.142.21 crores. Trading sales are more than 1/3<sup>rd</sup> of the Manufacturing sales. Since Trading activity is regularly pursued by the assessee and forms a reasonably good percentage of the Manufacturing activity, the assessee, on entity level, could not have been treated as a comparable to another lone Manufacturing company. Per contra, if Trading activity of a company forms a minimal and inconsiderable portion with the overwhelming functionally similar Manufacturing activity, then such a company cannot be ruled out for a comparison with a company engaged only in Manufacturing activity.

17. At this juncture, we consider it apt to quote Rule 10B(3) of Income-tax Rules, 1962 (hereinafter referred to as 'the Rules') as under: -

“Rule 10B(1)....

.....

(3) An uncontrolled transaction shall be comparable to an international transaction or a specified domestic 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.”*

18. On going through the prescription of the above rule, it transpires that an uncontrolled transaction shall be comparable to an international transaction if the differences, if any, between the two are not likely to materially affect the price charged or paid or reasonably accurate adjustment can be made to eliminate the material effects of such differences. The case under consideration is a classic example which fits within the prescription of rule 10B(3) inasmuch as JCB India Limited is otherwise functionally similar to the assessee company to the extent of 99.65% of its business operations. It is just 0.35% of its Manufacturing activity (not even of the overall operations that would further reduce the percentage of Trading activity etc.), which is different. The position would have been different if the percentage of traded products or services had been somewhat higher justifying the exclusion of the JCB

India Ltd. from the set of comparables. In that scenario of a combined profit of JCB India Ltd., one would have been unable to ascertain the impact of the profit from Trading or service activities on the profit from the Manufacturing activity, while benchmarking the assessee's Manufacturing segment. If JCB India Ltd. had been in the shoes of the assessee with percentage of traded items at about 35% of the manufactured items, it would have unhesitatingly merited exclusion. Since the percentage of Trading and design service activities of JCB India Ltd. is minimal, that is, less than one half per cent of the manufacturing activity, such a difference is not likely to materially affect the profit of the otherwise functionally similar manufacturing activity of this company.

19. In *CIT vs. Mercer Consulting (India) P. Ltd. (2017) 390 ITR 615 (P&H)*, one of the filters was that the export revenue should not be less than 75% of total turnover. One of the comparables chosen by the assessee had export revenue to turnover at 74.45%, which got excluded by the TPO on the basis of this filter. The Tribunal ordered its inclusion by accepting that a deviation of 0.55% was immaterial. When the



matter came up before the Hon'ble High Court, it approved the view point of the Tribunal by holding that: 'the case could not have been rejected merely because there was a deviation of 0.55%..... A minuscule difference cannot result in the rejection of the case if it is otherwise comparable.' Answering the apprehension of the Revenue, it was held: 'Indeed even the TPO would be entitled to refer to cases which deviate from the filter' by finally holding that: *'When export filter of 75% was applied, a little less than 75% in a case of a comparable does not make any difference, if the company is otherwise similar. It has to be accepted as comparable.'* The facts of the extant case are more or less similar as the issue herein is also of selection or rejection of a comparable on the ground of an infinitesimal small inclusion of about 0.35% turnover of trading and service activities in the otherwise 99.65% turnover of the matching manufacturing activity. As such, we are unable to countenance the contention of the assessee for the exclusion of JCB India Ltd. on the sole reason of it having 0.35% non-manufacturing activity, when its 99.65% manufacturing activity is similar to that of the assessee.

20. Without prejudice to our above decision on merits, we also take note of the fact that the assessee determined the ALP of its Manufacturing segment for the immediately preceding assessment year and *suo motu* included JCB India Limited in the list of comparables, which position was not tinkered with by the TPO and got finally merged in the list of comparables. On a pointed query, the ld. AR fairly admitted that there was no noticeable difference in the functional profile of JCB India Limited for the current year *vis-à-vis* the preceding year.

21. In view of the foregoing discussion, we uphold the inclusion of JCB India Limited in the list of comparables. At the same time, the TPO is directed to carry out reasonably accurate adjustment to the profit of JCB India Ltd. so as to eliminate the effect of a microscopic difference due to Trading sales and service income. Needless to say, the assessee will be allowed an opportunity of hearing.

22. The first additional ground is the adoption of incorrect methodology for computing capacity utilization adjustment. Both the sides are in agreement that the facts and circumstances of this ground are *mutatis mutandis* similar to

those of the preceding years where this issue came up for consideration before the Tribunal. In its order for the A.Y. 2010-11, the Tribunal dealt with the capacity utilization adjustment raised through ground No.4 and decided through para 7 of its order restoring the matter to the file of AO to be dealt with in accordance with its order for the immediately preceding assessment year viz., A.Y. 2009-10. Respectfully following the Tribunal orders in the assessee's own case for immediately preceding two years, we set aside the impugned order on this count and remit the matter to the file of AO/TPO for re-computing working capital adjustment in consonance with the methodology provided by the Tribunal in its order for the earlier years.

23. The second additional ground raised by the assessee is for allowing adjustment towards voluntary transfer pricing addition offered by the assessee in the computation of total income. In this regard, we direct the TPO to allow necessary relief *qua* the *suo motu* transfer pricing adjustment offered by the assessee, if the resultant transfer pricing addition turns out to be more than that.

24. Ground No.1 of the Revenue's appeal is against the direction given by DRP for taking 0.52% as PLI of the assessee, when correct PLI of the assessee, after considering Foreign Exchange (Net) and written back of Excess Provision for doubtful debts as non-operating income, came to 0.2212%.

25. There is no discussion on this issue in the order of the TPO. The DRP recorded at para 6.3 of its directions that the assessee computed its margin from manufacturing operations at 0.52% and the TPO also considered the same margin in his show cause notice. However, while finalizing the transfer pricing order, the TPO adopted margin of assessee from this segment at (-) 0.22% without providing computation for the same. It has also been mentioned in the same para that the assessee filed a rectification application before the TPO. In this backdrop of the facts, the DRP accepted the contention of assessee and accordingly directed the TPO to take assessee's PLI at 0.52%.

26. It is observed that the assessee filed a rectification application on this score way back on 13.02.2015. A copy of such an application has been placed at page 72 of the appeal

folder. Despite such application, the ld. AR stated that the TPO has not passed any rectification order for a period of more than six years. The ld. DR also could not place on record any rectification order having passed by the TPO on this issue. In such circumstances, we are of the considered opinion that the DRP was fully justified in directing the TPO to consider assessee's margin at 0.52% as against (-) 0.22% adopted by the TPO in his order.

27. The last issue taken up by the Revenue is against the direction of the DRP to compute transfer pricing adjustment on proportionate basis. The TPO while computing the transfer pricing adjustment took entity level figures.

28. This issue is fairly settled by a judgment of the Hon'ble jurisdictional High court in *CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2019) 414 ITR 704 (Bom.)*, holding that the transfer pricing adjustment made at entity level should be restricted to the international transactions only. It is pertinent to mention that the Department's SLP against this judgment has since been dismissed by the Hon'ble Supreme Court in *CIT Vs. Phoenix Mecano (India) Pvt. Ltd. (2018) 402 ITR 32 (St.)*.

Similar view has been espoused by the Hon'ble Bombay High Court in *CIT Vs. Thyssen Krupp Industries Pvt. Ltd. (2016) 381 ITR 413 (Bom.)* and *CIT Vs. Tara Jewels Exports (P). Ltd. (2010) 381 ITR 404 (Bom.)*. We, ergo, direct to restrict the transfer pricing addition only to the extent of international transactions in this segment.

29. To sum up, the transfer pricing addition made in the impugned order is set aside and the matter is restored to the file of the AO/TPO for re-computing the transfer pricing adjustment in the Manufacturing activity segment in accordance with the directions and observations given hereinabove.

30. In the result, the appeal of Revenue is dismissed and that of the assessee is partly allowed.

Order pronounced in the Open Court on 4<sup>th</sup> June, 2021.

Sd/-  
**(S.S. VISWANETHRA RAVI)**  
**JUDICIAL MEMBER**

पुणे Pune; दिनांक Dated : 4<sup>th</sup> June, 2021  
 GCVSR

Sd/-  
**(R.S.SYAL)**  
**VICE PRESIDENT**

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The DRP-3, Mumbai
4. The CIT (IT/TP), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे  
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

**आदेशानुसार/ BY ORDER,**

**// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

|     |                                                  | Date       |       |
|-----|--------------------------------------------------|------------|-------|
| 1.  | Draft dictated on                                | 03-06-2021 | Sr.PS |
| 2.  | Draft placed before author                       | 03-06-2021 | Sr.PS |
| 3.  | Draft proposed & placed before the second member |            | JM    |
| 4.  | Draft discussed/approved by Second Member.       |            | JM    |
| 5.  | Approved Draft comes to the Sr.PS/PS             |            | Sr.PS |
| 6.  | Kept for pronouncement on                        |            | Sr.PS |
| 7.  | Date of uploading order                          |            | Sr.PS |
| 8.  | File sent to the Bench Clerk                     |            | Sr.PS |
| 9.  | Date on which file goes to the Head Clerk        |            |       |
| 10. | Date on which file goes to the A.R.              |            |       |
| 11. | Date of dispatch of Order.                       |            |       |

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