आयकर अपीलीय अधिकरण, दिल्ली पीठ "आई-२", नई दिल्ली

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2", NEW DELHI
BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER

श्री आर. के. पांडा, लेखा सदस्य

AND/एवम्

श्रीमति बीना ए. पिल्लै, न्यायिक सदस्य के समक्ष
SMT. BEENA A. PILLAI, JUDICIAL MEMBER

अपील सं./In ITA No. 6433/Del/2012 में

(निर्धारण वर्ष/Assessment Year 2008-2009)

Hellmann Worldwide Logistics India Pvt. Ltd. DLF Cyber City, Building No. 9 14th Floor, Tower-A, Phase-III Gurgaon-122002.	Vs	DCIT Circle-10(1) New Delhi.
GIR/PAN: AABCH7715F		
अपीलार्थी/(Appellant)		**प्रत्यर्थी/(Respondent)**

Appellant by	:	Sh. Rajan Sachdev, Sh. Maneesh Bawa, Sh. Karnik Gulati, CAs.
Respondent by	:	Sh. T. M. Shiva Kumar, Sr.DR
Date of hearing	:	01.06.2017
Date of pronouncement	:	29.08.2017

O R D E R

PER BEENA A. PILLAI, J.M :

1. The present appeal has been filed by assessee against final assessment order dated 22/10/2012 passed under section 144C read with 143(3) of the Act passed by Ld. DCIT, circle-10(1), New Delhi. Subsequently, assessed income was rectified to Rs.3,11,82,412/-, vide order dated 08/11/2012 under section 154 read with 143(3) of the Act.

2. Brief facts of case are as under:

Assessee filed return of income declaring a loss of Rs. 6,55,59,110/- on 31/03/2010. The return was processed under section 143(1) of the Act and case was selected for scrutiny. Notices under section 143(2) of the Act was issued alongwith notice under section 142(1), and a detailed questionnaire was issued to assessee. Representatives of assessee attended proceedings from time to time and furnished various details as called for.

Assessee operates as a freight forwarding company, offering services like air freight and see freight in domestic and international arena. It is also been recorded to have been providing land, air and ocean transport services and warehousing and custom clearance services. Ld. TPO observed that assessee is a wholly owned subsidiary of Hellmann International Forwarders GmbH, Germany. It has been recorded by Ld. TPO that, assessee started its operations on 01/12/2006 and the year under consideration was first year for full operations of the company. It has been recorded by Ld. TPO that assessee is a part of Hellmann Network A. V. V., and is involved in numerous but homogeneous transactions in the areas of air freight and sea freight. The services and International Transport (scheduling carriers, trance-shipment, shipment tracking and preparing documentation on arrival) from part of baseline freight handling services provided by HWL Network companies. The services are offered by company directly to Hellmann India's customers or as a part of

deliverables sold to overseas customers by Hellmann Network personnel in other parts of world. Primary International Transactions of company during the year comprised, freight on imports and exports received and paid by companies respectively to its AE's. The International Transactions entered into by assessee during year are as under:

Nature of transaction	Method	Total value of
Freight on imports and exports (Paid/Payable)	CUP	32,05,31,765
Freight on imports and exports (Received/Receivable)	TNMM	26,79,85,364
Allocation of software related costs	CUP	17,74,595
Allocation of maintenance costs	CUP	1,48,340
Reimbursement of expenses to Group companies	CUP	7,85,896

Assessee applied CUP method as the primary method for benchmarking of freight transactions entered into with AE. To corroborate the economic analysis of international transactions, TNMM was considered as a suitable corroborative method. In the TNMM method, the OP/VAE of the assessee is -23.8 %. The assessee has claimed startup adjustments in the OP in appendix -I for the TP Report and after adjustment the OP/VAE is stated to be 13.54 %. The assessee has selected five comparables and OP/VAE of five comparables is 12.78%. Based on the TNMM results, the international transactions pertaining to freight on imports and exports were concluded to be at arm's length.

3. During the course of TP proceedings Ld. TPO rejected CUP and internal TNMM method applied by assessee against external TNMM as adopted by Ld. TPO as most appropriate method. Ld. TPO held that internal CUP and internal TNMM analysis were not appropriate to benchmark international

transactions entered into by assessee with its AE due to geographical/economic differences that existed between AE's and Non AE's.

4. The objection against findings were raised before DRP, who held that third-party agreements do not constitute valid CUP, since an agreement merely embodies terms and conditions which are to be applied in context of a prospective transaction undertaken between contracting parties. Another reason for rejecting application of internal TNMM by DRP was that it was raised before DRP for the first time directly and not before TPO. The DRP thus upheld observations of TPO in respect of most appropriate method and rejected CUP to be most appropriate method as agreements are in different geographical terrines and would not be acceptable and upheld application of external TNMM to international transactions.

5. Further TPO did not allow difference in the risk profile in working capital adjustment to eliminate material difference. It is also observed that TPO did not allow claim of plus 15% benefit of arms length range as amendment to proviso to section 92C (2) is applicable from assessment year 2009-10 onwards and is prospective in nature. The assessee had placed reliance upon board circular No. 12 dated 23/08/2001 wherein it was specified that in cases where range is within plus 5% band, no adjustment shall be made. Ld. TPO however rejected the claim of assessee which were upheld by DRP.

6. Against directions of DRP, Ld. AO passed final assessment order by computing assessed income at

Rs.3,11,82,412/- by applying external TNMM and rejected working capital adjustment claimed by assessee.

7. Against this final order, assessee is in appeal before us on following grounds of appeal:

> *1. Ld. DRP erred in rejecting Appellant's C-U-P approach by summarily dismissing evidentiary value of comparable third-party contract duly placed on record. As a consequence, Ld. DRP introduced notional definition of the term "transaction" in transgression of express statutory meaning assigned to the term under clause (v) of Section 92F of the Act;*
> *2. Ld. DRP, while admitting Appellant's plea for admission of additional evidence, erred in dismissing Appellant's claim of relying on internal TNMM based upon the arguments that:*
> *(i) since such analysis was not incorporated into the original transfer pricing documentation, Appellant was prevented by principle of promissory estoppel to press for its selection as the "most appropriate method" during the course of proceedings before the DRP; and further that*
> *(ii) since such analysis was prepared on post-facto basis, it failed the comparability test laid down under law, without indicating which particular statutory provisions were being referred to in the current context.*
> *3. Without prejudice to the abovementioned grounds, Id. DRP erred in terms of approving TPO's approach of summarily rejecting the comparables selected by the Appellant while upholding his selection of functionally dissimilar companies in context of external TNMM, and not granting appropriate adjustments as warranted under Rule 10B of the Rules.*
> *4. Ld. TPO made a gross computation error in giving effect to directions issued by Learned DRP under Section 144C(5) of the Act while restricting the*

quantum of adjustment to the amount of international transactions.

5. Ld. TPO erred in making the adjustment to the arm's length price of international transactions without giving benefit of the proviso to Section 92C(2) of the Act.

6. Ld. AO erred in not deleting the disallowance made under Section 36(l)(iii) of the Act notwithstanding clear directions issued by Ld. DRP under Section 144C(5) of the Act in this regard.

7. Ld. AO erred in terms of –

(i) Not granting due credit for taxes deducted at source;

(ii) Withdrawing and levying interest under – Section 244A and 234D of the Act, respectively; and

(iii) Initiating penalty proceedings under Section 271(1)(c) of the Act.

8. Ground No.1: Before us Ld. Counsel submitted that assessee adopted CUP as most appropriate method for the purpose of demonstrating the arm's length nature of international transaction entered into by assessee with its AE's. He relied upon various agreements licenses entered into between assessee and its AE and assessee with independent third-party in other jurisdictions namely, Rahtihuolinta Suomi Oy., Finland ; AVI-Ad worldwide Logistics 2000 limited., Israel; and cargo centre logistics/R. A. Porta S. R. L., Uruguay.

9. Ld. Counsel submitted that the third-party agreement shows similar/identical 50-50 revenue sharing model generally followed all across freight forwarding industry regardless domicile/place of residence of originating destination companies. He submitted that 50-50 revenue

sharing formula has been universally applicable in the real commercial world.

10. On the contrary, Ld. DR submitted that rule 10B (1a) prescribes steps to be considered while choosing appropriate method to derive arms length price of an international transaction. He submitted that transaction entered into by assessee cannot be offer uniform Pattar as services rendered by assessee would be of various natures. He further submitted that data is of companies operating in different geographical location would not provide a realistic measure because of differences in economic conditions and policies of respective governments. He thus heavily placed reliance upon order passed by Ld. TPO and DRP and submitted that TNMM would be most appropriate method as it is more tolerable and ease capable of considering all the variances arising due to geographical and economic differences with those countries with which assessee has entered into transactions.

11. Ground No.2: Alternatively, Ld. Counsel submitted that appellant had demonstrative arm's length nature of its international transaction with its overseas affiliated by using internal TNMM as secondary benchmarking method during course of DRP proceedings. He submitted that DRP rejected use of internal TNMM without giving any cogent reason and rejected by stating that assessee had not submitted data for application of internal TNMM before Ld. TPO. Ld. Counsel submitted that appellant is not precluded or debarred from

producing a better or more robust data to arrive at the arm's length analysis. He placed reliance on following decisions:

- *Bilas of (India) Ltd., reported in (2011) 136 TTJ 505*
- *Destination of world (subcontinent) private limited versus ACIT reported in (2014) 34 ITR (T) 355 (Delhi-Trib)*
- *Lummus Technology Heat Transfer BV, reported in (2014) 162 TTJ 263 (Delhi-Trib).*

12. We have perused submissions advanced by both sides in the light of records placed before us and judgments relied upon by assessee in its compendium of case law.

13. The assessee has demonstrated kind of services rendered by it to its AE's as well as non-AE's by placing reliance upon agreements more particularly placed at pages 156 onwards of the paper book. It was argued that assessee deals with AE as well as independent parties being network partners in all regions of world. He submitted that wherever there were no affiliates of parent company of assessee, they had network partners which are third-party entities. On perusal of agreements placed at pages 156 on words it is observed that agreement between assessee with its AE's and assessee with its non-AE's 50: 50 ratio.

14. Before us, Ld. Counsel contested for CUP to be used as Most appropriate method. Which has been rejected by authorities below. DRP rejected it as an agreement preceeds an actual transactions and is not a transaction per se and that price quoted in an agreement can by no stretch of imagination take the shape of price charged or actually paid

under circumstances. We are in agreement with this view of DRP and therefore, reject the use of CUP as MAM.

Accordingly Ground No. 1 raised by assessee is dismissed.

15. Ground No. 2: Alternatively, Ld. Counsel argued for use of internal TNMM for the purposes of computing ALP of international transaction.

16. In our considered view accuracy of profitability has to be verified in case of AE vs non AE's for the purposes of application of internal TNMM. The plea of use of internal TNMM was raised for first time before DRP, which was rejected by observing as under:

> *4.8 Ground No. 8: The objection regarding internal TNMM has been considered by the DRP. In the TP Report when the assessee initiated the corroborative analysis it resorted to external comparables. It did not carry out an internal FAR and identify proper revenue and costs vis a vis the audited accounts to emphasise that the internal comparability overrides the external comparability under TNMM. We do not agree that such a situation will arise as late as proceedings before DRP. Without prejudice we are not persuaded by any substantive date which may prove that such internal segmental was genuinely maintained for comparability. Hence, we over rule this ground of objection.*

17. In view of the above, we set aside to Ld. TPO/AO for verification of applicability of internal TNMM to the present facts of the case. Assessee shall carry out internal FAR and identity proper revenue and costs vis a vis the audited accounts to establish internal comparability under TNMM as

MAM. In the event assessee fails to demonstrate the same, it shall file details in respect of external comparables under TNMM as MAM and TPO shall decide the issue as per law by giving proper opportunity to assessee.

Accordingly this ground No. 2 raised by assessee is allowed for statistical purpose.

18. Ground No. 3 raised by assessee becomes infructuous as we have allowed Ground No. 2 raised by assessee for statistical purposes in terms of internal comparables used by assessee.

19. Ground No. 4 is in terms of proportionate adjustments, we agree with arguments of Ld. Counsel that adjustments if any arising due to computation of ALP should be restricted only to international transaction and not to entire turnover of assessee company. We, therefore, direct assessing officer to restrict adjustments if any to international transactions which are found by him to have taken place at a price other than ALP.

Accordingly this ground raised by assessee is allowed.

20. Ground No. 5 is in respect of allowability of benefit of plus -5% to arms length range as prescribed under section 92C (2) of the Act. It is observed that Ld. TPO has not allowed benefit of plus -5% as provided under the Act whereas Ld. Counsel submitted that amendment inserted by Finance Act 2009 is prospective in nature and cannot be applied to year under consideration. It has been submitted by Ld. Counsel that by way of this amendment basis of

taxation/determination of arms length price in respect of international transactions undertaken by a taxpayer changes. Ld. Counsel further submitted that this amendment has effect of imposing a new liability by taking away option from assessee. Accordingly, this amendment is substantive in nature cannot be applied retrospectively.

21. We agree with principle submission advanced by Ld. Counsel which is supported by various decisions of Hon'ble High Courts and this Tribunal. We accordingly direct Ld. TPO to grant benefit of plus -5% range while computing arm's length price as the amendment introduced by Finance Act, 2009, is prospective in natural and will not be applicable to the year under consideration.

Accordingly this ground raised by assessee stands allowed.

22. Ground No. 6 is in respect of disallowance under section 36 (1) (iii) of the Act.

23. Ld. Counsel submitted that assessing officer erred in not following directions issued by DRP. He submitted that all interest free loans given by assessee were for business purposes. He submitted that DRP while deciding this issue observed as under:

> *The AO has considered the last five items totaling to Rs. 2,50,55,581/- are making the disallowance. It is however seen that advances to employees, service tax, input credit, third party advance for business purposes and prepaid expenses are for the business purposes of the assessee. These advances are made for the purposes of carrying out the*

business activity. Similarly, advance deposit with airport authority of India/CSF/Shipping lines is also found to be for the business purpose of the assessee as the assessee engaged in the business of freight forwarding and is offering services such as air freight, sea freight, warehousing dispatch and clearance in cargo in harbor areas and custom clearance. The advances to airport authority of India/CSF/Shipping lines are absolutely for the business purposes of the assessee. Thus, the AO is not justified in proposing disallowance of interest in respect of the advances. The objection of the assessee is sustained. The AO is directed not to make the disallowance of Rs. 9,89,705/- on account of interest free advances.

In lieu of the same, we direct Ld. AO to delete disallowance of Rs.9,89,705/- on account of interest free advances.

Accordingly this ground raised by assessee stands allowed

24. Ground No. 7 ease in respect of levy of interest under Section 244A and 234D of the Act and initiation of penalty proceedings under section 271(1)(c) of the Act. These are consequential in nature and therefore, do not require any adjudication.

Insofar as not granting of due credit for taxes deducted is concerned, Ld. AO is directed to allow credit of tax is paid as per law.

Accordingly this ground raised by assessee stands allowed partly.

In the result appeal filed by the assessee stands partly allowed.

Order pronounced in the open court on 29th August, 2017.

Sd/- Sd/-

(आर. के. पांडा/R. K. PANDA) **(बीना ए. पिल्लै/BEENA A. PILLAI)**

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

दिनांक/Date: 29.08.2017

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