

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K. N. CHARY, JUDICIAL MEMBER

ITA No. 3630/Del/2011
(Assessment Year: 2007-08)

Globe Ground India Pvt. Ltd, C-9, Connaught House, Connaught Place, New Delhi PAN: AAACG8313K	V s.	The Deputy Commissioner of Income Tax , Circle-12(1), New Delhi
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(Appellant)

(Respondent)

Assessee by :
Revenue by:

Shri Tarandeep Singh, Adv
Shri H.K. Chaudhary, CIT
DR

Date of Hearing
Date of pronouncement

02/01/2019
18/02/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by assessee against the order of the learned Assistant Commissioner Of Income Tax, circle 12 (1), New Delhi [The ld AO] dated 31/5/2011 passed under section 143 (3) read with section 144C of The Income Tax Act 1961 [the Act] passed in pursuance of the direction issued by The Dispute Resolution Panel – 1, New Delhi [The Ld DRP] dated 25/04/2011 under section 144C (5) of the act determining total income of the assessee at INR 93254530/- against the returned income of the assessee of Rs. 41350620/- for assessment year 2007-08. The assessee has raised the following grounds of appeal:-

“GROUNDS OF APPEAL

1. *That on facts and in law the orders passed by the Assessing Officer [hereinafter] referred as “AO”/ Dispute Resolution Panel [hereinafter referred as “DRP”]/ Transfer Pricing Officer [hereinafter referred as “TPO”] are bad in law and void ab-initio.*

- 1.1 *That on facts and in law, the assumption of jurisdiction by the AO/TPO to determine Arm's Length Price is bad in law and void ab-initio.*
2. *That on facts and in law the DR P erred in sustaining an adjustment to total income of Rs.5,19,03,911/- under Chapter- X of the Income Tax Act, 1961.*
 - 2.1. *That on facts and in law the DRP erred in holding that for the purpose of benchmarking the international transactions the TPO was justified in using current year data only while computing the Profit Level Indicator of the comparables.*
 - 2.2 *That on facts and in law the TPO erred in observing that the assessee is providing following services:*
 - (a) *Lounge Services*
 - (b) *Ticketing*
 - (c) *Crew briefing*
 - (d) *Fueling Supervisions*
 - (e) *Passenger Boarding Bridges Handling*
 - (f) *Aircraft Security*
 - (g) *Executive Aviation Handling*
 - (h) *Floor Walker Service*
 - (i) *Government Aircraft Handling*
 - 2.3 *That on facts and in law the DRP erred in upholding and the TPO erred in proposing a fresh set of comparable companies.*
 - 2.4 *That without prejudice on facts arid in law the AO/TPO erred and the DRP inter alia erred in not appreciating that the TPO should have applied a turnover filter of Rs. 100 crores.*
3. *That on facts and in law the TPO erred in comparing the operating margins of the assessee with the mean operating margins of the alleged comparable.*
4. *That on the facts and in law the DRP erred in not adjudicating upon ground no. 5 raised as an objection before it.*

- 4.1 *That in facts and in law the TPO/ DRP while computing the operating margins of the comparable companies selected by them in not taking into consideration the financial information/ results from their respective annual reports.*
4. *That without prejudice on facts and in law the DRP erred in not directing the AO to allow the benefit for the adjustment of the Arms Length Price “ALP” by as per the proviso to section 92C(2).*
2. Brief facts of the case shows that the assessee is a company engaged in the business of providing ground and passenger handling services to airlines at airport. It filed its return of income declaring income of Rs. 41350620/- on 30/10/2007. As the assessee has entered into an international transactions of ground handling services rendered to its associated enterprise of INR 312584553/- along with other international transactions, case of the assessee was referred by the learned assessing officer to The Additional Commissioner Of Income Tax, Transfer Pricing – 1 (2), New Delhi [The LD TPO] to determine the arm’s-length price of such international transactions.
3. The assessee benchmarked the about transaction by adopting the transactional net margin method [TNMM] as the most appropriate method [MAM]. Assessee selected certain comparable companies. The learned transfer pricing officer carried out the fresh search and ultimately selected 5 comparable companies whose profit level indicator [PLI] such as OP/TC was found to be 38.67 percentage. The total cost incurred by the assessee of INR 2 97133853/- was determined at margin of 38.61 percentage determining the price at INR 411857233 against which the price received by the assessee was only INR 327120031/- and therefore an adjustment u/s 92CA was proposed of INR 84737202/-. Consequently the order u/s 92CA (3) of the income tax act was passed on 7/10/2010. The draft assessment order was passed by the learned assessing officer on 15/12/2010 wherein the adjustment of INR 8 4737202 proposed by the learned transfer pricing officer was added to the total income of the assessee. The assessee filed the objection before the learned dispute resolution panel that passed the

direction on 25/04/2011. Consequently final assessment order was passed by the learned assessing officer on 31/05/2011 making the final adjustment to the arm's-length price of the international transaction of INR 5903911/-. Consequently the total income of the assessee was assessed at INR 9 3254530/- against the returned income of Rs. 41350620/- by order u/s 143(3) rws 144C of the Act dated 31/5/2011. Assessee aggrieved with the order of the learned assessing officer has preferred this appeal before us.

4. The learned authorised representative submitted that assessee is only pressing issue of exclusion of 1 comparable company selected by the learned transfer pricing officer. He submitted that the learned transfer pricing officer has introduced Kerala state industrial enterprises Ltd with which the assessee is aggrieved. The learned authorised representative referred the functional profile of the assessee in detail. He further referred to the copy of the ground handling agreement entered between the appellant and M/s Deutsche Lufthansa Akitiengesellschaft (AE) and also the copy of IATA standard ground handling agreement 2004/1998. He also referred to the various clauses and codes of the agreement to show what activities assessee is carrying on. He then referred to the page number 10 of order of the learned transfer pricing officer wherein the objection of the assessee about this comparable company was raised. He submitted that the air cargo activities carried on by the assessee and Management of Air Cargo complex carried on by the Kerla state industrial enterprises Ltd are altogether different. He further referred to page number 3 of the directions of the learned dispute resolution panel wherein the above comparable is held to be similar and action of TPO to that extent approved. He also referred to the objection raised before the learned dispute resolution panel vide page number 42 of the appeal set. In short, he submitted that comparable company is engaged into operation of an air cargo complex and into the trading activities also. He submitted that the company earns the majority of its income from its tangible asset that is air cargo terminals and such stream of income includes fees paid by cargo airlines for making use of the cargo terminals, warehousing facilities and related infrastructure. He stated that the assessee's Functional Profile does not include all such income. Main source of the assessee's income is for providing ground

handling support services to the airline only. He stated that there is a vast difference between a company which is handling cargo complex which is related to the logistic and cargo operation sector and not cargo handling incidental to passenger services like baggage handling etc. and therefore the profile of the company does not match with the profile of the comparable company selected by the learned transfer pricing officer. He referred to the various pages of the annual report of the Kerala state industrial enterprises Ltd to show that it is functionally different and cannot be compared with the assessee for the purpose of determination of the arm's-length price. He further stated that the comparable company is a government company and therefore it cannot be included as a comparable.

5. The learned departmental representative vehemently objected to the argument of the learned authorised representative and stated that the comparables selected by the learned transfer pricing officer is perfect comparable. He submitted that the trading activity are nominal and does not have any impact on the profit and loss of the comparable company. He further stated that such profit can already be computed on the basis of the information available from the annual accounts of the assessee. He further stated that the government company cannot be held to be comparable cannot be a rule. He stated that the several government companies are engaged into the business and are earning much higher profits than the private enterprises and therefore the rule cannot be laid down that government companies cannot be selected as a comparable company if the functional profile of those companies matches with the functional profile of the assessee. He submitted that in the present case it is so. He further stated that merely the fee earning income cannot be a filter and it is not a relevant criterion for the exclusion of the above comparable. He further referred to page number 6 of the order of the learned transfer pricing officer where Kerala state industrial enterprises has been shown to have earned margin of 69.71 percentage and is only engaged in cargo handling and incidental to the air transport activities. He therefore submitted that the above comparable cannot be excluded.

6. In rejoinder the learned authorised representative referred to the transfer pricing study report furnished by the assessee before the learned transfer pricing officer and stated that the functions performed by the assessee are quite different and not at all comparable with the functions performed by the comparable company. With respect to the argument of the learned departmental representative that the trading activities is the minimum and its impact on the profit and loss account can be separately worked out by taking out the figures and then deriving the margin of the comparable company, he submitted that the issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in 397 ITR 160 where the similar prayer was made and it was held that the revenue's contention that the segment revenue and expenses are available in financials cannot be accepted. He submitted that the mere availability of the proportion of the turnover allocable for trading activities per se cannot lead to an assumption that segmental data for relevant facts are available to determine the profitability of the concerned comparable. With respect to selection of a government company as a comparable he referred to the decision of the honourable Delhi High Court in case of principal Commissioner of income tax vs. international SOS services India private limited dated 30/5/2017 in ITA number 454/2016 wherein the honourable High Court has held that whether taking up hundred percent government-owned company as a comparable would be justified or not would depend on the facts and circumstances of the case and the basic rule as contained in rule 10 B of the income tax rules would apply. The special leave petition filed before the honourable Supreme Court in the present case has also been dismissed wide order dated 3/7/2018. He therefore submitted that the government company may be taken as a comparable provided the conditions envisaged under rule 10 B of the income tax rules 1962 are satisfied. In the present case he submitted that such conditions do not satisfy as the comparable company is carrying out altogether a different business activity which is not comparable with the business of the assessee.
7. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Firstly it is important to identify the exact nature of the services rendered by the assessee to understand the functional

profile of the assessee. Such profile has been disputed by the assessee wide ground number 2.2 of the grounds of appeal. The functional profile stated in the transfer pricing study report prepared by the assessee is sketchy and does not deserve any mention. The learned transfer pricing officer in para number 2 is extracted the activities carried out by the assessee from the website of the assessee. On that basis the learned transfer pricing officer and stated that the assessee is providing a very specific mission services and having a specialized functions which require critical knowledge of the dynamics of the industry, specialized training of the staff of the assessee. And therefore looking at the present environment of high security the functions and responsibility of the company and the employees of the assessee become almost significant and require high-quality. Therefore the learned transfer pricing officer proceeded to compare the functions of the assessee on those criteria. Assessee has objected before the learned transfer pricing officer that learned transfer pricing officer is not appreciated activities of the assessee which are in the nature of only business support services. It was further contended by the assessee that it is not providing any refueling services or any security services and therefore the services provided by the assessee are not specialized services. Such objection is recorded in para number 3.1 of the order of the learned transfer pricing officer. The assessee has submitted the copy of the ground handling agreement between the assessee and its associated enterprises. It is a standard ground handling agreement between the parties effective from 01/02/2002 and it is claimed that the same agreement continues. The services to be provided by the assessee are listed in paragraph 1 of the agreement. Same are also compared with the standard ground handling agreement version of 1998 and it is found that assessee would be providing following services:-

LH SGHA 1 st Feb 2002 to 31 st Dec 2006	
SGHA Version 1998	

Section 1	Representation and accommodation	
	1.1. 3	Indicate that the Handling Company is acting as handling agent for the Carrier.
	1.1. 4	Inform all interested Parties concerning movements of the Carrier's aircraft.
Section 2	Load Control & Communications and Departure Control System	
	2.1	Load Control
	2.1. 2	c) Distribute
		as appropriate, documents, including but not limited to, loading instructions, loadsheets, balance charts, Captain's load information and manifests, in accordance with local or international regulations or as reasonably required by the Carrier.
	2.3	Departure Control System (DCS)
	2.3. 1	b) Operate
		equipment and facilities to allow the Handling Company access to the Carrier's DCS, as mutually agreed.
	2.3. 2	Access the following facilities in the Carrier's DCS
		b) Check-in.
		c) Boarding Control
		d) Baggage reconciliation.
		e) Baggage tracing
Section 3	Unit Load Device Control	
	3.1	Handling
	3.1.	(b) Arrange for

	1	
		suitable storage space for ULD's, as mutually agreed.
	3.1. 2	Apply correct storage and handling techniques in accordance with the Carrier's requirements.
	3.1. 3	Take appropriate action to prevent theft or unauthorized use of, or damage to the Carrier's ULD's in the custody of the Handling Company. Notify the Carrier immediately of any damage to or loss of such items.
	3.2	Administration
	3.2. 3	a) Take physical inventory of ULD stock and maintain a stock record.
		b) Compile and dispatch ULD Control Messages (UCM), according to UCM procedure.
		c) Compile and dispatch Stock Check Messages (SCM), as mutually agreed.
Section 4	Passengers and Baggage	
	4.1	General
	4.1. 3	When requested by the Carrier
		a) Provide
		or
		b) Arrange for
		special equipment, facilities and specially trained personnel, as available, for assistance to
		1) Unaccompanied minors.
		2) Disabled passengers.

		3) VIP's.
		4) Transit without visa passengers (TWOV's).
		5) Deportees.
		6) Others, as specified.
		Additional costs may be recharged to the Carrier.

According to the above extraction the assessee does not provide any lounge service, ticketing services, Crew briefing, fuelling supervisions, aircraft Security services, other than listed above. Therefore it is apparent that the learned transfer pricing officer has wrongly interpreted the functions provided by the assessee. The assessee is providing mainly the passengers and baggage is handling services as listed in section 4 of the above version. The other services provided are the informative services such as informing the airport activities concerning the specific carriers' aircraft to the concerned persons/ agencies/ other operators and to operate certain facilities available at the airport for these passenger and baggage services. Therefore according to the above finding the functional profile of the assessee is now undisputed. In the revenue profile of the assessee it derives income from providing ground services inclusive of all type of cargo and passenger handling services to the airlines at Indian airports. In its asset base it does not have any immovable property but the total asset base is INR 25,76,70,389/-.

8. Now we consider the functional profile of Kerala state industrial Corp Ltd which is considered by the learned transfer pricing officer and the learned DRP as a comparable company for determining arm's-length price of the international transactions entered into by the assessee with its associated enterprise. The assessee has placed the annual accounts of the above company for the financial year ending on 31st of March 2007 at page number 265 – 313 of the compilation. In the directors report of the above company it was stated in para number 2 that during the year 2006 – 2007 the company under total income of INR 121,695,000 as compared to INR

101,733,000 and in the previous year. Major portion of the income was earned from operation of air cargo complexes followed by income from trading activities. In para number 3 it was further stated that the cargo operation showed an increasing trend during 2006 – 07. The cargo complexes achieved a turnover of INR 85,830,600 against the turnover of 6,88,87,000 in the previous year. During the year under report 18896 metric ton of import cargo and 30075 metric turn of export cargo handled by the air cargo complex are managed by your company compared to 14990 metric ton of import cargo and 24166 metric ton of export cargo handled during the previous year. It was further stated that that company is operating Trivandrum air cargo terminal (TACT) and Calicut air cargo complex. After that operation of both the above cargo complexes are discussed. In para number 4 it is stated that 3 sales of imported at Trivandrum, coachin and Calicut and the e-commerce site together achieved a turnover of rupees to 88,64,000 as against rupees to 85,58,000 achieved in 2005 – 06. In para number 8 it is stated that the company continues to be very active as a virtual office of APEDA for the state of Kerala. It is further mentioned that the company is in constant dialogue and cooperation with the directorate of agricultural government of Kerala in the implementation of AEZ capital schemes in Kerala. Now coming to the profit and loss account of the comparable company it is apparent that it has shown sales in schedule H, closing stock on the face of the profit and loss account, and opening stock on the face of the profit and loss account and purchases as per schedule L of the profit and loss account. Therefore it is apparent that assessee is carrying on the trading activities as stated in the director's report. Further on looking at the balance sheet and the notes on accounts attached to that the company has not drawn the segmental accounting with respect to trading activities as well as activities of operating cargo complex. Looking at the assets employed by the comparable company at schedule/D of the accounts it has land of INR 1 5786221 and building of INR 5 7002163/- it is also in its balance sheet the assets of forklift weighbridge and x-ray machine. The total asset block of the company is 110676538/-. While looking at note number I of the balance sheet it shows the inventory of various items in the form of opening stock, closing stock,

purchases and turnover. The note number 3 (I) speaks that part of the buildings at Trivandrum Air cargo terminal is situated on leasehold land and may 350 5 m² taken from Airport authority of India. Export operations such as cooling room, cold storage, weighbridge et cetera are accommodated on this land. The fixed assets include a cool room and cargo handling facility set up by APEDA at a cost of INR 26,718,000 which is shown at INR 1 in the accounts as the entire cost is borne by them. Similarly actual room, cold storage setup at a total cost of INR 2 08/04/2002/- is shown in the accounts at INR 8 0402/- after deducting INR 20 Lacs reimbursed by MPEDA. Further it is mentioned that INR 1 95.50 Lexus grant-in-aid from government of India through KINFRA under ASIDE scheme and an amount of INR 6,465,000 received from APEDA was fully utilized for acquiring the assets sanctioned under the scheme. Hence the grant is shown at nil value. Further this company is the premier agency of the Government of Kerala, mandated to for industrial and investment promotion in Kerala. Formed in 1961, KSIDC's primary objective was to promote, facilitate and finance large and medium scale industries and catalyze the development of physical and social infrastructure required for industrial growth in the state. Over the years this company has developed in to activities of investment in Kerala and the single point contact for investors setting up shop in the state. It offers a comprehensive set of services encompassing support in developing business ideas and viable projects, assistance in conducting feasibility studies, providing various financial products tailor made for different types of investments, handholding and facilitation from project conceptualization to commissioning, providing developed Infrastructure facilities and guidance for implementation It s also a nodal agency for foreign and domestic investments in Kerala, KSIDC facilitates clearances, approvals and processes various incentive schemes for starting a new business ventures. As stated on its website its team includes a core group of skilled professionals from various fields like Engineering, Management, Finance and Law. It has also to its credit a track record of attracting a commendable volume of investment to the State. The corporation has so far promoted more than 750 projects in the State and has played a vital role in the setting up of pioneering organizations such as Cochin International

Airport Limited and many other companies. Therefore it is apparent that the functional profile of this company is not comparable with the assessee. Further more in the comparable companies profile there are substantial trading activities for which no segmental account has been provided for. And for these reasons we are of the opinion that the function of operating an air cargo complex and the function of carrying on a support services for baggage and passenger handling at the airport are not comparable. In view of this we direct the learned transfer pricing officer/officer to exclude the above comparable from the comparability analysis for determining the arm's-length price of the international transactions entered into by the assessee. Accordingly ground number 2.2 and 2.3 of the appeal are allowed with above direction.

9. All other ground of appeal are either general in nature or are consequential and therefore without adjudicating on them they are dismissed in view of our finding in ground number 2.2 and 2.3 of the appeal.
10. Accordingly appeal of the assessee is partly allowed.

Order pronounced in the open court on /02/2019.

-Sd/-

(K.N.CHARY)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 18/02/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi