आयकर अपीलीय अधिकरण, कोलकाता पीठ "सी'', कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

डॉ मनीष बोरड, लेखा सदस्य एवं श्री अनिकेश बनर्जी, न्यायिक सदस्य के समक्ष

[Before Dr. Manish Borad, Accountant Member &Shri Anikesh Banerjee, Judicial Member]

I.T.A. No. 595/Kol/2021
Assessment Years: 2017-18

Jamshedpur Continuous Annealing & Processing Company Pvt. Ltd. (PAN: AACCJ 5624 L)	Vs.	National e-Assessment Centre, Delhi
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

I.T.A. No.295/Kol/2022
Assessment Years: 2018-19

Jamshedpur Continuous Annealing & Processing Company Pvt. Ltd. (PAN: AACCJ 5624 L)	Vs.	National e-Assessment Centre, Delhi
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	01.02.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	26.02.2024
For the Appellant/ निर्धारिती की ओर से	Shri Saumen Saha, A.R
For the Respondent/ राजस्व की ओर से	Shri Kiran Chatrapoty, JCIT, Sr. D.R

ORDER / आदेश

Per Anikesh Banerjee, Judicial Member:

The instant appeals were filed by the assessee that is directed against final assessment order passed by the ld. National e-Assessment Centre(in brevity AO) U/s 143(3) rws144C (13)/ 144B of the Income Tax Act (brevity the Act) dated 25/10/2021in pursuant to the directions of Dispute Resolution Panel-2 (in brevity DRP), New Delhi, dated 13/09/2021 issued U/s 144C(5) of the Act pertains to Assessment years2017-18 & 2018-19.

2. At the outset both the appeals have the same nature and fact and have a common factual issue. For brevity we have taken together,heard together and disposed of together. We have taken on**ITA No. 595/Kol/2021** as the lead case.

3. The assessee has raised following grounds of appeal:

*1. **General Ground***

That on the facts and in the circumstances of the case and in law, the Learned AO erred in assessing the total loss at INR 2,699,202,298 under normal provisions as against loss of INR 2,709,117,138 declared by the Appellant in the return of income under normal provisions of the Act.

*2. **Transfer Pricing Adjustment***

That on the facts and in the circumstances of the case, the Learned TPO and the Learned AO erred, in carrying out an adjustment to the international transactions with AEs.

*2.1. **Rejected Cash PLI***

On the facts and in the circumstances of the case and in law, with respect to the transaction of purchase of spare parts from NSENGI, the learned TPO has erred in *rejecting the cash profit level indicator ("PLI") of the Appellant as well as of comparable for the purpose of bench marking.*

*2.2. **Rejected Transfer pricing Documentation and Economic Analysis***

That on the facts and in the circumstances of the case, the Learned TPO and the Learned AO erred.

i) in rejecting the transfer pricing documentation maintained by the company in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("Rules) And
ii) in not accepting the economic analysis undertaken by the Appellant which was in accordance with the provisions of the Act read with Income Tax Rules, 1962 (Rules) for establishing the Arm's Length Price (ALP) of the International Transactions.
iii) In undertaking a fresh search and thereby making an adjustment to the international transactions with AEs.

*2.3. **Comparables***

On the facts and circumstances of the case and in law, the learned TPO erred

a. in not providing the detailed search process for selecting the companies considered comparable by him.
b. Rejecting the companies proposed by the Appellant which were functionally comparable.
- *Vallabh Steel Limited, for which rectification application under Section 154 has been filed with the learned Transfer pricing officer and is pending for disposal.*
- *Uttam Galva Steels Ltd.*

c. In selecting the companies engaged in functionally different operations:
- *Tata Steel BSL Limited*
- *M/s Stelco Limited*

3. On the facts and circumstances of the case, the Ld. AO has erred in proposing to initiate penalty proceedings under Section 270A of the Act against the Appellant, which is bad in law.

4. Brief facts of the case are that Jamshedpur Continuous Annealing & Processing Co. Pvt Ltd ('JCAPCPL' or the assessee')was incorporated on 17th March 2011 as a wholly owned subsidiary of Tata Steel Limited (TSL). It was later converted into a Joint Venture (JV) between TSL and Nippon Steel and

Sumitomo Metal Corporation (NSSMC) on 17th August 2012.The JV was incorporated for constructing, owning and operating a Continuous Annealing and Processing Line ('CAPL') in Jamshedpur for the production of continuously annealed, cold-rolled steel / coils and sheets for catering to the niche product requirements of the automotive sector which was not very established in India.The commercial operations of JCAPCPL commenced on 01/04/2015. The company has been set up as India's first CAPL 600,000 tonnes per annum of high-quality cold rolled sheets exclusively for the automotive industry. Transaction under consideration:

Purchase of spares For AY 2017-18

- Transaction Value with AE: Rs. 2,52,65,650/-
- Value of Adjustment: Rs.35,27,000/-

For AY 2018-19

- Transaction Value with AE: Rs. 8,10,61,143/-
- Value of Adjustment: Rs. 20,33,322/-

During calculation of Net profit margin in ALP the TPO had considered the depreciation of asseessee. The assessee is a newlyset up business entity and yielding huge depreciation. The assesseerequested for acceptance of cash PLI for calculation ALP which was rejected the by the

TPO. The DRP had accepted the assessee'splea, but the TPO had not considered. The adjustment is calculated by the TPO amount to Rs. 35,27.000/- for AY 2017-18 which was upheld by the ld. AO. The aggrievedassessee filed an appeal before us by challenging the assessment order.

5. The Ld. A.R vehemently argued and filed a written submission which are kept in the record. The Ld. A.R invited our attention in written submission APB page 223 and the details of comparisons for calculation of ALP. The submission has duly inserted as below:

5.0 In light of above, final list of comparable companies and arm's length margin is computed as under:

SI No.	Name of the Comparable Company	F.Y. 2014-15	F.Y. 2015-16	F.Y. 2016-17	Aggregation & OP
1	Metal Coatings (India) Ltd.	OR=1142.7 OP=37.2	OR=9153.29 OP=316.55	OR=9791.72 OP=399.67	OR=20087.71 OP=753.42
2	Steelco Gujarat Ltd.	OR=571.64 OP=5.02	OR=509.77 OP=-0.98	OR=533.81 OP=-10.64	OR=1615.22 OP=-6.6

3	Stelco Limited	OR=127.10 OP=12.47	OR=127.94 OP=20.76	OR=139.68 OP=32.17	OR=394.72 OP=65.4
4	Tata Steel BSL Ltd	OR=10645.77 OP=1235.57	OR=11802.63 OP=331.39	OR=13705.94 OP=1236.4	OR=36154.34 OP=2803.36
Average					

The profit margin and the PLI as per annual report of the assessee (Operating profit /Operating revenue) is computed as under:

Rs. In lacs

1	Operational income (OR)		67,484.02
2	Total Operating Cost (OC)		72899.02
3	Operating Profit		-5415
4	***PLI = OP/OR***		***-8.02%***

As the PLI of the assessee i.e. -8.02% (as per TP order dated 04.12.2020) falls outside the tolerance range of +/- 3% to the average of comparables above, the arm's length adjustment is computed as under:

S.No.	Particulars	Reference	Amount (in lacs)
1	Operating Revenue (OR)	A	67,484.02
2	Operating Cost (OC)	B	72899.02

3	Operating Profit (OP)	C	-5415
4	OP/OR	D	6.91%
5	Arm's Length Margin	E = A X D	4663.15
6	ALP on Operating Expenditure (Cost)	F = A-E	62821
7	Excess Expenditure	G = B-F	10078.02
8	Value of transaction made from AE	H	252.66
9	% of Purchase made from AE over Total Operating Cost	I = H/B	0.35%
	Arm's length adjustment	J = G X I	**35.27 Lac**

6. The Ld. A.R further proceed that the issue was already considered by the DRP and the assessee is using TNMM as MAM so cash credit/operating revenue as margin of the assessee there on was 3.45%. Whereas including depreciation the margin comes to 16.92%. The Ld. A.R further proceeded that the company is newly set up and all the fixed assets are yielding huge depreciation. Considering excluding depreciation of the variables, the cash PLI is almost similar with the other comparable. The Ld. A.R has drawn our attention in the order of Ld. DRP in page 2 para 4.1 which is reproduced as below:

"4.1. In DRP proceedings, the assessee submitted that adjusted PLI i.e. cash profit/operating Revenue should be considered under TNMM in place of operating profit for better comparison. Specifically, the assessee wished to exclude depreciation on the grounds that during the year, though the assets of the Assessee were put to use to which depreciation has been recognized, the operation of the company- had not started. The assessee stated that considering depreciation as a part of the total cost would not be appropriate for the purpose of benchmarking since the depreciation in the year under consideration was 16.92% of its revenue, vis-a-vis depreciation of 4.85% of seven comparable companies (taken by the TPO) which in most cases as average depreciation as a percentage of revenue en in the table below. The assessee also stated that as per rule 10B(1)(e) of the Act, the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions should be 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. The assessee referred to OECD guidelines,US transfer pricing regulations and ICAI guidance note in this regard. The assessee also relied upon various decisions including that of Hon'ble Delhi ITAT in SchefenackerMotherson Limited (123 TTJ 509) wherein it was held that the transfer pricing regulations do not provide for mandatory deduction of depreciation and that depreciation could be disregarded to compute the operating margin of the tax payer and the comparables.

4.2 The submissions have been perused along with the materials on record. The Panel finds that this issue has been elaborately discussed by the Hon'ble ITAT, Delhi order dated Sumi Motherson Innovative Engineering Ltd vs DCIT in ITA No. 1816/Del/2011 dated 11.2.2014 in which the'decision of SchefenackerMotherson Limited (supra) relied upon by the assessee has also been discussed."

Further the Ld. A.R invited our attention in written submission related to depreciation/sale of comparable and the assessee. The comparableare duly reproduced as below:

For AY 2017-18

Depreciation/ Sales of comparables and JCAPCPL (Pg 4 of handout for DRP hearing PPT for AY 2017-18)

Name of the company	Year of incorporation	Depreciation for FY 2016-17 (INR in lacs)	Dep % of Revenue
Stelco Limited	1995	151.93	1.09%
Tata Steel BSL Limited	1983	1,68,561	11.19%
Steelco Gujarat Ltd.	1989	252.15	0.47%
Metal Coatings (India) Limited	1988	73.21	0.75%
Average			**3.38%**
JCAPCPL		11,418	**16.92%**

Cash Margins of comparables and JCAPCPL

Name of the company	Net Margins as per TP order <PB Pg 223-224>	Cash PLI
Steelco Gujarat Ltd.	-0.41%	0.09%
Metal Coatings (India) Limited	3.75%	4.02%
Tata Steel BSL Limited	7.75%	19.92%
Stelco Limited	16.56%	17.71%
Average	**6.91%**	**10.44%**
JCAPCPL	**-8.02%**	**10.44%**

The relevant cash margins for comparables and JCAPCPL is enclosed as **Annexure 1** and **Annexure 2** respectively.

<u>For AY 2018-19</u>

Depreciation/ Sales of comparables and JCAPCPL (Pg 5 of handout for DRP hearing PPT for AY 2018-19)

Name of the company	Year of incorporation	Depreciation for FY 17-18 (INR in lacs)	Dep % of Revenue
Metal Coatings (India) Ltd.	1988	70	0.63%
Hisar Metal Industries Ltd.	1990	2,631	0.81%
Jindal Steel & Power Ltd.	1984	1,90,966	10.82%
Sunflag Iron & Steel Co. Ltd.	1984	3413	1.65%
JSW Steel Ltd.	1994	3,05,400	4.70%
Steelco Ltd	1995	148	0.79%
Prakash Industries Ltd	1980	10,303	4.74%
Jai Corp Ltd	1985	1,536	2.67%
Avon Ispat & Power Ltd	1968	760.17	1.27%
Average			**3.12%**
JCAPCPL		8,099	**6.27%**

Margins using Cash PLI and OP/OR of comparables and JCAPCPL

Name of the company	Net Margins as per TP order <PB pg 216-218>	Cash PLI
Prakash Industries Ltd	1.86%	13.63%
Metals Coatings India Ltd	3.20%	3.65%
Hisar Metals Industries ltd	4.66%	2.83%
Avon Ispat & Power Ltd	6.86%	8.11%
Jindal Steel & Power Ltd	8.34%	20.20%
Sunflag Iron & Steel Company ltd	8.92%	11.18%
JSW Steel Ltd	13.86%	20.44%
Jai Corp Ltd	14.67%	15.96%
M/s Stelco Ltd	19.65%	14.66%
Median	**8.34%**	**12.30%**
Range	**6.86% to 8.92%**	**11.18% to 14.66%**
JCAPCPL	**5.98%**	**12.05%**

The relevant cash margins for comparables and JCAPCPL is enclosed as **Annexure 3** and **Annexure 4** respectively.

The Ld. A.R respectfully relied on the decision of Co-ordinate Bench of ITAT-Kolkata in the case of DCIT vs. **M/s Epcos Ferrites Ltd., in ITA No. 1597 & 1598/Kol/2017 for AY 2002-03 & 2003-04 date of order 30.01.2019**. The relevant paragraph is reproduced as below:

> *"We note that for determining the fair and true profit for the purpose of the application of the TNMM, it is appropriate that the effect of the depreciation must be excluded out of the operating profit for determining the operating profit ratio. The best way of computing operating profit would be to compute profit before depreciation in respect of each of the comparable company. It would take out the inconformity or the variation in the profit level of the comparables arising due to adoption of different method of charging depreciation. For this we rely on the judgment of the Coordinate Bench of ITAT Delhi in the matter of SchefenackerMotherson Ltd. V. Income-tax Officer [2009] 123 TTJ 509 (Delhi) wherein coordinate bench confirmed the use of cash profit for the purpose of application of the TNMM.We also rely on the decision of the Hon'ble Bombay High*

> *Court in the matter of CIT vs. Reuters India (P) Ltd reported in [2016] 69 taxmann.com 187 (Bombay) wherein the Hon'ble High Court confirmed the application of the cash profit margin for the purpose of computation of net profit indicator (PLI) under the TNMM. Keeping in view the aforesaid judicial precedents, we approve the use of cash profit margin by the assessee for placing the tested party and the comparable companies on equal footing. The assessee has demonstrated that the cash profit margin of the assessee was 8% (approximately), whereas the arithmetic mean of the cash . profit margins of the aforesaid nine comparable companies stands at 12,41%. It is noted that the net profit margin of the tested party was (-)6.70%, whereas the cash profit margin of the tested party stood 8% thereby indicating that the loss was caused by a considerable increase in provision for depreciation. We are of the considered view that the assessee was justified in applying cash profit margin as more appropriate financial indicator than net profit margin."*

7. The Ld. D.R duly relied on the order of revenue authorities but unable to submit any contrary judgment against the submission of the Ld. A.R.

8. We heard the rival submissions and considered the documents available in the record. The grievance of the assessee is to consider the depreciation during calculation of fair net profit under TNMM by the TPO. The assessee is newly set-up company and yielding huge depreciation in respect of comparable M/s Stelco Limited and M/s Tata Steel BSL Limited who are incorporated in 1995 and 1983 respectively. In comparison of depreciation percentage of revenue was @1.09% for Stelco Limited and 11.19% for Tata Steel BSL Limited whereas the assessee has @16.92%. The assessee prayed to reject both the comparable as functionally different. We accordingly direct the TPO /AO to remove both the comparable during calculation of fairnet profit for ALP.

Further, the assessee has requested for acceptance of two comparable M/s Vallabh Steel Limited, for which rectification application under Section 154 has been filed before the TPO and is pending for disposal and M/s Uttam Galva Steels Ltd. We direct the TPO /AO to accept both the comparable M/s Vallabh Steel Limited and M/s Uttam Galva Steels Ltd after considering the function and activity of the two companies and direct to dispose the rectification petition filed U/s 154. The TPO/AO is directed to allow the fresh search in relation to comparable of the assessee.

The assessee prayed to remove the depreciation during the calculation of profit margin and requested for cash PLI in TNMM. In cash PLI the average of comparable 10.44% which is similar for assessee. The assessee stated that considering depreciation as a part of the total cost would not be appropriate for the purpose of benchmarking since the depreciation in the year under consideration was 16.92% of its revenue, vis-a-vis depreciation of 4.85% of seven comparable companies as taken by the TPO which in most cases as average depreciation as a percentage of revenue. The assessee has relied on the order of **ITAT-Kolkata Bench** in the case of **M/s Epcos Ferrites Ltd**(supra). We also relied on the same. In our considered view the depreciation should be removed for calculation of net profit margin and cash PLI is justified method. Accordingly, we remit back the matter to the file of TPO/AO for further calculation of TP adjustment by considering the direction of the Bench. We order accordingly.

9. As the **ITA no 595/Kol 2021** is adjudicated and allowed for statistical purpose, the **ITA No 295/Kol/2022** has name nature of fact and *mutates mutandis* applicable and followed accordingly.

10. In the result, both the appeals filed by the assessee in **ITA No. 595/Kol/2021 & ITA No. 295/Kol/2022**are allowed for statistical purpose.

Order is pronounced in the open court on 26th February, 2024

Sd/-	Sd/-
(Dr.Manish Borad/डॉ मनीष बोरड)	(Anikesh Banerjee /अनिकेश बनर्जी)
Accountant Member/लेखा सदस्य	Judicial Member/न्यायिक सदस्य

Dated: 26th February, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Jamshedpur Continuous Annealing & Processing Company Pvt. Ltd., Tata Centre, 43, Jawaharlal Nehru Road, Kolkata-700071.
2. Respondent – National e-Assessment Centre, Delhi
3. DRP-2, New Delhi
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy   By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata