

2. The assessee has raised as many as 13 grounds of appeal. However, the grievance of the assessee can be summarised as under:

- i) Transfer Pricing adjustments qua the comparables;
- ii) Assigning of NIL value to the value of international transactions in relation to receipt of Intra Group Services [IGS]; and
- iii) Disallowance made u/s 40a(ia) of the Act.

3. Briefly stated the facts of the case are that the core business of the appellant company is international air and ocean export and import shipments. The basic function of the appellant company can be categorised into the following segments:

- a) Export Business [Air and Sea]
- b) Import Business [Air and Sea]

4. In case of the export business, the principal contractor with the shipper/consignor would be JAS India. JAS India would organize the collection of the goods from the Exporter's premises and load the same for transport (air or ship). It would also provide a copy of the air-

way/shipping bill and bill of lading to the Exporter. The copy of Bill of lading/House Airway Bill after loading the material is given to the shipper. Thereafter, it would communicate with its associated enterprise in the destination country, who would organize the material released in the recipient country, including custom clearance and delivery to the consignee. JAS will raise the bill to the exporter for the transportation charges; haulage charges, custom clearance charge, ocean/air freight, air handling/clearing, charges, documentation charges, terminal charges, advance cargo declaration charges and fumigation charges.

5. In case of the import business, the principal contractor with the shipper/consignor would be the JAS Associated Enterprises and JAS India would be responsible for clearing the goods at the Indian port and co-ordination with the consignee in India. In addition to the profit share and the agreement, JAS India would recover the following charges:

- a) Freight charges recovered from the consignee in relation to material transformed on "To pay basis"
- b) Customer clearance charges, delivery charges, transportation charges and any duties incurred on behalf of the

consignee would be recovered from the consignee any incremental costs incurred by JAS India towards irregularities in the shipment would be recovered from the associated enterprises.

6. In respect of these international transactions, the compensation model is based on the arrangement between JAS India and its AE's and is shared in the ratio of 50:50.

7. The major international transactions undertaken by the appellant with its AEs during the year are as under:

Nature of Transaction	Amount (000)
Freight and forwarding services rendered to the associated enterprises	46,71,57,000
Freight and forwarding services rendered by the associated enterprises	19,59,34,000
Reimbursement of Insurance Charges	7,59,000
Reimbursement of server Maintenance Charges	1,64,000
Reimbursement of guarantee Fee Charges	7,38,000
Management Fee	14,05,000
Netting Fee	1,19,000

8. In its Transfer Pricing Study Report, the assessee has aggregated the international transactions relating to receipt and payment of freight charges as closely linked transactions using TNMM as the most appropriate method and Profit Level Indicator [PLI] of OP/OC. In its Transfer Pricing Study Report, the assessee selected the following comparables as under:

S. No.	Company Name	Multiple Year Weighted Average Operating Profit (OP/OC)
1.	PL Shipping & Logistics Ltd.	(1.94%)
2.	Seaways Shipping Ltd.	1.09%
3.	Shreyas Relay System Ltd.	2.31%
4.	Sindhu Cargo Services Ltd.	3.90%
5.	Reliance Logistics Ltd.	0.48%
	Arithmetic Mean	1.17 %
	Appellant's OP/OC	2.74 %

9. The assessee claimed that since its OP margin is 2.74% and that of the comparables is 1.17%, the transactions are stated to be at arm's length.

10. The TPO, during the Transfer Pricing assessment proceedings, rejected all the comparables of the assessee and conducted a fresh

search and finally the Transfer Pricing assessment was completed on the basis of the following set of comparables:

1. Agarwal Industrial Corporations Limited
2. VRL Logistics Limited
3. BIC Logistics Limited
4. Central Warehousing Corporation
5. Innovative B2B Logistics Solutions Limited
6. Sindhu Cargo Services Limited
7. Sical Logistics Limited

11. The arithmetic mean of the comparables was at 11.23% and when compared with the assessee's profit margin of 2.74%, the TPO made an upward adjustment of Rs. 8,18,45,970/- on account of TNMM in freight forward segment.

12. Proceeding further, the TPO noticed that the assessee was paying certain IGS charges to its AE stated to be the cost reimbursements as under:

	Amount in ('000)
Reimbursement of Insurance Charges	759
Reimbursement of Server Maintainance	164
Reimbursement of Software License Fee	738
Reimbursement of Gaurantee Fee	404
Management Fees	1405
Netting Fees	119
Total	3589

13. The assessee was asked to explain the treatment given in its books of account and was also required to submit the cost benefit analysis of the above services.

14. The assessee filed detailed reply vide letter dated 11.10.2011.

15. Reply filed by the assessee did not find any favour with the Assessing Officer who was of the opinion that the assessee has failed to specify whether these services were actually received or not.

16. The TPO observed that the assessee has neither been able to specify the services nor been able to produce any evidence of services. The TPO further observed that the assessee has not been able to produce any evidence of any tangible benefit received from such services and formed a belief that the AE has imposed upon the assessee certain costs pertaining to itself and without passing on either any services or any benefit out of the above.

17. Rejecting the contentions of the assessee, the TPO made an adjustment on account of IGS payment made to AE at Rs. 35,89,000/- by determining the Arm's Length Price of IGS at Rs. NIL.

18. The assessee raised objections before the DRP vehemently contending that the comparables selected by the TPO are not functionally comparable with those of the assessee in as much as the assessee is providing only freight forwarding services whereas the comparables are either into transportation business or warehousing business.

19. After considering the facts and submissions and the objections raised by the assessee, the DRP observed that in TNMM broader comparability is possible and any rough edges of comparability tend to get evened out. Accepting the contention of the TPO that transportation segment is covered in transportation activity companies taken by the assessee and hence the segment related to transport shall be considered for analysis. However, the DRP observed that transportation, per se, is a very wide term to be applied without any micro analysis when comparing companies involved in logistics and freight forwarding. With these observations, the DRP directed the TPO to exclude Agarwal Industrial Corporation Limited from the final set of comparables.

20. The objections in respect of other comparables were dismissed by the DRP and the adjustment on account of IGS was confirmed.

21. While giving effect to the directions of the DRP, the Assessing Officer sought details of payment made to non residents and asked the assessee to explain whether tax was deducted at source or not.

22. The assessee filed detailed reply, furnishing details of payments made to non residents and the same is as under:

	Name of Party	Name of the country	Amount Paid credited	TDS Deducted	Treaty (Yes)
1	JAS Middle East, FZE	United Arab Emirates	893,530	NIL	Yes
2	JAS Jet Air Services Argentina, SA	Aires, Argentina	10,432	NIL	No
3	JAS Forwarding Worldwide Pty Ltd.	Banksmedow, Australia	1,741,128	NIL	Yes
4	JAS (Jet Air Service) Belgium NV	Brussels, Belgium	6,994,450	NIL	Yes
5	JAS Do Brasil Transporters, Internationals Ltda.	Paulo, Brasil	1,427,306	NIL	Yes
6	Jas Canada Inc.	Toronto, Canada	2,979,530	NIL	Yes
7	JAS Forwarding S. A.	Switzerland	155,588	NIL	Yes
8	JAS Forwarding (Chile) Ltda	Santiago De Chile	17,660	NIL	No

9	Shanghai JAS Intl. Cargo Transport Co. Ltd.	China	10,270,980	NIL	Yes
10	JAS Forwarding (Czech) s.r.o.	Czech	206,85/	NIL	Yes
11	JAS Forwarding GMBH	Frankfurt, Germany	7,533,986	NIL	Yes
12	JAS Nordic APS	Copenhagen, Denmark	255,078	NIL	Yes
13	Jet Air Service Ecuador S. A.	Quito, Ecuador	16,610	NIL	No
14	JAS Forwarding Spain, S.A.	Barcelona, Spain	3,002,296	NIL	Yes
15	JAS (Jet Air Service) France	Paris, France	3,121,764	NIL	Yes
16	JAS Forwarding (UK) Ltd.	London, U. K.	10,516,748	NIL	Yes
17	JAS Forwarding (HK) Ltd.	Hong Kong	948,111	NIL	No
18	JAS Cargoways Inc. Kft.	Budapest, Hungary	123,840	NIL	Yes
19	PT JAS Worldwide Indonesia	Indonesia	4,303	NIL	Yes
20	JAS Jet Air Service Spa	Milan, Italy	55,137,907	NIL	Yes
21	JAS Forwarding (Japan) Co. Ltd.	Tokyo, Japan	3,346,987	NIL	Yes
22	JAS Forwarding (Korea) Co. Ltd.	K Seoul, Korea	1,899,893	NIL	Yes
23	JAS Forwarding De Mexico, S.A. DE C.V.	Guadalajar, Mexico	341,044	NIL	No
24	JAS Worldwide (M) SDN. BHD.	Malaysia	3,512,105	NIL	Yes
25	JAS Forwarding 9nederland) BV	Amsterdam, Netherlands	2,779,309	NIL	Yes
26	JAS Forwarding (N.Z.) Ltd.	New Zealand	103,950	NIL	Yes
27	JAS-FBG-S.A.	Poland	2,955,325	NIL	Yes
28	JAS Forwarding (Scaninavia) Ab	Sweden	3m418m042	NIL	Yes
29	JAS Forwarding Pte. Ltd.	Singapore	3,519,785	NIL	Yes
30	JAS Forwarding (Thailand) Co. Ltd.	Thailand	37,610		
31	JAS Forwarding Co. Ltd. (Jas Forwardelik Limited Sirketi)	Turkey	2,189,714	NIL	No
32	JAS Forwarding (Taiwan) Ltd.	Taiwan	614,947	NIL	No

33	JAS Forwarding (USA) Inc.	USA	65,299,1014	NIL	Yes
34	JAS Forwarding C. A.	Venezuela	78,983	NIL	No
35	JAS Forwarding (Austria) GMBH	Austria	37,575	NIL	Yes
36	JAS Forwarding (China) Co. Ltd.	China	29,801	NIL	Yes
37	JAS Forwarding SA Pty. Ltd.	South Africa	441,962	NIL	Yes
38	JAS Forwarding Worldwide Pty. Ltd.	Banksmedow Australia	164,170	NIL	Yes
39	JAS Forwarding (USA) Inc.	USA 758,646	758,648	NIL	Yes
40	JAS Worldwide Management LLC	USA	738,145	NIL	Yes
41	JAS Worldwide Management LLC	USA	403,962	NIL	Yes
42	JAS Worldwide Management LLC	USA	1,404,726	NIL	Yes
43	JAS Worldwide Management LLC	USA	119,358	NIL	Yes
44	Cargowise Edl (Australia) Pty. Ltd.	Australia	195,496	20,656	Yes
45	CARGOWISE EDI (SINGAPORE) PTE. LTD.	Singapore	5,365	537	Yes
	TOTAL		199,754,165	21,193	

23. After considering the details, the Assessing Officer sought explanation from the assessee as to why tax was not deducted at source. The assessee filed detailed reply justifying its stand of not deducting tax at source. The detailed reply of the assessee did not find any favour with the Assessing Officer who was of the firm belief that non compliance with TDS provisions attracts the provisions of

section 40a(ia) of the Act and, accordingly, made disallowance of Rs. 19,95,53,304/-.

24. Before us, the ld. counsel for the assessee vehemently stated that the TPO as well as the DRP have grossly erred in not appreciating the true business profile of the assessee and hence erred in selecting comparables. It is the say of the ld. counsel for the assessee that the road transportation is different from freight forwarding activities. The ld. counsel for the assessee further stated that the comparables selected by the TPO are either owning trucks/ships or air-crafts and, therefore, cannot be taken as a good comparable.

25. The ld. DR reiterated what has been observed by the DRP stating that logistics, per se, is a big umbrella which includes all the services like transportation, shipment, etc. and, therefore, comparables selected by the TPO should be upheld.

26. We have given thoughtful consideration to the orders of the authorities below. There is no quarrel in so far as the most appropriate method is concerned. Both the appellant and the TPO have taken

TNMM as the most appropriate method with PLI OP/OC. We will now address to the disputed comparables.

VRL LOGISTICS LIMITED

27. The website screen shot of this company shows that its name is entered in Limca Book of Records as the largest fleet owner of commercial vehicles in India in the private sector. The Annual Report of this company shows that this company has acquired one Hawker Beechcraft Premier IA Aircraft. Its freight receipts are at Rs. 51,258.80 lakhs. The fixed assets show vehicles and there is also one aircraft. The segment revenue shows revenue from goods transport, bus operation, sale of wind power and air charter business.

28. We further find that there is allocable expenditure with unallocable revenue and unallocable assets. In our considered opinion, the business profile of this company is far different from that of the appellant company. Moreover, the segmental accounts are also not clear so as to make this company find a place in the final list of comparables. Considering the dissimilarity in the functioning alongwith

unclear segmental report, we direct for exclusion of this company from the final list of comparables.

BIC LOGISTICS LIMITED

29. This company is also engaged in road transportation. As mentioned elsewhere, the appellant is engaged as non vessel owning freight forwarding company providing logistics services which is very different from the transportation business. The co-ordinate bench in the case of M/s Kuehne + Nagel Pvt Ltd in ITA No. 5648/DEL/2010 has held that companies owning trucks/airplanes and other assets useful for transportation cannot be compared to freight forwarding companies which do not own such assets.

30. Similar view was taken by the co-ordinate bench in the case of CEVA Freight India Private Limited in ITA No. 4956/DEL/2013 wherein the Tribunal has held that road transportation company is functionally dissimilar to freight forwarding companies. It would not be out of place to mention here that the DRP itself excluded Agarwal Industrial Corporation on this count. Considering the functional profile of this company with that of the appellant, in the light of the decision of the

co-ordinate bench [supra], we direct for exclusion of this company from the final list of comparables.

CENTRAL WAREHOUSING CORPORATION

31. This is created by an Act of the Parliament being Central Warehousing Corporation Act, 1962 and being a Government company, earns income from warehousing charges, marketing facilitation fees, container rail transport, strategic alliance etc. The Annual Report of this company shows that it has acquired licence from the Indian Railways to run container train. Moreover, the segmental details are not available. In our considered opinion, a company engaged in two diversified services cannot be compared as comparables at entity level. We, accordingly, direct for exclusion of this company from the final list of comparables.

INNOVATIVE B2B LOGISTICS SOLUTIONS LIMITED

32. The ld. counsel for the assessee furnished calculation of Related Party Transactions [RPT] and pointed out that this company has

significant RPT at 37.10% of sales and hence fails RPT filter as applied by the TPO.

33. We find that the TPO has applied RPT filter of 25%. We are of the considered view that the TPO must look into the calculation made by the assessee and decide afresh whether this company passed the RPT filter or not. We, accordingly restore this comparable to the file of the TPO. The TPO is directed to examine the RPT and whether it passes the filter. The TPO shall given reasonable opportunity of being heard to the assessee.

GORDON WOODROFEE LOGISTICS LTD

34. The ld. counsel for the assessee pointed out that Gordon Woodrofee Logistics Ltd was excluded by the assessee when it applied a filter on comparables having 75% of turnover. It is the say of the ld. counsel for the assessee that when the TPO has applied filter on turnover of more than Rs. 1 crore, then this comparable should have been included in the final list of comparables.

35. We find force in the contention of the ld. counsel for the assessee. Earlier, when the assessee applied filter of 75% of Revenue, this comparable was excluded. But later on, the TPO applied the filter and included the companies having turnover of more than Rs. 1 crore. Since this company now fits in the filter adopted by the TPO, we direct the TPO to include this company in the final list of comparables.

36. With the above directions, the grievance relating to transfer pricing adjustment qua the comparables is allowed.

37. Second grievance relates to the adjustment on account of IGS.

38. As mentioned elsewhere, the TPO has taken arm's length price of IGS at NIL and made an adjustment of 35.89 lakhs. The reimbursement received by the assessee has already been exhibited elsewhere. A perusal of the order of the TPO shows that the TPO has constantly hit upon the fact that the assessee has failed to demonstrate the need and benefits derived from such services.

39. The Hon'ble High Court of Delhi in the case of EKL Appliances Ltd in ITA No. 1068 & 1070/DEL/2011 after considering the decision of the Hon'ble Supreme Court in the case of Sassoon J, David Pvt Ltd, 118 ITR 261 referred to the legislative history and noted that:

"when the Income Tax Bill of 1961 was introduced, [Section 37\(1\)](#) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is

expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised."

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40. Similar view has been taken by the Hon'ble High Court of Delhi in the case of Bausch & Lomb Eyecare [India] Pvt Ltd in ITA No. 643/2014 & Ors of 2014. Relevant finding of the Hon'ble High Court reads as under:

"66. On the issue of the intra group services, the Assessee is justified in contending that the re-characterization of its transaction involving its AE for the two years which have been fully disclosed in the TP Study on the basis of it not being for commercial expediency of the Assessee is clearly beyond the powers of the TPO and contrary to the legal position explained in EKL Appliances (supra)."

41. In the light of the aforementioned decisions of the Hon'ble High Court of Delhi, we are of the considered view that the only thing that a TPO can examine is the rendition of services and supporting evidences. We, accordingly, restore this issue to the file of the TPO. The TPO is directed to examine the rendition of services with supporting evidences and the assessee is directed to file the details for the same. This ground is treated as allowed for statistical purposes.

42. In so far as the disallowance u/s 40a(ia) is concerned, we find that the quarrel is squarely covered in favour of the assessee and against the revenue by the decision of the Tribunal in assessee's own case in ITA No. 3222/DEL/2011 and 3296/DEL/2011. The relevant findings of the Tribunal read as under:

"21. The payments made to non-resident are not on account of rendering any services in the nature of technical or professional services or fees for technical services or getting any income on account of royalty, albeit the nature of activities performed by the non-resident are purely business activities. The AEs are carrying on the business of freight forwarding services in their respective jurisdictions which are mirror reflection of the business activities carried on by the Assessee. This issue has also been discussed and adjudicated in favour of the Assessee in the case of Mumbai ITAT, UPS SCS (Asia) Limited, [2012] 18 taxmann.com 302 (Mum.), wherein the Tribunal has held that payments to

non residents for providing freight and logistics services outside India, 29 is not within the purview of fees for technical services and in the absence of any permanent establishment or 'business connection in India', the same is not taxable. 22. Since as held above that there is no 'business connection in India', therefore, we hold that the Assessee was not under an obligation to deduct tax u/s 195 of the Act. Correspondingly, no disallowance could be made u/s 40(a)(i) of the Act. Thus, we uphold the order of the CIT (A) and the appeal filed by the Revenue accordingly is dismissed."

43. As no distinguishing decision has been brought to our notice in favour of the revenue, respectfully following the decision of the coordinate bench, disallowance of Rs. 19,95,53,304/- is directed to be deleted.

44. In the result, the appeal of the assessee in ITA No. 5410/DEL/2012 is allowed in part for statistical purposes.

The order is pronounced in the open court on 23.10.2019.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 23rd October, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	