

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

ITA No. 178/Kol/2017
Assessment Year: 2010-11

ITA No. 187/Kol/2017
Assessment Year: 2011-12

ITA No. 188/Kol/2017
Assessment Year: 2012-13

Bothra Shipping Services**Appellant**
(Currently known as Bothra Shipping services Pvt. Ltd.)
Room No. 10
2nd Floor
"Sagar Estate
2 Clive Ghat Street
Kolkata - 700 107
[PAN : AADFB 8479 P]

Assistant Commissioner of Income Tax, Central Circle-1(1), Kolkata.....Respondent

Appearances by:

Shri Naresh Jain & Mrs. Arati Debnath, AR, appeared on behalf of the assessee.

Shri G. Mallikarjuna, CIT, D/R. appearing on behalf of the Revenue.

Date of concluding the hearing : June 26th, 2018

Date of pronouncing the order : July 31st, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

All these appeals filed by the assessee are directed against the separate orders passed u/s 144C r.w.s. 143(3) of the Income Tax Act, 1961 (in short the 'Act'). As the issues arising in all these appeals are common, for the sake of convenience they are heard together and disposed off by way of this common order.

2. Brief facts of this case are brought out by the ld. DRP at page 1 of his order which is extracted for ready reference:-

Bothra India is engaged in the business of handling bulk cargoes. Its activities include vessel handling, stevedoring & cargo handling, clearing & forwarding and other port related activities. Jaldhi Overseas Pte Ltd ('Jaldhi Overseas') engages Bothra India for vessel handling at the port, to provide various vessel related services until the vessel

embarks on its journey. The operations carried out by Bothra India are independent contractor while dealing with unrelated enterprises as well as Jaldhi Overseas. The Assessing officer passed the assessment order on 30/12/2016 for the assessment year 2012 u/s 143(3) r.w.s. 153A & Section 144C. Similarly, he passed an order for the ay 2010-11 on 27/12/2016 and for ay 2012-13 on 26/12/2016.

Aggrieved the assessee filed this appeal on the following revised grounds:-

1. *On the facts and circumstances of the case, and in the law, the Ld. A.O. /Ld. Panel erred in initiating proceedings under Section 153A of the Act even though it was time barred.*

The Appellant therefore prays that the assessment order be treated as void-ab-initio and bad in law.

2. *On the facts and circumstances of the case, and in law, the Assessment Order passed by the Ld. Assessing Officer ('AO') under the directions of and Hon'ble Dispute Resolution Panel ('DRP' or 'Ld. Panel') under Section 143(3) read with section 92CA(4) & 144C(13) & 153A of the Act is bad in law and without appropriate jurisdiction.*

The Appellant therefore prays that the assessment order be set aside.

3. *On the facts and in the circumstances of the case, and in law, the Ld. AO /Ld. Panel /Assistant Commissioner of Income-tax (Transfer Pricing)-1 ('Ld. TPO') erred in making a transfer pricing adjustment of Rs. 5,01,37,172 to the Appellant's international transactions.*

The Appellant therefore prays that the Ld. AO /Ld. Panel /Ld. TPO be directed to treat the international transaction at arm's length.

4. *On the facts and circumstances of the case and in law, the draft assessment order passed by AO is beyond the time limit prescribed u/s 153B and thus time barred and liable to be quashed.*

5. *On the facts and circumstances of the case and in law, the order of the Transfer Pricing Officer is time barred and contrary to the provisions of section 92CA(3A) r.w.s. 153B and is liable to be quashed.*

6. *On the facts and circumstances of the case and in law, the Ld. Assessing Officer has failed to apply his mind and has mechanically referred the matter to the Ld. Transfer Pricing Officer u/s 92CA(1) and also violated principle of natural justice, thereby rendering the reference bad in law.*

7. *On the facts and in the circumstances of the case and in law, the Ld. Aa I Ld. Panel I Ld. TPO erred in:*

i. rejecting the transfer pricing study which was maintained in good faith and with due diligence despite satisfying conditions prescribed under section 92C(3) of the Act;

- ii. rejecting use of multiple year data;*
- iii. using the data available at the time of assessment for undertaking comparability analysis;*
- iv. not applying the filter on net fixed assets;*
- v. incorrectly applying different accounting year end filter;*
- vi. incorrectly applying related party transactions filter with denominator as sales and purchase combined;*
- vii. incorrectly applying persistent losses I diminishing revenues filter;*
- viii. incorrectly modifying sales filter;*
- ix. including certain comparables, which were not comparable based on the functions performed, asset used and risks assumed (FAR analysis) of the Appellant;*
- x. not including certain comparables selected by the Appellant in its transfer pricing study report based on the FAR analysis;*
- xi. arbitrarily including a company viz. Apollo Logi solutions Limited, as comparable which was functionally different and which did not find place in SCN issued by the Ld. TPO and thereby violating principle on natural justice.*

The Appellant therefore prays that the Ld. Aa / Ld. Panel / Ld. TPO be directed to treat the value of international transactions at arm's length.

8. Without prejudice to the generality of the foregoing ground, on the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel has erred in affirming the action of the Ld. Transfer Pricing Officer / Ld. Assessing Officer in including Aegis Logistics Ltd in the final set of comparables ignoring the fact the functions, assets and risk of the company are not comparable with the appellant company.

9. Without prejudice to the generality of the foregoing ground, on the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel has erred in affirming the action of the Ld. Transfer Pricing Officer / Ld. Assessing Officer in including Om Logistics Ltd in the final set of comparables ignoring the fact the functions, assets and risk of the company are not comparable with the appellant company and the segmental data is also not available.

10. In the facts and circumstances of the case and in law, the Ld. Transfer Pricing Officer has erred in including Aqua Logistics Ltd. twice in the final set of comparables.

11. On the facts and circumstances of the case, the profit level indicator was wrongly computed by appellant in its Transfer Pricing Study Report at 0.27% of total cost whereas in fact actual profit level indicator for the year was approximately 3.88%.

12. That the correct PLI of the appellant is approximately 3.88% which is within the +/- 5% of arms length PLI computed by the TPO , hence addition made on account of transfer pricing adjustment be deleted.

13. *On the facts and circumstances of the case, and in law, the Ld. Panel erred in confirming the action of the Ld. AO in disallowing 25% of the dock labour charges amounting to Rs. 4,72,406 on ad-hoc basis on the alleged ground that the payments are illegal in nature.*

The Appellant therefore prays that the Ld. Aa / Ld. Panel be directed to delete the impugned ad-hoc disallowance of dock labour charges.

14. *On the facts and circumstances of the case, and in law, the Ld. Panel erred in confirming the action of the Ld. AO in disallowing speed money of Rs. 3,03,265 on the alleged ground that the payment are illegal in nature.*

The Appellant therefore prays that the Ld. AO / Ld. Panel be directed to delete the impugned disallowance of speed money.

15. *On the facts and circumstances of the case, and in law, the Ld. Panel erred in confirming the action of the Ld. AO in restricting the claim of depreciation on Tata & JCB Loaders at 15% on the alleged ground that these equipments cannot be put in the same category as Lorry, Taxi, Bus or treated as specific commercial vehicles in accordance with Section 32(1) of the Act r.w. Section 2 of the Motor Vehicles Act, 1988 without appreciating the fact the Hon'ble Calcutta High Court in the appellant's own case for the Assessment Years 2004-05 to 2007-08 has allowed the same in ITA No. 144 of 2015 vide order dated 5th September, 2016.*

The Appellant therefore prays that the Ld. AO / Ld. Panel be directed to allow the depreciation on Tata & JB Loaders at the rate of 30% as claimed in the return of income.

16. *On the facts and in circumstances of the case, the Ld. Panel erred in confirming the action of the Ld. AO in applying interest under section 234B of the Act.*

The Appellant therefore prays that the Ld. AO be directed to delete the levy of interest u/ s. 234B of the Act.

17. *On the facts and in circumstances of the case, the Ld. AO erred in initiating penalty proceedings under section 274 r.w.s. 271 of the Act.*

The Appellant therefore prays that the Ld. AO be directed to delete the initiation of penalty proceedings u/s. 274 r.w.s. 271 of the Act.

The Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.

3. Though the assessee has raised a number of grounds before us, it had contested only the issue of determination of Arms length price under Transfer Pricing Provisions. No other ground was argued or contested during the course of hearing of the case.

3.1. All the technical grounds have not been pressed. Hence these are dismissed as not pressed.

4. On the issue of determination of Arm's Length Price, the Id. Counsel for the assessee agitated the selection of M/s. Aegis Logistics Ltd. ('Aegis') And M/s. Malabar Coast Marine Services Pvt. Ltd. ('Malabar') as comparables for the Assessment Year 2010-11. For the Assessment Year 2011-12 and 2012-13 the selection of Aegis, as a comparable was disputed.

For the Assessment Year 2011-12 one more issue that was contested in the alleged, *prima facie* error in computing the PLI. All other grounds in these three assessment years were not pressed, due to smallness of the amount or due to the assessee preferring not to contest the technical grounds and hence these are all dismissed as such.

4.1. Hence, we consider only the issues that are agitated before us.

5. We have heard Shri Mahesh Jain along with Ms. Arati Debnath the Id. Counsels for the assessee and Shri G. Mallikarjuna, Id. CIT, D/R, on behalf of the revenue.

On a careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case-law cited, we hold as follows:-

6. Ground No. 7 disputes the determination of ALP by the Id. TPO.

7. Ground No. 8 specifically disputes the inclusion of Aegis in the final set of comparables.

7.1. The Id. Counsel for the assessee submits that the functional profile of 'Aegis' and the functional profile of the assessee are not comparable and hence Aegis should be excluded from the final list of comparables. We now examine the functional profile of the assessee company as well as the comparable i.e. 'Aegis'. The TPO in his order u/s

92CA (3) of the Act, 29/01/2016, at page 2 para 3 states the functional profile of the assessee as follows:-

3.0. Functional Profile of Bothra Shipping:

Bothra Shipping renders various services as a logistics service provider in the Indian Market. It operates in the port of Visakhapatnam, Kakinada and Mangalore. Key operations of se India are s follows,

- Stevedoring and Clearing: The activity primarily relates to loading, unloading and cargo handling. It requires employment of loading equipment, proper techniques for lifting and stowing cargo had correct handling of materials. Majority of non-bulk cargo is transported in Shipping containers. The containers arrive at the port by truck, rail or ship and are stacked in the port storage area.*
- Clearing and Cargo handling: These includes submission of export application, customs clearances, and other/formalities at the port on behalf of the exporters /importers.*
- Vessel Agency services: Bothra India's shipping division take care of all vessel related requirements. These operations are undertaken to ensure quick berthing of vessel and efficient cargo handling which includes vessel operation handling, monitoring and reporting, receipt of owner funds, verification of PDAs and managing payments, cargo document verification, statement of facts etc. for correctness, issuance of letter of protests, assisting coordination with master for signing bill of lading etc.*

The functional profile of Aegis as brought out by the DRP at page 5 of its order is as follows:-

"Aegis Logistics is engaged in the sale of liquefied petroleum gas (LPG), wholesale of solid, liquid and gaseous fuels and related products, and storage and warehousing of products, such as general merchandise warehouse and warehousing of furniture, automobiles, gas and oil, chemical and textiles. The company has two major divisions – Liquid Terminal and Gas Terminal. In the absence of the segmentation of the revenues and costs, the Company cannot be considered as a comparable. Aegis is engaged in the sale of products as against the assessee which renders services, and is thus functionally different evident form its annual report. During the FY 2009-10, Aegis has acquired Shell Gas (LPG) India Private Limited, another company engaged in the sale of LPG, which is an extraordinary event and also demonstrates that Aegis Logistics is not functionally similar to that of the Assessee."

7.1.1. A perusal of the functional profile of the assessee company and on a comparison of the same with the profile of Aegis Logistics Ltd., it is clear that they are different. The assessee is engaged mainly in vessel handling, stevedoring & cargo handling, clearing & forwarding and other port related activities whereas Aegis Logistics Ltd. is primarily engaged in providing liquid logistics outside the port area, up to the destination through pipelines.

7.2. The Id. DRP, has directed the TPO to retain this comparable only if segmental data is available. The final assessment order has been passed without carrying out these binding directions.

The assessee also argued that the directions of the Id. DRP to the TPO, to take segmental data if available, amounts to further enquiry and is illegal and is in contravention of Section 144C(8) r.w.s. 144C(5) of the Act. Reliance was placed on the following case-law:-

- *IBM India (P.) Ltd. v. Joint Commissioner of Income-tax, Large Taxpayers Unit [2014] 46 taxmann.com 129 (Bangalore - Trib.)*

It was argued that the Id. DRP having come to a conclusion that the functional profile is not the same, it should have directed exclusion of 'Aegis' as a comparable and not order further investigation.

7.2.1. On considering these submissions, the findings of the DRP and the fact that the functional profile of both these companies are different, we direct the assessing officer to exclude Aegis Logistics Ltd. from the list of final comparables for the purpose of computation of ALP, under the Act. In the result, this ground of the assessee is allowed.

8. The next issue that arises for our consideration, is whether the company 'Malabar' should be excluded from the final list of comparables. The assessee contends that 'Malabar' should not be included in the final list of comparable for the following reasons:

- a. The turnover of the assessee company is Rs.275 Crores whereas of 'Malabar' is Rs.1.96 Crores. Reliance is placed on the judgment in the case of *CIT vs. Patni Computer Systems Ltd. v. Dy. CIT [2012] 19 taxmann.com 180 & CIT v. Pentair Water India (P.) Ltd. (2016) 381 ITR 216 (Bom.)*
- b. 'Malabar' is a 100% subsidiary of M/s. Aspinwall Ltd. M/s. Aspinwall was taken as a comparable both by the assessee as well as by the T.P.O. and this holding company reported a profit margin of 3.13% on a turnover of Rs.80 Crores and whereas 'Malabar', the subsidiary company reported margin of 42.33% on a low turnover of Rs.1.96 Crores. This anomaly, will require investigation, as laid down by the Hon'ble Delhi High Court in the case of *[2015] 60 taxmann.com 355 (Delhi) Rampgreen Solutions (P.) Ltd. v. Commissioner of Income-tax*. It was submitted that profits are abnormal as 'Malabar' had utilized all the workforce and facilities of the holding company and as 'Malabar's' working is widely influenced by the holding company which resulted in huge profit margins. It was submitted that even small fluctuations can result in wide variations in profit margin.

The ld. D/R, submits that this comparable i.e. 'Malabar' was picked up by the assessee himself and hence he cannot plead for exclusion of this comparable.

In reply the ld. Counsel for the assessee relied on the decision of Hon'ble Chandigarh ITAT, Special Bench in the case of *Quark Systems Private Limited v. DCIT: 2010 38 SOT 307*, for the proposition that even if the assessee had itself included a comparable in its TP Study, there is no bar to plead exclusion of the same before the Hon'ble Tribunal.

8.1. After hearing rival contentions, we find that the Hon'ble Bombay High Court in the case of *Pentair Water India Pvt. Ltd. (Supra)* has approved the following findings of the Tribunal at Para 5 and 6 of the order:-

"5. On perusal of the impugned Order passed by the Tribunal dated 23.05.2014, we find that the Tribunal has recorded the reasons for not accepting the said three companies are comparable by stating as follows :

- (i) *HCL Comnet Systems & Services Ltd :- We find force in the submission of the ld. AR that this company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the Assessee, the turnover is around Rs. 11 crores only. While making the selection of comparables, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of Rs. 11 crores cannot be compared with a company which is having turnover of Rs. 260 crores which is more than 23 times the turnover of the Assessee. This company cannot be regarded to be in equal size to the Assessee. We, accordingly, direct the AO to exclude this company out of the comparables.*
- (ii) *Infosys BPO Ltd. :- In this case also we noted the turnover in respect of this Company is Rs. 649.56 crores while the turnover of the Assessee company is around Rs. 11 crores which is much more than 65 times of the Assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT (A) in excluding this Company out of the comparables. Accordingly, we confirm the order of the CIT (A).*
- (iii) *Wipro Ltd. :- After hearing the rival submissions, we noted that the CIT (A) applying the turnover filter has excluded this company out of the comparables. The turnover reported in the case of Wipro Ltd. Is Rs. 939.78 crores while in the case of the Assessee the turnover is around Rs. 11 crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the Assessee company and accordingly, we do not find any infirmity in the finding of CIT (A) while he excluded this company on the turnover criteria following the decision of this tribunal in :*

Sony India (P.) Ltd. v. Dy. CIT [\[2008\] 114 ITD 448 \(Delhi\)](#)

E-Gain Communication (P.) Ltd. v. ITO [\[2008\] 23 SOT 385 \(Pune\)](#)

Deloittee Consulting India (P.) Ltd. v. Dy. CIT [\[2013\] 144 ITD 451/36 taxmann.com 68 \(Hyd.\)](#)

Genisys Integrating System (India) (P.) Ltd. v. Dy. CIT [\[2012\] 53 SOT 159/20 taxmann.com 715 \(Bang.\)](#)

6. The said findings of the Tribunal in respect of the said three Companies are on the basis of appreciation of evidence on record. We find no infirmity in the said findings of the Tribunal on that count. In fact, the Tribunal has endorsed the views of the CIT Appeals whilst coming to such conclusions. The concurrent findings of facts arrived at by the Authorities below, cannot be re-appreciated by this Court in the present Appeal."

8.2. Applying the proposition of law laid down, we hold that 'Malabar' cannot be taken as a comparable in the final list of comparables for the reasons that the turnover in question is not comparable. The margins of this company is far in excess of the margins of its holding company M/s. Aspinwall Ltd. which is also taken as a comparable by both the assessee as well as the revenue. Hence we direct that this comparable should be excluded from the final list of comparables. The TPO could not have included this company as a comparable, without investigating the reasons for 'Malabar' declaring

abnormal profits at 42.33%, as compared to all other comparables including its holding company. Accordingly, this ground of the assessee is allowed.

9. Thus the appeal for the Assessment Year 2010-11 in ITA 178/Kol/2017, is partly allowed by directing the Assessing Officer to exclude from final list of comparables, M/s. Aegis Logistics Ltd. & M/s. Malabar Coast Marines Ltd. and to re-compute the ALP accordingly.

10. All other ground both technical and otherwise, are hereby dismissed as not pressed.

11. In the result this appeal of the assessee is allowed in part.

12. In ITA no. 187/Kol/2017 for the Assessment Year 2011-12, Ground No. 8 is on the issue of inclusion of M/s. Aegis Logistics Ltd. in the final list of comparable for the purpose of computation of ALP. Consistent with the view taken by us for the Assessment Year 2010-11, we direct the Assessing Officer to exclude this comparable from the final list of comparables. Hence we allow Ground no. 8 of the assessee.

13. Ground no. 11 & 12, are on the issue of computation of PLI. The assessee's contention is that the assessing officer has committed a *prima facie* error in computing the PLI at 0.2%, whereas the correct PLI works out to 3.88%. After considering the submissions of the ld. D/R, we restore this issue to the file of the Assessing Officer for verifying the claim of the assessee and calculating the correct PLI and dispose off the issue. In the result ground no. 11 & 12 are allowed for statistical purpose.

14. All other grounds both technical and otherwise, are hereby dismissed as not pressed.

15. In the result this appeal of the assessee is allowed in part.

16. Now we take up ITA No. 188/Kol/2017 for the Assessment Year 2012-13.

The only ground agitated before us is the inclusion of M/s. Aegis Logistics Ltd. in the final list of comparables. Consistent with the view taken by us for the Assessment Year 2010-11, we direct the Assessing officer to exclude this comparable from the final list of comparables.

17. **In the result, this appeal of the assessee is allowed.**

Kolkata, the 31st day of July, 2018.

Sd/-
[Aby T. Varkey]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated : 31.07.2018
{SC SPS}

Copy of the order forwarded to:

**1. Bothra Shipping Services
(Currently known as Bothra Shipping services Pvt. Ltd.)
Room No. 10
2nd Floor
"Sagar Estate
2 Clive Ghat Street
Kolkata - 700 107**

2. Assistant Commissioner of Income Tax, Central Circle-1(1), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches