

**IN THE INCOME TAX APPELLATE TRIBUNAL
“J” Bench, Mumbai**

**Before Shri G.S.Pannu, Vice President
and Shri Ravish Sood, Judicial Member**

**ITA No. 6913/Mum/2013
(Assessment Year: 2008-09)**

Wilhemsen Ship Management
(India) Private Limited,
31/32, 3rd Floor,
“Apple Heritage”, Sir M.V. Road
Andheir (West)
Mumbai-400 093
PAN – AAACI1614H

Vs.

The Asst. Commissioner of Income
Tax Officer, 8)(1),
Aayakar Bhavan,
Mumbai 20

(Appellant)

(Respondent)

Appellant by: Shri Nishant Thakkar &
Ms. Jasmin Amalsadvala, A.Rs

Respondent by: Shri V. Jenardhanan, D.R

Date of Hearing: 16.11.2018
Date of Pronouncement: 30.01.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-15, Mumbai dated 06.09.2013, which in turn arises from the order passed by the A.O under Sec.143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 (for short ‘I.T. Act’), dated

21.12.2011 for A.Y. 2008-09. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

“(1) Maintainability of the TP Reference and non - satisfaction of the AO for reference u/s 92CA(1) of the ITA:-

The CITA has erred in wrongly / not disposing off the objections raised by your Appellants with respect to the legality of the reference made to the TPO as also erred in not furnishing a copy of the reference letter and other related documents sought by Your Appellants.

(2) Manning, Consultancy Fee, Training Fee, Training Expenses, Course Administration cost and Sale of Uniform —Arms Length Price Adjustment - Rs.1,53,50,563/-:

(i) *The CITA has erred in law and on facts in upholding the Arm Length Price adjustment of Rs. 1,53,50,563/- made by the TPO /AO.*

(ii) *The CITA has erred in law and on facts in upholding the rejection, by the TPO, of Your Appellants' TP Benchmarking Study Report, without any valid reasons.*

(iii) *The CIT(A) has erred in law and on facts in upholding the action of the TPO of finding fault with your Appellants method of allocation of general overheads, when the TPO never asked to furnish any further evidence in spite of informing him of the methodology of how the expenses were allocated, vide your Appellants letter dated August 08, 2011.*

(iv) *The CITA has erred in law and on facts in upholding the action of the TPO in applying the 'TNMM method at entity level'.*

(3) Advances Written Off - Rs.2,78,992/-:

(i) *The learned CITA has erred in law and on facts in upholding the AO's decision to add to the total income of your appellants.*

(ii) *The learned CITA has erred in differentiating "Bad Debts Written off" and "Advances written off" as different category.*

(4) Initiation of penalty proceedings:-

The learned CITA has erred in law and facts, in dealing with your appellants' objections stating that this ground of appeal is considered premature and accordingly dismissed.

(5) Relief/Prayer: In view of the foregoing, your appellants humbly pray that –

(i) *The said Appellate Order dated September 06, 2013 passed by the CITA for this year be modified to the above extent; and*

(ii) *Any other reliefs deemed necessary by Your Honours may please be granted.*

Your appellants crave leave to add, amend, alter, substitute, withdraw, any or all of the foregoing grounds of appeal before or at the time of Hearing of this appeal.”

2. Briefly stated, the assessee company viz. Wilhmsen Ship Management (India) Pvt. Ltd. [formerly known as Barber Ship Management (India) Pvt. Ltd.] is a captive service provider engaged in the business of sourcing, screening, selecting Indian seafarers and providing assistance in completing their pre-joining formalities so as to enable them to join the vessels managed by Barber Ship Management Ltd., Hong Kong on behalf of foreign ship owners. Apart therefrom, the assessee was also providing training to seamen at its manning centres. The assessee had e-filed its return of income for A.Y 2008-09 on 30.09.2008, declaring total income at Rs. 99,40,286/- under the normal provisions and ‘book profit’ under Sec.115JB was shown at Rs.1,42,87,963/-. Subsequently, the assessee company filed a revised return of income on 30.07.2009, declaring total income at Rs.99,40,273/- (after setting off the unabsorbed depreciation of Rs.75,90,331/-) under normal provisions and ‘book profit’ under Sec.115JB at Rs.1,42,87,963/-. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2) of the I.T. Act.

3. During the course of the assessment proceedings a reference under Sec. 92CA(1) of the I.T. Act was made by the A.O to the Addl. Commissioner of Income-tax (Transfer Pricing)-II(6), Mumbai (for short ‘TPO’) for computation of the Arm’s Length Price (for short ‘ALP’) of the international transactions reported by the assessee in the prescribed Form No. 3CEB. In the course of the proceedings it was observed by the TPO that the assessee had adopted the following methods for benchmarking the various types of international transactions in its TP study report: -

1.	Manning Services	TNMM
2.	Health Safety Environment and Quality Services	TNMM
3.	Sourcing Services	TNMM

However, it was submitted by the assessee before the TPO that it had adopted the following methods for benchmarking the various types of transactions:

1.	Manning	CPM
2.	Management	TNMM
3.	Training	CUP
4.	Consultancy Fee	CPM
5.	BPS Consultancy	CPM
6.	ECB Loan	CUP

In the course of the proceedings, it was stated by the assessee before the TPO that in contrast to the earlier years, it had during the year under consideration changed the method for benchmarking from TNMM to CPM. It was observed by the TPO that the assessee had failed to explain as to why the method adopted by it in the TP study report was not accepted by it. It was noticed by the TPO that the assessee had in the TP study report stated that unlike as in the case of trading and manufacturing activities, in case of services the cost attributable to providing of services i.e cost of services similar to cost of goods sold cannot be determined, hence the TNMM method could be used as an appropriate method in preference to CPM which could only be used with modifications. It was noticed by the TPO that the assessee had also not maintained audited segmental accounts during the year under consideration. Further, the TPO observed that the costs in respect of the various activities carried out by the assessee were also not allocated by the assessee on a scientific basis. Observing that the cost of the services provided by the assessee were not clearly identifiable, the TPO declined to accept the CPM method adopted by the assessee. Apart threfrom, as the assessee had allocated the

expenses artificially without proper justification, hence the CUP method that was adopted for 'training activity' was also not accepted by the TPO. On the basis of necessary deliberations it was concluded by the TPO that the most appropriate method in the case of the assessee was TNMM method. Further, keeping in view the fact that the various activities of the assessee viz. (i) manning; (ii) management; (iii) training; (iv) consultancy; and (v) BPS were inextricably interlinked and interdependent and the resources of the assessee were utilized for all of the aforementioned activities, therefore, it was observed by the TPO that the TNMM method was to be applied at entity level in the case of the assessee.

4. The assessee in compliance to the directions of the TPO furnished current year data of the comparables selected by it for determining the ALP, as under:

Sr. No.	Company Name	OP/TC
1.	Ask Me Info Hubs Ltd. (now known as Shreejal Info Flub Ltd.)	8.28%
2.	Cosmic Global Ltd.	24.36%
3.	Maple Solutions Ltd.	22.94%
*4.	Transworks information services Ltd (now known as the Aditya Birla Minacs Worldwide Ltd)	-5.20%
5.	Triton Corp Ltd.	20.21%
6.	Galaxy Commercial Ltd.	2.02%
7.	National Securities Depository Ltd.	43.28%
8.	Choksi Laboratories Ltd.	29.95%
9.	Dolphin Medical Services Ltd.	9.24%
10.	Medinov Diagnostic Services Ltd.	4.47%
11.	N.G. Industries Limited	21.56%
12.	Vimta Labs Limited	15.84%
13.	Pfizer Ltd. Services	15.84%
14.	Transgene Biotek Ltd.	38.72%
	Average (251.51/14)	17.97%
	After removing S. No.4*	19.75%

Out of the comparables selected by the assessee the comparable at S.No. 4 i.e Transworks Information Services Ltd. (now known as the

Aditya Birla Minacs worldwide Ltd.) not found to be functionally comparable, was thus rejected. In the backdrop of the aforesaid deliberations the TPO adopted the arithmetic mean of the profit level indicator of comparables @ 19.75% and calculated the ALP of the services rendered by the assessee, as under:

Total Cost	Rs.14,84,48,232/-
Arms Length. Mean Margin	19.75% of the Operating Cost.
Arms Length Price (ALP) @ 19.75% of Operating Cost	Rs.17,77,66,758/-
Arms Length Price of Service rendered	Rs.17,77,66,758/-
Total Income	Rs.16,27,36,195/-
Shortfall being adjustment u/s 92CA	Rs. 1,50,30,563/-

On the basis of the aforesaid calculations it was observed by the TPO that the variation between the income returned by the assessee and the ALP did not fall within the safe harbour range of +/- 5%. Accordingly, the TPO suggested an adjustment of Rs.1,50,30,563/- at the entity level, which covered the manning, consultancy fee, training fee, training expenses, course administration cost and sale of uniform as these were incidental to the main activity of manning and consultancy.

5. The A.O after receiving the order passed by the TPO under Sec. 92CA(3) of the I.T. Act, dated 28.10.2011 called upon the assessee to explain as to why the adjustments made by the TPO should not be made in its hands. In reply, it was submitted by the assessee that no variation was called for in respect of the international transactions of the assessee with its Associate Enterprises (for short 'AE'). The A.O not finding favour with the said contention of the assessee made the adjustments of Rs.1,50,30,563/- as suggested by the TPO to the total income of the assessee. Apart therefrom, the A.O disallowed a sum of Rs.2,78,992/- that was claimed by the assessee as a deduction under Sec. 36(1)(vi) r.w.s.36(2) of the I.T. Act. On the basis of the aforesaid

deliberations the A.O assessed the income of the assessee at Rs.2,52,49,828/- as per the normal provisions while for the 'book profit' under Sec. 115JB remained unadjusted at an amount of Rs.1,42,87,963/-.

6. Aggrieved, the assessee assailed the assessment framed by the A.O under Sec. 143(3) r.w.s.144C(5) of the I.T. Act, dated 21.12.2011 in appeal before the CIT(A). However, the CIT(A) not being persuaded to subscribe to the contentions advanced by the assessee dismissed its appeal.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the A.O/TPO while determining the ALP had not confined the benchmarking in respect of A.E transactions of the assessee and had carried out the same in respect of its total sales. It was submitted by the ld. A.R that in case of transfer pricing proceedings the ALP determined by the assessee has to be seen only with regard to its international transactions with its AEs and not on its entire turnover/sales. The ld. A.R submitted that if the benchmarking in the case of the assessee is confined to its A.E transactions only and not the entire transactions (including A.E and Non-A.E) then no transfer pricing adjustment would be called for in the hands of the assessee. In sum and substance, it was averred by the ld. A.R that the TP adjustment as per the mandate of law is only in respect of the international transactions of the assessee and not the transactions entered into by the assessee with independent unrelated parties. In order to fortify his contention that the TPO while determining the ALP had carried out the TP adjustments not only in respect of the AE transactions but for the entire turnover of the

assessee company, therein drew our attention to Page 9 of the order passed by the TPO under Sec.92CA(3) of the I.T. Act. The ld. A.R in order to drive home his contention that for determining ALP of the international transactions the benchmarking has to be done only in respect of the AE transactions and not for entire turnover, therein relied on the following judicial pronouncements :

- (i) Hindustan Unilever Ltd. Vs. Addl. CIT, Range-1(1), Mumbai. (2012), 28 Taxman.com 142 (Mum).
- (ii) CIT-1, Mumbai Vs. Hindustan Unilever Ltd. (2017) 394 ITR 73 (Bom).
- (iii) The CIT-1, Mumbai Vs. Alstom Projects India Ltd. (ITA No. 362 of 2014; dated 14.09.2016) (Bom).
- (iv) The CIT-8, Mumbai Vs. Phoenix Mecanno (India) Pvt. Ltd., Mumbai (ITA No. 1182 of 2014; dated 07.06.2017) (Bom).
- (v) The CIT-8 Vs. Petro Araldite Pvt. Ltd. (ITA 1804 of 2013; dated 24.11.2015)(Bom)

8. Apart therefrom, it was submitted by the ld. A.R that the assessee had in the course of the assessment proceedings claimed deduction of Rs.2,78,992/- in respect of advances written off during the year under consideration. The ld. A.R submitted that as the aforesaid amounts had become irrecoverable, therefore, the assessee had written off the same as irrecoverable in its 'books of accounts' and had claimed the same as a deduction under Sec. 36(1)(vi) r.w.s.36(2) of the I.T. Act. It was the claim of the ld. A.R that though the aforesaid 'writing off' the bad debts by the assessee was as per the mandate of law, however, the A.O while framing the assessment had declined to allow the same.

9. Per contra, the ld. Departmental Representative (for short 'D.R') fairly admitted that as per the settled position of law in the course of the transfer pricing proceedings the ALP determined by the assessee

has to be seen only with regard to its international transactions with its AEs and not in respect of its entire turnover/sales. However, it was submitted by the ld. D.R that as observed by the TPO the assessee had allocated expenses in respect of its various activities in an artificial manner without proper justification. In sum and substance, it was the claim of the ld. D.R that the assessee had neither allocated the costs in respect of its various services on a scientific basis nor produced any data from which the basis adopted for the allocation of the expenses could be discerned. It was averred by the ld. D.R that as the allocation of costs by the assessee did not inspire any confidence and hence was not reliable, therefore, its claim that no transfer pricing adjustment would be called for in its hands if the ALP is determined only with regard to its international transactions with its AE could not be summarily accepted on the very face of it. The ld. D.R rebutting the allocation of expenses by the assessee in respect of its various activities (as placed on record) submitted that the same was required to be verified by the TPO. In the backdrop of his aforesaid contentions it was submitted by the ld. D.R that the matter may be restored to the file of the TPO for carrying out necessary verifications as regards the veracity of allocation of expenses by the assessee in respect of its various activities. Insofar, the disallowance of the claim of deduction of an amount of Rs.2,78,992/- that was claimed by the assessee as advances 'written off' under Sec.36(1)(vi) r.w.s. 36(2) of the I.T. Act was concerned, it was submitted by the ld. D.R that as the assessee could not prove that the amounts under consideration were earlier offered for tax, therefore, the A.O had rightly declined to allow the said claim of deduction so raised by the assessee.

10. The ld. A.R rebutting the aforesaid contentions of the revenue submitted that the allocation of the costs was carried out by the

assessee in respect of its various activities on a scientific basis. Insofar, the allocation of salary expense was concerned, it was submitted by the ld. A.R that the same was carried out on the basis of the number of staff members employed in the respective activities. Apart therefrom, it was submitted by him that the assessee had allocated electricity, depreciation and repairs on the basis of the area occupied by each activity. The ld. A.R in order to buttress his claim that the allocation of costs had been carried out on a scientific basis, therein placed on record a certificate of a Chartered Accountant, wherein the latter had certified that the allocation of the costs was in accordance with the generally accepted accounting principles, applicable accounting standards issued by the Institute of Chartered Accountant of India and 'Schedule R' to the 'balance sheet' of the assessee company for the year under consideration. As regards the disallowance of the assessee's claim of deduction of an amount of Rs.2,78,990/- in respect of advances "written off", the ld. A.R placed on our record a 'Chart' which revealed that an amount aggregating to Rs.1,32,645/- (out of Rs.2,78,990/-) was offered by the assessee as its income in the preceding years viz. F.Y. 2005-06 and F.Y 2006-07. It was submitted by the ld. A.R that its claim of deduction under Sec.36(1)(vi) r.w.s. 36(2) of the I.T. Act was well in conformity with the judgment of the **Hon'ble Supreme Court** in the case of **TRF Ltd. Vs. CIT (2010) 323 ITR 397 (SC)**. It was further submitted by the ld. A.R that in order to verify as to whether the amounts "written off" by the assessee during the year under consideration were offered by the assessee as its income in the preceding years the matter may be restored to the file of the A.O.

11. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Insofar, the claim of the assessee that in case of

transfer pricing proceedings the ALP determined by the assessee has to be seen only with regard to its international transactions with the AEs and not on its entire turnover/sales, the same we find is squarely covered by the order of the Tribunal in the case of **Hindustan Unilever Ltd. Vs. Addl. CIT, Range-1(1), Mumbai (2012) 28 Taxman.com 142 (Mum.)** In the aforesaid order, it was observed by the Tribunal that in the course of transfer pricing proceedings the ALP determined by the assessee has to be seen only with regard to its international transactions with the AEs and not in respect of its entire turnover/sales. We find that the aforesaid order of the Tribunal had thereafter been affirmed by the **Hon'ble High Court of Bombay** in the case of **CIT-1, Mumbai Vs. Hindustan Unilever Ltd. (2017) 394 ITR 73 (Bom)**. In the aforementioned case the revenue had fairly admitted before the Hon'ble High Court that the issue of justifiability of application of ALP only to A.E transactions and not to all transactions was already concluded against the revenue and in favour of the assessee by the earlier decisions of the court in the case of **(i) CIT Vs. Tara Jewellers Pvt. Ltd. [ITA No. 1814 of 2013, dated 05.10.2015]; (ii) CIT Vs. Petro Araldite (P) Ltd.] [ITA No.1804 of 2013; dated 24.11.2015]; (iii) CIT Vs. Thyssen Crupp Industries (P) Ltd. [ITA No.2201 of 2013; dated 02.12.2015]; and (iv) CIT Vs. Summit Diamond (India) P. Ltd. [ITA No.1647 of 2013; dated 11.07.2016]**. We find that the Hon'ble High Court taking cognizance of the fact that the issue under consideration was already concluded by its earlier orders, held that no substantial question of law did arise from the order of the Tribunal in context of the issue under consideration.

12. We have given a thoughtful consideration and are of the considered view that as the issue that the ALP determined by the assessee has to be seen only with regard to its international transactions with its AE's and not in respect of its entire

turnover/sales is squarely covered by the aforementioned judgments of the Hon'ble High Court of Bombay, therefore, respectfully following the same we restore the matter to the file of the TPO with a direction to re-determine the ALP of the assessee by confining himself only to the international transactions and not the entire turnover/sales of the assessee. In case the ALP on the basis of the aforesaid working is found to be within the safe harbour range of +/- 5%, then no adjustment shall be made in the hands of the assessee. Before parting, we may herein observe that insofar the contention of the Id. D.R that the assessee had neither allocated the costs amongst its various services on a scientific basis nor produced any data from which the basis adopted for the allocation of the expenses could be discerned is concerned, the same does not find favour with us. Admittedly, the TPO had observed that the assessee had neither allocated expenses on a scientific basis nor produced the basis adopted by it for such allocation. However, there is nothing discernible from the records which could persuade us to conclude that the TPO had ever called upon the assessee to place on record and justify the basis of allocation of expenses adopted by it. Rather, it is the contention of the Id. A.R that the TPO had never called upon the assessee to furnish any further evidence inspite of being informed about the methodology that was adopted for allocation of expenses by the assessee, vide its letter dated 08.08.2011. The Id. D.R could not rebut the aforesaid contention of the assessee. Apart therefrom, we find that the allocation of the expenses had been supported by the assessee on the basis of a certificate of a chartered accountant, wherein the latter had certified that the allocation of the costs was in accordance with the generally accepted accounting principles and the applicable accounting standards issued by the Institute of Chartered Accountant of India. Be that as it may, in terms of our aforesaid

observations we are not inclined to subscribe to the adverse inferences that were drawn by the TPO as regards the methodology of allocation of costs adopted by the assessee, without calling upon the latter for any justification of such allocation in the course of the proceedings before him. The **Ground of appeal No. 2** raised by the assessee before us is allowed in terms of our aforesaid observations.

13. We shall now advert to the claim of the ld. A.R that the A.O had erred in disallowing the claim of deduction of the assessee in respect of an amount of Rs. 2,78,992/- that was “written off” as irrecoverable under Sec.36(1)(vi) r.w.s. 36(2) of the I.T. Act. We find from a perusal of the orders of the lower authorities that the aforesaid claim of deduction of the assessee was rejected on the ground that the respective amounts under consideration were not earlier offered as income by the assessee. However, the ld. A.R in the course of hearing of the appeal had rebutted the aforesaid observations of the A.O and had stated that the amounts were duly offered as the income of the assessee in the preceding years and having been rendered as irrecoverable during the year were “written off” as irrecoverable in the books of accounts. As observed by us hereinabove, the ld. A.R in order to fortify his aforesaid contention had also placed on record details of certain advances aggregating to Rs.1,32,645/- which are stated to have been earlier offered as income by the assessee in F.Y. 2005-06 & F.Y. 2006-07.

14. We have given a thoughtful consideration to the issue before us and are persuaded to subscribe to the contention of the ld. A.R that after 01.04.1989 for claim of deduction of ‘bad debts’ under Sec.36(1)(vi) r.w.s. 36(2) of the I.T. Act, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable and it is enough if the bad debt is “written off” as irrecoverable in the

accounts of the assessee. In our considered view the claim of deduction of the assessee towards 'bad debt' of Rs.2,78,992/- had been declined by the lower authorities on the ground that the assessee had not offered the said amount as its income in the earlier years. However, the assessee had not only rebutted the aforesaid observations of the lower authorities, but had also placed on record the date wise details of certain 'debts' (forming part of the sum of Rs.2,78,992/-) which are claimed to have been offered as income by the assessee in the preceding years viz. F.Y.2005-06 and F.Y. 2006-07. In the backdrop of the aforesaid facts, we are of the considered view that the aforesaid unsubstantiated claim of the assessee cannot be summarily accepted on the very face of it and the same in all fairness requires to be revisited by the A.O for making necessary verifications. We thus for the limited purpose for making necessary verification as to as to whether the amount of Rs. 2,78,992/-, or any part thereof, as claimed by the assessee as 'bad debt' under Sec.36(1)(vi) r.w.s 36(2) of the I.T. Act had earlier been shown as its income, or not, therein restore the matter to the file of the A.O. We may herein observe that to the extent the contention of the assessee is found to be in order, the claim of 'bad debt' raised by the assessee to the said extent shall be allowed by the A.O. The **Ground of appeal No. 3** is allowed for statistical purposes.

15. The assessee has further assailed before us the initiation of penalty proceedings under Sec. 271(1)(c) of the I.T. Act. In our considered view as the A.O had only initiated the penalty proceedings, therefore, the aforesaid ground of appeal raised by the assessee is premature. We thus dismiss the **Ground of appeal No. 4** raised by the assessee before us.

16. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 30.01.2019

Sd/-

(G.S.Pannu)
VICE PRESIDENT

मुंबई Mumbai; दिनांक 30.01.2019

Ps. Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT,**
Mumbai

