

**THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai**

**Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.1030/Mum/2015
(Assessment Year: 2010-11)**

DHL Logistics Private Limited
201A, Silver Utopia,
Cardinal Gracias Road,
Chakala, Andheri (East)
Mumbai 400 059

Vs.

Deputy Commissioner of
Income Tax Circle 9(3)(1),
Mumbai

PAN – AAACM6824H

(Appellant)

(Respondent)

Appellant by: Shri Percy Pardiwala, Senior Advocate
& Shri Madhur Agrawal, A.R

Respondent by: Shri Anand Mohan &
Shri Saurabh Deshpande, D.Rs

Date of Hearing: 29.11.2019
Date of Pronouncement: 20.12.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the Assessing Officer under Sec.143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated 30.12.2014. The assessee has assailed the impugned order by raising before us the following grounds of appeal:

"Each of the grounds and/or sub-grounds of the appeal are independent and without prejudice to the others.

1. That on the facts and circumstances of the case, and in law, the Assessment Order passed in pursuance to the directions issued by the Dispute Resolution Panel ('DRP') is a vitiated order, as the DRP erred both on facts and in law in confirming and enhancing the addition made by the Addl. Commissioner of Income Tax, Range 9(3)(i) ('Assessing Officer' or 'AO') to the appellant's income.
2. The DRP erred both on facts and in law in directing the AO to compute the arm's length price of international transactions pertaining to receipt of freight receipts and expenses which resulted in the addition of Rs.

244,47,98,588/- to the income of the appellant by holding that its international transactions do not satisfy the arm's length principle envisaged under the Income-tax Act, 1961 ('the Act').

3. The DRP/Transfer Pricing Officer ('TPO') erred in holding as under:
 - 3.1. disregarding the arm's length price ("ALP") and the scientific benchmarking process carried out by the appellant in the Transfer Pricing ("TP") documentation maintained by the appellant in terms of section 92D of the Act read with Rule 92D of the Income-tax Rules, 1962 ("Rules");
 - 3.2. failing to appreciate the economic rationale of using "Operating Profit/ Value Added Expenses" as the Profit Level Indicator ('PL'), and instead using "Operating Profit/Total Cost" ('OP/TC') as the PLI;
 - 3.3. failing to grant any opportunity to the appellant to rebut the fresh set of arguments considered in the directions;
 - 3.4. computing the operating margin using OP/TC as a PLI after excluding the employee cost and the other administrative expenses from the cost base, further not considering the break-up of costs attributable to the different business segments as per the segmental accounts furnished by the appellant during the course of the assessment;
 - 3.5. grossing up of pass through cost as mentioned in Note 9(a) of the schedule 13 to the Notes to the Financial Statements of the appellant for A.Y. 2010-11 and artificially enhancing the cost base for the purpose of computing the operating margin (OP/TC) of the assessee;
 - 3.6. not allowing the use of multiple year data as prescribed under Rule 10B(4) of the Rules read with the OECD TP Guidelines, and determining the arm's length price on the basis of financial information of the comparables for the year ended March 31, 2007 identified pursuant to a fresh search for comparables performed during the assessment proceedings. The AO/TPO/DRP erred in rejecting the contemporaneous documentation maintained by the appellant as required under the Indian TP regulations;
 - 3.7. ignoring the set of comparables specifically requested by the DRP during the course of proceeding;
 - 3.8. including certain comparables, which were not functionally comparable;
 - 3.9. not including certain comparables selected by the Appellant in its TP Study
 - 3.10. not considering the fresh search of comparables provided during the course of hearing;
 - 3.11. denying the benefit of (+/-) 5 percent range mentioned in proviso to section 92C(2) of the Act while computing the ALP.

The appellant prays that the book value of the international transactions of freight receipts and expenses should be held to be the arm's length price of the said transactions as per the appellant's Transfer Pricing documentation, and the addition made on account of the above grounds should be deleted.

4. The DRP erred both on facts and in law in confirming the addition of Rs.29,21,028/- to the income of the Appellant by holding that its international transaction pertaining to provision of support service does not satisfy the arm's length principle envisaged under the Act;

The appellant prays that the book value of the international transactions of provision of support services should be held to be the arm's length price of the said transactions as per the appellant's Transfer Pricing documentation, and the addition made on account of the above grounds should be deleted.

5. Depreciation on goodwill resulting from acquisition of business unit of Lee & Muirhead Pvt. Ltd. in AY 2008-09
 - 5.1. On the facts and in the circumstances of the case and in law, the learned AO erred in not allowing depreciation of Rs. 22,36,07,8 13 under section 32 of I.T Act on goodwill consisting of various intangible assets arising out of the acquisition of business unit of Lee & Muirhead Pvt. Ltd.
 - 5.2. On the facts and in the circumstances of the case and in law, the learned A.O erred in not allowing depreciation under Sec.32 of the I.T Act on intangible assets being contracts and customer relationship (valued at Rs.33,70,00,000/-) arising out of acquisition of business unit of Lee & Muirhead Pvt. Ltd.
 - 5.3. On the facts and in the circumstances of the case and in law, the learned AO erred in not allowing depreciation under section 32 of I.T Act on intangible assets being right to use trade name (valued at Rs. 13,60,00,000) arising out of acquisition of business unit of Lee & Muirhead Pvt. Ltd.

- 5.4. On the facts and in the circumstances of the case and in law, the DRP erred in rejecting the valuation report taken from an independent expert valuer without properly appreciating facts of the present case.
- 5.5. Without prejudice, and in any case DRP erred in not apportioning purchase consideration (i.e. Rs. 1,59,01,00,000) towards various assets acquired on the acquisition of business unit of Lee & Muirhead Pvt. Ltd. in AY 2008-09 and granting depreciation on the same.
- 5.6. On the facts and in the circumstances of the case and in law, the learned AO has erred in holding that the ratio laid by the Hon'ble Supreme Court in case of Smifs Securities Ltd. (348 ITR 302) is not applicable in the present case and consequently erred in disallowing depreciation on intangible assets including goodwill.

It is prayed that the learned AO be directed to allow depreciation of Rs. 22,36,07,813 on intangible assets including goodwill.

6. Penalty proceeding

- 6.1. On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(1)(c) of the I.T. Act without appreciating that the Appellant has not concealed any particulars of its income nor furnished any inaccurate particulars of the income.

That the AO be directed to re-calculate the interest levied under section 234B after considering the relief granted by the Hon'ble Tribunal in respect of the grounds raised by the appellant.

The appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing."

2. Also, the assessee has raised the following additional grounds of appeal before us:

1. The learned Dispute Resolution Panel ('Ld. DRP') erred in passing the order dated 16 May 2016 rejecting the application of the Appellant under section 154 of the Income Tax Act, 1961 ('the Act').
2. The Ld. DRP erred in not accepting the segmental margins (of the Appellant) on the basis that the same were not available before the Ld. DRP at the time of issuance of the original order (dated 14 November 2014) without appreciating that the issue of segmental was not a subject matter of the Appeal before the Ld. DRP as the same was accepted by the TPO. The Ld. DRP erred in not appreciating that the same were not requested at any of the proceedings (before the Ld. DRP), which were submitted and considered by the TPO and hence, the order gave rise to mistake apparent from the record.
3. The Learned DRP erred in not treating certain items of costs (freight inbound, certain third party charges and customs duty) as pass through cost on the premise that the break-up of the same were not available before the before the Ld. DRP at the time of issuance of the original order (dated 14 November 2014) without appreciating that the same was not subject matter of dispute before the Ld. DRP. The Ld. DRP erred in not appreciating that the same were not requested at any of the proceedings (before the Ld. DRP) and, hence, the order gave rise to mistake apparent from the record.
4. The Ld. DRP erred in not appreciating that the Appellant does not take any risk in so far as pass through cost are concerned and, hence, the same cannot be considered for determining the operating profit of the Appellant."

3. Briefly stated, the assessee company which is a logistics service provider offering a comprehensive portfolio of international, domestic and specialised freight handling services had e-filed its return of income for A.Y. 2010-11 on 13.10.2010, declaring its total income at Rs.97,56,96,430/-. Subsequently, the assessee filed a revised return declaring a total income of Rs.75,20,88,621/-. The return of income filed by the assessee was processed as such under

Sec.143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

4. In the course of the assessment proceedings, it was observed by the A.O that the assessee had entered into international transactions with its Associated Enterprise (for short 'AE') in excess of an amount of Rs.15 crores. Accordingly, a reference under Sec. 92CA(1) of the Act was made to the TPO after obtaining the approval of the CIT-8, Mumbai.

5. During the course of proceedings it was observed by the Transfer Pricing Officer (for short 'TPO') that the assessee had entered into the following international transactions during the year :

Sr. No.	Description of the Transactions	Amount (Rs.)
1.	Freight Revenue	3,852,512,977/-
2.	Freight Expenses	1,314,597,267/-
3.	Management and Technical Services	169,943,798/-
4.	Provision of support services	8,724,774/-
5.	Purchase of supplies	13,339/-
6.	Allocation of Insurance expenses	1,092,476/-
7.	Other allocated costs	48,474,815/-
8.	Reimbursement (Payments)	37,260,164/-
9.	Reimbursement (Receipts)	865,409/-

It was noticed by the TPO that the assessee had benchmarked its international transactions as per the Transactional Net Margin Method (TNMM) at entity level. As per the Transfer Pricing Study Report (for short 'TPSR'), the assessee for the purposes of benchmarking had aggregated the international transactions of purchase of supplies, receipt of technical and management services with its primary transaction of provision and receipt of freight handling services. It was noticed by the TPO that the assessee had used three year data and had taken Profit Level Indicator (for short 'PLI') of 'Operating Profit' to 'Value Added Expenses' i.e OP/VAE. Using Prowess and Capital line data base, the assessee on the basis of its search had selected 7 comparables namely (i) Shreyas Relay Systems Ltd.; (ii) Arshiya International Ltd.; (iii) Om Logistics Ltd.; (iv) All Cargo Global Logistics Ltd. (Segment-Multimodal Transport Operation); (v) Haytrans India Ltd.(segment), (vi) Sindhu Cargo Ltd.; and (vii) Hindustan Cargo Ltd. It was further observed by the TPO, that although Haytrans India Ltd. was rejected by the assessee as a comparable at company level as it had failed the assessee's negative net-worth filter and was a persistent loss maker, but it was selected by the assessee at the segment level, for the reason, that it had not applied the filter at segment level. Although, two other

comparables of the assessee viz. (i) Sindhu Cargo Ltd.; and (ii) Hindustan Cargo Ltd. did not appear in the search dump, but they were selected by the assessee on the basis of the TP study report for the immediately preceding year i.e financial year 2008-09. Assessee had determined the mean margin of the aforesaid comparables at 30.60% based on three years weighted average and worked out its own margin (OP/VAE) at 36.32%. On the basis of the aforesaid facts and figures the assessee had claimed its AE transactions to be at Arm's length.

6. As directed by the TPO, the assessee updated the margins of its comparables on the basis of the current year data and worked out the OP/VAE and OP/TC at 36.32% and 7.70%, respectively, However, OP/VAE margin was worked out by the assessee only for 5 comparables, as it did not consider the margins of Shreyas Relay Systems Ltd. and Om Logistics Ltd., for the reason, that the said companies had abnormally high margin of OP/VAE. At the same time, the assessee had considered all the 7 comparables for working out the OP/TC. TPO after considering all the 7 comparables which were selected by the assessee in its TP study report observed that their average PLI of OP/VAE worked out at 60.86%. In the backdrop of the aforesaid facts the TPO called upon the assessee to show cause as to why Shreyas Relay Systems Ltd. and Om Logistics Ltd. may not be considered as comparables for the purpose of benchmarking its international transactions as they were selected by the assessee itself after carrying out a structured search. Apart from that, the assessee was also called upon to explain as to why Haytrans India Ltd. was selected as a comparable despite the fact that it had failed the filters applied by the assessee. Also, the assessee was called upon to explain as to why Sindhu Cargo Ltd. and Hindustan Logistics Ltd. were selected as a comparable even though they did not appear in its structured search.

7. After perusing the TP study report, the TPO held a conviction that the information and data which was used by the assessee in the computation of the arms length price was not reliable for certain reasons viz. (i) that, the assessee had used multiple years data; (ii) that, the assessee had carried out cherry picking of comparables; (iii) that, there was wrong application of filters by the assessee; and (iv) that, the assessee had wrongly selected its PLI as the OP/VAE. On the basis of his aforesaid observations the TPO called upon the assessee to show cause as to why in the backdrop of the aforesaid defects in its TP study report the provisions of Sec. 92C(3)(C) may not be invoked and the ALP of its international transactions be determined

in accordance with the sub-section (1) and (2) of Sec.92C i.e. on the basis of material, information and documents available with him. In reply, the assessee tried to justify the working of the arm's length price of its international transactions in its TP study report on multiple grounds viz. (i) that, though Haytrans India Ltd. had failed the net-worth as well as persistent loss making filter at company level, however, the same was selected as a comparable at segment level; (ii) that, Sindhu Cargo Ltd. and Hindustan Cargo Ltd. were selected as comparable, for the reason, that they were selected as comparables in the earlier years; (iii) that, two of the comparables i.e Shreyas Relay Systems Ltd. and Om Logistics Ltd. were rejected, for the reason, that they were not functionally comparable as they owned transportation assets and also earned substantially high margin; (iv) that, multiple year data was used instead of a single year data as the single year data gave skewed result; (v) that, in respect of adoption of PLI of OP/VAE reliance was placed on the order of the ITAT, Mumbai in the case of ACIT, Mumbai Vs. M/s Agility Logistics Pvt. Ltd. (ITA No. 2000/Mum/2010) and ITAT, Delhi in the case of Dy. CIT Vs. M/s Cheil Communications India Pvt. Ltd. (ITA No. 712/Del/2010). The assessee further justifying the adopting of the PLI of OP/VAE submitted, that the same was selected to reliably measure the income which the tested party would have earned if it dealt with uncontrolled parties at arm's length. It was further submitted, that as the value added expenses are those that are incurred by a logistics provider on a day to day basis in support of its operations, therefore, it was imperative to measure its costs separately since a logistics service providers efficiency could only be measured by the gross margin (service income less direct costs such as freight charges, customs clearance costs etc.) earned given a particular operational capacity. Apart from that, it was submitted, that the PLI of OP/VAE was rightly selected for benchmarking the international transactions of the assessee as the return on total costs would not measure the efficiency of the logistics operations as it would disregard the composition of costs, for the reason, that it would assume a common mark up on all costs including direct costs which may differ from time to time depending on the volume of business of the logistics service provider. However, the TPO was not persuaded to accept the aforesaid claim of the assessee. Observing, that the element of freight could be considered as pass through expense only when no profit or mark up is obtained on freight, the TPO was of the view that the same was not so in the case of the assessee as the handling charges in its case varied from customer to customer, and were dependant upon the mark up which the assessee

obtained from its customers based on negotiations. It was observed by the TPO that even in a case where the cargo was booked by the assessee specifically for a single customer, there also several other dues were added in the airway bill, such as charges due to the agent on account of handling, stuffing, loading etc. It was observed by the TPO that all of the aforesaid expenses were often charged as freight in the invoice. On the basis of his aforesaid observations, it was concluded by the TPO that even in the so called freight element there was a component of profit (or value added). Accordingly, in the backdrop of his aforesaid observations, the TPO was of the view that the operating profit of the assessee comprised not just of its handling charges but also the differential freight which it charged from the customers as against that paid to the shipping line. Further, it was observed by the TPO, that as very few companies were reporting their Value Added Expenses separately, therefore, the required disaggregated information as regards them could not be gathered from their annual accounts. Observing, that the data for calculation of Value Added Expenses was not reliable as lots of assumptions were to be made in order to derive the same, therefore, the TPO was of the view that OP/VAE could not be calculated reliably from the financials of the comparable companies and thus could not have been adopted as an appropriate PLI. In order to fortify his aforesaid view, the TPO had drawn support from the fact that the rejection of Shreyas Relay Systems Ltd. and Om Logistics Ltd. by the assessee as a comparable, for the reason, that they had abnormal OP/VAE in itself proved that the classification of expenses was not uniform across the companies. Accordingly, the TPO holding a conviction that OP/VAE was not reliable as an appropriate PLI to benchmark the international transactions, rejected the same. The TPO supporting the rejection of OP/VAE as the PLI for benchmarking the international transactions of the assessee observed, that the same could have been adopted if the freight and other costs were only a pass through expense, which however was not so in the present case as the freight was the main contributor to the operating profit of the assessee. After rejecting the OP/VAE as PLI the TPO adopted operating profit to the operating costs ratio (OP/OC) as an appropriate PLI for benchmarking the international transactions of the assessee.

8. As regards the comparables which were adopted by the assessee, it was observed by the TPO as under :

(i) **Haytrans India Ltd.:**

It was observed by the TPO that the assessee itself had rejected it at company level as it was failing both net worth as well as loss making filter. It was observed by the TPO, that now when the aforesaid company had failed the filter, therefore, it was not correct on the part of the assessee to have selected it at segment level without applying the said filter, as otherwise there would not be any sanctity of the structured search process. Also, the claim of the assessee that it had selected the said company because it was making a profit in financial year 2006-07 which was one of the three years available at the time of search was held by the TPO to be a false claim. It was observed by the TPO, that the assessee had mentioned in its TP study report that the companies from both data base had been extracted only if they had relevant financial year data for at least two out of three financial years ending during the period 01.04.2007 and 19.02.2010. Accordingly, on the basis of his aforesaid observations the aforesaid company was rejected by the TPO as a comparable, for the reason, that it had negative net worth and also because it was making persistent losses for three years including the current year.

(ii) Sindhu Cargo Ltd. & Hindustan Cargo Ltd:

It was observed by the TPO that the assessee had included the aforesaid two comparables after it had completed its structured search despite the fact that the said companies had not figured in the search process. The claim of the assessee that as the number of comparables for the year under consideration were less, therefore, it had selected as comparables the aforesaid two companies which were included in the final list of comparable by the TPO in A.Y. 2007-08, did not find favour with the TPO. The TPO was of the view that now when the assessee had selected 4 comparables based on a structured search which were sufficient to benchmark the international transactions, therefore, there was no justification for the assessee to have selected the aforesaid two companies as a comparable despite the fact that they had not figured in its structured search. Apart therefrom, the TPO was of the view, that as every year was a separate year for income tax proceedings, therefore, the reasoning given by the assessee for including the aforesaid companies as a comparable did not merit acceptance. Also, the TPO was of the view, that though many other comparables were suggested by him but the assessee had not selected those and had rather cherry picked the aforesaid two companies as comparables, only for the reason that the average margin of the said companies was within the limit of its arm's length. On the basis of his aforesaid deliberations the TPO

declined to accept the inclusion of the aforesaid two companies in the final list of the comparables.

(iii) Shreyas Relay Systems Ltd.:

It was observed by the TPO that the aforesaid company was consistently selected by the assessee as a comparable for financial year 2007-08 onwards. However, the assessee had sought the exclusion of the aforesaid company as a comparable, for the reason, that unlike the assessee it owned transportation assets. Rebutting the aforesaid claim of the assessee, it was observed by the TPO, that as could be gathered from the annual report of the aforesaid company for financial year 2008-09 and 2009-10 the composition of its assets had remained the same. In fact, it was noticed by the TPO that the assets of the aforesaid company were more in financial year 2008-09 as in comparison to the year under consideration i.e financial year 2009-10. Apart from that, the TPO was of the view that the operations as well as the background of the aforesaid company during the year had remained the same as in the last two preceding years. Accordingly, the seeking of exclusion of the aforesaid company as a comparable by the assessee was declined by the TPO. Also, the claim of the assessee that the comparability analysis should be carried out on the basis of direct cost to total cost ratio was also rejected by the TPO. As regards the claim of the assessee that the aforesaid company was having super profit, it was observed by the TPO that merely for the said reason the same could not have been held to be inappropriate for comparability analysis. It was observed by the TPO, that it was only where the assessee could show that there were exceptional events or circumstances leading to higher than normal profit that the exclusion of a company as a comparable on the ground that it was having super profit could be accepted. Apart therefrom, it was observed by the TPO that as the OP/TC of the aforesaid company was near about normal margin range, therefore, the claim of the assessee that it was earning any super profit stood negated. Rather, the TPO was of the view that in the last two years when the aforesaid company was making either loss or showing meagre profits the assessee had taken it as a comparable, but when the said company had made break even, it was sought to be rejected as a comparable by the assessee. On the basis of his aforesaid deliberations the TPO declined to accept the claim of the assessee that the aforesaid company be excluded as a comparable for benchmarking its international transactions.

(iv) Om Logistics Ltd:

It was the claim of the assessee that as the aforesaid company owned transportation assets and had started warehousing business, therefore, it could not have been selected as a comparable to the assessee. However, the TPO observed that the 'annual report' of the aforesaid company for financial year(s) 2008-09 and 2009-10 revealed that its composition of assets had remained the same. Rather, it was observed by the TPO that in financial year 2008-09 the assets of the aforesaid company were more than those during the year under consideration i.e financial year 2009-10. Also, it was observed by the TPO, that the operations as well as the background of the aforesaid company had remained the same as in the last two preceding years. Accordingly, on the basis of his aforesaid observations the claim of the assessee was rejected by the TPO. As regards the claim of the assessee that the aforesaid company was having super profit, it was observed by the TPO that merely for the said reason the same could not be rejected as a comparable. TPO observed that for rejecting a company as a comparable, for the reason, that it had shown super profit, it had to be shown that there were exceptional events or situation leading to higher than the normal profits in the case of such comparable. Accordingly, it was observed by the TPO that as no such exceptional circumstances or events were shown to exist by the assessee, therefore, its plea that the aforesaid company be rejected as a comparable did not merit acceptance. Apart from that, it was observed by the TPO that as the OP/TC margin of the company was ranging from 9.76% to 17.37%, and in fact the same had gone down to 14.46% in the next year, therefore, there was no such pattern which would suggest any abnormality in the profit of the assessee. On the basis of his aforesaid deliberations the TPO declined to accept the claim of the assessee that the aforesaid company was to be excluded from the final list of comparables.

9. It was further observed by the TPO, that as the assessee had conducted its search process on 19.02.2010 i.e well before the end of the relevant financial year i.e 2009-10, therefore, by so doing it had prevented the use of any contemporaneous data whatsoever. Also, it was observed by the TPO that the assessee while calculating its margins had chosen financial year data of multiple years. It was observed by the TPO, that the data for the

preceding two years as was considered by the assessee for working out its margins was not in conformity with the requirements of Rule 10B(4). As observed by us hereinabove, the TPO had rejected the use of OP/VAE as the PLI by the assessee and had substituted the same by OP/TC. It was further observed by the TPO that not only the adoption of OP/VAE on the part of the assessee was not justified, but even otherwise as most of the companies operating in the logistics segment in their data base did not have VAE as an item segregated, therefore, for the said reason most of the said companies got automatically rejected and resultantly only 4 companies were selected by the assessee as comparable. As regards the selection of Hindustan Cargo Ltd. and Sindhu Cargo Ltd. as comparables, the TPO was of the view that the assessee had cherry picked the aforesaid companies as comparable. Also, the TPO was of the view that the assessee had wrongly applied its own filter and selected Haytrans India Ltd. as a comparable. On the basis of the aforesaid facts, the TPO was of the view that the entire comparability analysis of the assessee was flawed. Accordingly, the TPO observed, that as the information or data used in computation of the arm's length price by the assessee was not reliable or correct, therefore, the provisions of clause (c) of Sec.92C(3) would be attracted and transfer pricing documentation submitted by the assessee would stand modified.

10. On the basis of his aforesaid observations the TPO selected the following companies in the final list of comparables for benchmarking the international transactions of the assessee :

Sr. No.	Name of the company	OP/VAE	OP/TC
1.	Shreyas Relay Systems Ltd.	148.53%	8.61%
2.	Arshiya International Limited	66.79%	8.04%
3.	Om Logistics Limited	95.90%	17.37%
4.	All Cargo Global Logistics Limited- Mutimodal Transport Operations	63.50%	9.76%
Average		93.68%	10.94%

Adopting the mean PLI i.e OP/TC of 10.94% of the aforesaid comparables, the TPO worked out an adjustment of Rs.67,47,763/- to the arm's length price of the assessee's international transactions, as under :

Particulars	OP/TC
Sales/Operating Income	11,60,29,64,757
AE Income	4,52,70,87,740
None AE Income	7,07,58,77,018
Less: Cost of Operations (Direct Cost) – Constant	8,91,23,54,752
Less: Value Added Expenses (VAE) – Constant	1,38,92,03,329

Operating profit	1,30,14,06,676
OP/TC of comparable	10.94%
Arms Length Price	4,52,70,87,740
Transaction Value	3,85,25,12,977
Difference	67,45,74,763
5% of TV	19,26,25,649

The TPO while carrying out the aforesaid calculations had also observed that the assessee had wrongly calculated its PLI i.e OP/TC at 6.12% as against the correct OP/TC of 6.08%.

11. Alternatively, and without prejudice to the fact that OP/TC was held by the TPO as the appropriate PLI in the case of the assessee, it was observed by him, that even after adopting OP/VAE as PLI the margin of the assessee was not found to be at arm's length. Accordingly, based on the PLI of OP/VAE of the aforementioned comparables the TPO on the basis of a single year data worked out an adjustment of Rs.50,06,61,639/- to the arm's length price of the assessee international transactions, as under :

Particulars	OP/VAE
Sales/Operating Income	11,42,90,51,634
AE Income	4,35,31,74,616
Non AE Income	7,07,58,77,018
Less: Value Added Expenses (VAE) – Constant	1,38,92,03,329
Operating Profit	1,12,74,93,553
OP/TC	
OP/VAE	93.68%
Arm's Length Price	4,35,31,74,616
Transaction Value	3,58,25,12,977
Difference	50,06,61,639
5% of TV	19,26,25,649

12. Apart therefrom, the TPO observed that the assessee had provided Information technology related support services (ITeS) to its AE. It was noticed by the TPO that the assessee had provided services like invoicing, data entry, tariff management and monitoring of the goods in transit. It was noticed by the TPO that the assessee during the year had entered into the following international transactions with its AEs in respect of ITeS services :

Nature of Services	Amount (Rs.)
IT Enabled Support services	87,24,774/-

It was observed by the TPO that the assessee for the purpose of benchmarking the IT enabled services/data processing services had applied TNMM method. The PLI adopted was operating

profit to total cost ratio (OP/TC). It was the claim of the assessee that its PLI worked out at (-) 14.66% of cost whereas the average PLI of the comparables was 14.27% as per the comparability analysis in the TP study report. It was noticed by the TPO that the assessee had worked out the PLI of the comparables by adopting weighted average margin of 3 years data. Also, it was observed by him that the assessee had selected 11 companies as comparable on the basis of search conducted in the public data base i.e prowess and capital line plus. The TPO after deliberating on the acceptance/rejection matrix applied by the assessee for arriving at the final set of the comparables, for the purpose of selecting the proper comparables which were functionally similar to that of the assessee came up with certain additional filters viz. (i) that, the companies whose data was not available for financial year 2009-10 were to be excluded; (ii) that, the data of the companies for financial year 2009-10 was to be considered only for the period from 01.04.2009 to 31.03.2010; (iii) that, the companies whose I.T enabled services income <Rs.1 crores were to be excluded; (iv) that, the companies whose I.T enabled services revenues was less than 75% of the total operating revenues were to be excluded; (v) that, the companies which had more than 25% related party transactions (as well as sales expenditure combined) of the operating revenues were to be excluded; (vi) that, the companies which had less than 75% of the revenues as export sales were to be excluded; (vii) that, the companies which had diminishing revenues/persistent losses for the year under consideration were to be excluded; (viii) that, the companies having different financial years ending (ie. not March 31, 2010) or those companies whose data did not fall within the 12 month period i.e 01.04.2009 to 31.03.2010 were to be rejected; and (ix) that, the companies that were functionally different from the assessee or working in peculiar economic circumstances after giving valid reasons were to be excluded. As regards the PLI adopted by the assessee for benchmarking the IT enabled services provided to its AE, it was observed by the TPO that the assessee had chosen operating profits (OP) to operating cost (OC). As regards the comparables which were selected by the assessee for benchmarking the IT enabled services provided to its AE, the TPO after necessary deliberations observed that the assessee had wrongly rejected some of the comparables appearing in its accept/reject matrix despite the fact that their FAR was comparable to it. In the totality of the facts emerging from the TP analysis carried out by the assessee, the TPO was of the view, that the same suffered from certain pertinent defects viz. (i) that, though as per Rule10B(4) it was mandatory to use the current

financial year data but the assessee had not considered the current year data of all the comparable companies; (ii) that, the assessee had used earlier two years data without justifying as to how the said preceding years data had an influence on pricing of the assessee or the comparable companies; (iii) that, the assessee had considered companies with significant controlled or related party transactions; (iv) that, the assessee had considered companies with domestic operations despite the fact that the assessee's I.T enabled services segment was mainly export oriented; (v) that, some of the assessee's comparables did not stand the scrutiny of FAR analysis; and (vi) that, though some of the companies selected as comparable by the assessee qualified all the filters applied by the assessee based on the data pertaining to financial year 2009-10, however, they were not selected as a comparable. On the basis of his aforesaid observations, the TPO was of the view that the information as well as the data used in computation of the arms length price by the assessee was not reliable and correct. Accordingly, the TPO invoked the provisions of Sec.92C(3)(c) and proposed to re-modify the comparability analysis carried out by the assessee. In the backdrop of his aforesaid deliberations, the TPO concluded that only three comparables out of 15 comparables selected by the assessee passed the filters that were applied by him, as under

Sr. No.	Name of the Company	OP/TC
1.	Cosmic Global Ltd.	14.97%
2.	Informed Technologies India Ltd.	26.15%
3.	Infosys BPO Ltd.	31.20%
	Average	24.11%

Accordingly, applying the average PLI of 24.11% of the aforesaid comparables the TPO worked out the arm's length price of the payment for IT enabled Services rendered by the assessee to its AEs, as under:

Operating Cost (a)	Rs.75,86,760/-
Arm's Length Mean Margin	24.11% on Cost
Total Arm's Length Price – (b)=124.11% of (a)	Rs.94,15,928/-
Operating Revenue (c)	Rs.64,74,900/-
Shortfall being adjustment u/s. 92CA (g) = (b) –(c)	Rs.29,21,028/-

As such, considering the aforesaid shortfall of Rs.29,21,028/- the TPO made a transfer pricing adjustment to the price charged by the assessee in respect of its international transactions pertaining to IT enabled services that were rendered to its AEs during the year under consideration. As the assessee had claimed that it had voluntarily offered an adjustment of

Rs.22,49,874/- to its taxable income, therefore, the TPO had observed that the A.O after making necessary verifications as regards the veracity of the aforesaid claim of the assessee may give credit for the said amount while making the addition towards the T.P adjustment.

13. On the basis of his aforesaid deliberations the TPO had proposed the following T.P adjustment in the hands of the assessee :

Freight Segment	Rs.67,45,74,763/-
ITES	Rs. 29,21,028/-
Total	Rs.67,74,95,791/-

Resultantly, the TPO vide his order passed under Sec. 92CA(3), dated 31.12.2013 proposed an upward T.P adjustment of Rs.67,74,95,791/-.

14. The A.O after receiving the order passed by the TPO under Sec.92CA(3), dated 31.12.2013 passed a draft assessment order under Sec.143(3) r.w.s 144C(1), dated 28.02.2014. In his aforesaid order the A.O proposed to make an upward adjustment under Sec. 92CA(4) of Rs.67,74,95,791/-. Apart from that, the A.O had also sought to disallow the assessee's claim for depreciation on goodwill amounting to Rs. 22,36,07,813/-.

15. Aggrieved, the assessee objected to the additions which were proposed by the A.O in his draft assessment order, dated 28.02.2014, before the Dispute Resolution Panel-1, Mumbai, (for short 'DRP'). The DRP after deliberating at length on the issue under consideration observed, that the TPO had for valid reasons rejected the TP analysis of the assessee. As regards the rejection of OP/VAE as PLI and adoption of OP/TC by the TPO, it was observed by the DRP that as the assessee had at no point of time identified the direct costs as pass through cost, therefore, no infirmity in the rejection of OP/VAE as the PLI did emerge from the order of the TPO. Insofar rejection of the multiple year data used by the assessee in its TP study report was concerned, it was observed by the DRP that as per Rule 10B(4) the data of the comparable transactions was to be for the financial year in which the assessee had entered into an international transaction. It was observed by the DRP, that the exception carved out in Rule 10B(4) for using the earlier year data in addition to the data pertaining to the relevant financial year was only in respect of a situation where it could be shown that the earlier year data had an influence on the determination of transfer prices in relation to the transactions being compared.

As the assessee had failed to show as to how the earlier years data had an impact on the profits of the current year i.e financial year 2009-10 or that of the comparables, therefore, the DRP was of the view that the TPO had rightly rejected the adoption of multiple year data by the assessee for benchmarking its international transactions. As regards the seeking of inclusion of certain comparables by the assessee viz. (i) Haytrans (India) Ltd.; (ii) Sindhu Cargo Ltd.; and (iii) Hindustan Cargo Ltd., the DRP rejected the claim of the assessee and upheld the view taken by the TPO. Also, the declining on the part of the TPO for the inclusion of two comparables by the assessee viz. (i) Shreyas Relay System Ltd; and (ii) Om Logistics Ltd. was also upheld by the DRP. Further, the claim of the assessee that the TP adjustment should be computed with respect to the expenses whereas the TPO had computed the same with respect to the revenue in order to make a larger adjustment, the same was also rejected by the DRP. It was observed by the DRP, that admittedly as the assessee had both revenue and expense transactions with its AE and the PLI (OP/TC) at entity level in respect of such AE transactions was below ALP, therefore, the adjustment had to be computed in a manner that OP/TC of the assessee could be brought at ALP. As the revenue from the AE was higher than the cost paid to the AE, therefore, the DRP was of the view that the adjustment had to be computed on the basis of sales, as well as tainted transaction had to be adjusted to the comparables mean margin and the cost had to be taken as the base for computing the adjusted operating margin of the assessee company.

16. The DRP in the course of the proceedings observed that the segmental financial information was not provided by the assessee. In the backdrop of the aforesaid facts, the DRP directed the A.O/TPO to compute the margins of the assessee as well as the comparable companies by excluding employee costs and other administrative costs. Also, the DRP directed the AO/TPO to gross up to revenue/cost by an amount of Rs,763.23 crores in respect of viz. (i) freight on inbound shipments; (ii) custom duty; and (iii) other third party port related charges.

17. As regards the TP adjustment of Rs.29,21,028/- carried out by the TPO on account of arm's length price of IT enabled services provided by the assessee to its AE, the DRP declined to accept the objection of the assessee as regards the rejection by the TPO of its TP study report as regards benchmarking of ITeS provided to its AE. It was observed by the DRP, that the TPO after considering the deficiencies in the TP study report of the assessee regarding

benchmarking of ITeS rendered to its AE had rightly rejected the same. Also, the objection of the assessee as regards use of single year data for the current year i.e financial year 2009-10, as against three years data that was used by it for determining its PLI was rejected by the DRP. As regards the objection raised by the assessee in respect of inclusion/exclusion of comparables by the TPO, it was observed by the DRP that it was not the case of the assessee that the companies identified by the TPO did not satisfy any of the filter applied or that the TPO had resorted to any cherry picking. Although, the DRP observed that since the ITeS turnover of the assessee < 1 crores, therefore, the TPO was not correct in applying the total turnover of > 1 crore filter. But then, it was observed by the DRP, that as the turnover filter was not the only reason for rejecting of the comparables, and thus was of the view that even if the aforesaid filter was not applied, there would be no impact on the selection of the comparables. Observing, that the assessee had not submitted any specific arguments in respect of any of the comparables applied or rejected by the TPO, the DRP was thus not inclined to accept the objection raised by the assessee as regards inclusion/exclusion of comparables by the TPO. It was observed by the DRP that the three comparables identified by the TPO were from the list of the assesses comparable itself. Also, it was observed by the DRP, that the TPO while rejecting certain comparables had given elaborate reasons for so doing in his order. Accordingly, on the basis of its aforesaid observations, the DRP upheld the comparables selected by the TPO and rejected the objection raised by the assessee. As regards the objection of the assessee in respect of disallowance of depreciation of Rs.22,36,07,813/- that was claimed by the assessee in respect of goodwill, the DRP observed that as the goodwill and intangibles were not recorded in the books separately as an asset, therefore, depreciation was not admissible as their value was indeterminate. Accordingly, the DRP upheld the disallowance of depreciation on intangibles and goodwill as was proposed by the A.O in his draft assessment order.

18. The A.O after receiving the order passed by the DRP under Sec. 144C(5), dated 14.11.2014, passed the final assessment order under Sec.143(3) r.w.s 144C(13), dated 30.12.2014. On the basis of the directions of the DRP, the A.O made a TP adjustment of Rs.244,47,98,588/-. Also the A.O disallowed the assesses claim for depreciation on goodwill amounting to Rs.22,36,07,813/-. On the basis of his aforesaid observations, the A.O vide his order passed under Sec.143(3) r.w.s 144C(13), dated 30.12.2014 assessed the total income of

the assessee under the normal provisions at Rs.342,04,95,020/- and its 'book profit' under Sec.115JB at Rs.72,99,75,222/-.

19. The assessee being aggrieved with the order of the A.O passed under Sec.143(3) r.w.s 144C(13), dated 30.12.2014 has carried the matter in appeal before us. We have heard the authorised representatives for both the parties at length, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Our indulgence in the present appeal has been sought for adjudicating three issues viz. (i). that, as to whether the A.O/DRP had rightly worked out the TP adjustment as regards the freight segment of the assessee; (ii). that, as to whether the A.O/DRP had rightly worked out the TP adjustment as regards the ITeS services rendered by the assessee to its AE; and (iii). that, as to whether the A.O/DRP had rightly disallowed the assessee's claim for depreciation in respect of intangibles i.e goodwill.

20. Before proceedings any further, we shall first advert to the 'additional grounds' of appeal raised by the assessee before us. As is discernible from the application dated 09.07.2018 filed by the assessee for admission of the 'additional grounds' of appeal, it is claimed, that the issues therein involved arise from the order of the DRP dated 16.05.2016, wherein it had declined to give effect to the assessee's application for rectification on certain points emerging from its order dated 22.01.2015. It is submitted by the assessee that no separate appeal is provided under Sec. 253 of the Act, against the directions of the DRP while disposing off the rectification application filed by an assessee. In the backdrop of the aforesaid position of law, it is claimed by the assessee, that as the observations of the DRP while disposing off the assessee's rectification application will have a strong bearing on the adjudication of the issues under consideration, therefore, the same may be admitted. In our considered view, as the observations recorded by the DRP while disposing off the rectification application of the assessee are inextricably linked or in fact interwoven with the issues under consideration before us, and the same cannot be separately assailed before us under Sec. 253, therefore, we admit the same as per Rule 11 of the Appellate Tribunal Rules, 1963.

21. We shall first advert to the observations of the A.O/DRP as regards the TP adjustment in respect of the assessee's freight segment. As observed by the TPO, the assessee in its TP

study report had aggregated its international transactions of purchase of supplies, receipt of technical and management services with its primary transaction of provision and receipt of freight handling services for the purpose of benchmarking. Assessee selecting itself as the tested party had benchmarked its aforesaid international transactions as per the TNMM at entity level. It had used three year data and had taken the Profit Level Indicator (PLI) of Operating Profit to Value Added Expenses (OP/VAE). Using Prowess and Capital line data base, the assessee on the basis of its search had selected 7 comparables namely (i) Shreyas Relay Systems Ltd.; (ii) Arshiya International Ltd.; (iii) Om Logistics Ltd.; (iv) All Cargo Global Logistics Ltd. (Segment-Multimodal Transport Operation); (v) Haytrans India Ltd.(segment), (vi) Sindhu Cargo Ltd.; and (vii) Hindustan Cargo Ltd. As can be gathered from the orders of the lower authorities, though the assessee had rejected Haytrans India Ltd. as a comparable at company level as it had failed the assessee's negative net-worth filter and was also a persistent loss maker, but it was selected at the segment level. Also, two other comparables of the assessee viz. (i) Sindhu Cargo Ltd.; and (ii) Hindustan Cargo Ltd. though did not appear in the search dump, but they were selected by the assessee on the basis of the TP study report for the immediately preceding year i.e financial year 2008-09. Assessee had determined the mean margin of the aforesaid comparables at 30.60% based on three years weighted average and worked out its own margin (OP/VAE) at 36.32%. Accordingly, it was the claim of the assessee that its AE transactions were at Arm's length. As observed by us hereinabove, the TPO not finding favour with the adoption of the PLI of OP/VAE by the assessee for benchmarking its aforesaid international transactions had rejected the same for primarily three reasons viz. (i). that, as the freight element booked in the books by the assessee had a component of profit (or value added) in it, therefore, the assessee claiming the same as pass through cost had wrongly reduced the same from its turnover and costs while computing its margins; (ii). that, the recovery of third party costs at ports except for in few instances where invoices were produced by the assessee, in the absence of any evidence had wrongly been treated by the assessee as back to back costs; and (iii). that, the VAE could not be safely gathered from the 'books of account' of the comparables. After rejecting the PLI of OP/VAE the TPO had substituted the same by OP/TC. Further, the DRP had upheld the rejection of PLI of OP/VAE and substitution of the same by OP/TC by the TPO. In fact, the DRP observing that as the segmental financial information was not provided by the assessee, therefore, it had directed the AO/TPO to

compute the margins of the assessee as well as the comparable companies by excluding employee costs and other administrative costs. Also, the A.O/TPO were directed by the DRP to gross up the revenue/cost by an amount of Rs.763.23 crores in respect of viz. (i) freight on inbound shipments; (ii) custom duty; and (iii) other third party port related charges recoverable by the assessee.

22. We shall first focus on the rejection by the TPO/DRP of the PLI of OP/VAE that was applied by the assessee for benchmarking its aforesaid international transactions. As observed by us hereinabove, the DRP had upheld the rejection of PLI of OP/VAE and substitution of the same for OP/TC by the TPO. It is the claim of the Id. A.R that keeping in view the facts of the assessee's case and the nature of the functions performed in logistics industry the assessee had rightly adopted the PLI on the basis of Value Added Expenses (VAE) as opposed to the Total Cost (TC). In logistics companies the element of costs can safely be bifurcated into 'direct costs' and 'value added costs'. The 'direct costs' are the expenses which are incurred by the logistics company for procuring services from a third party service providers viz. shippers/airliners, clearing and forwarding agents, transporters etc. On the other hand, the 'Value added expenses' are the expenses which would be incurred by the logistics service provider on a day-to-day basis in support of its own operations viz. personnel cost, selling cost, establishment costs etc. It is the claim of the Id. A.R that as no value was added by the assessee company which was a logistic service provider in relation to the services obtained from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider, therefore, there was no requirement on its part to measure its operating efficiency in relation to such 'direct costs' i.e third party costs. In sum and substance, it is the claim of the Id. A.R, that as the costs pertaining to services obtained from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. does neither involve any service element of the assessee nor the assessee carries any risk or employs any of its assets with respect to the same, therefore, the PLI of OP/VAE also known as 'Berry ratio' has rightly been applied for benchmarking the international transactions of the assessee. It was averred by the Id. A.R, that in case the assessee would have provided the aforesaid services i.e shipping, transportation etc. on its own, then the same would have been liable to be included in its cost. In sum and substance, it was the claim of the Id. A.R that as the aforesaid services are

provided to the customers on “as is” basis, therefore, the assessee's profits could not be compared on the basis of such costs, which in fact are pass through costs. It was submitted by the Id. A.R, that the services of a logistics service provider could only be measured on the basis of the adequacy of its gross margin over the value added expenses so incurred by it. Accordingly, it was the claim of the Id. A.R that applying PLI of OP/TC would mean that the assessee was expected to earn a return on such third party/direct costs despite the fact that it was not performing any of the functions therein involved. On the basis of his aforesaid contentions, it was claimed by the Id. A.R that a comparison of the margin of the assessee in the backdrop of its Value Added Expenses as against that of its comparables would be the appropriate basis to measure the profitability of its logistics business. It was submitted by the Id. A.R, that a comparison of the returns/margins of the assessee on the basis of its ‘total costs’ which would include ‘direct costs’ that would vary from time to time depending on the volume of the business, would present a skewed result of the assessee's profitability and thus could not be considered as an appropriate PLI in its case. It was submitted by the Id. A.R, that having regard to the assessee's functional analysis the applying of the PLI of OP/VAE was the most appropriate approach. In order to drive home his aforesaid contention the Id. A.R had drawn support from Rule 10B(e)(i) which sets out the determination of PLI viz., ‘net profit’ margin in relation to different bases depending upon the facts and circumstances of each case. As pointed out by the Id. A.R, the intent to select the appropriate PLI as per Rule 10B(e)(i) was to best measure the relationship between the profits of the controlled taxpayer and the functions of such taxpayer. The Id. A.R taking us through Rule 10B(e)(i) submitted, that the same envisaged that as per the TNMM the ‘net profit’ margin realised by an enterprise from an international transaction entered into with an associated enterprise was to be computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base. It was submitted by the Id. A.R that nowhere it was mandated that in all cases the ‘net profit’ margin was to be computed only in relation to the ‘total costs’ incurred by the enterprise. The Id. A.R advocating the use of the OP/VAE as the most appropriate PLI by the assessee for benchmarking its logistic operations submitted, that the assessee was merely an agency/intermediary with respect to the third parties cost and did not take any risk with respect to the same in the course of providing logistics support services. In support of his aforesaid contention, the Id. A.R had taken us through the underlying

documents in the form of 'agreements' and 'invoices'. As regards its claim that while providing logistics support services in "air business" the assessee merely acted as an agent of the airlines. It was submitted by the Id. A.R that the assessee was governed by the terms and conditions of "Cargo agency agreements" which it had entered into with various airline carriers which were members of IATA. Taking us through the 'agreements', it was submitted by the Id. A.R that the assessee was to act as an agent for the various member carriers. As per the 'agreements' the assessee was vested with a limited authority to represent various member carriers while selling the air cargo transportation services to the customers and was bound to adhere to the various terms and conditions imposed by the member carriers. In sum and substance, it was the claim of the Id. A.R that the conduct of the assessee at all times was governed by the carriers. Also, as per the terms of the 'agreement' the assessee was bound to represent itself as an "agent" in all its communications viz. letterheads, telephone listings, office signs etc. with the customers, and was specifically prohibited from representing or projecting itself as a "Principal". Further, the 'agreement' also provided for indemnification of the assessee by the member carrier in the event of a loss/damage arising in the course of transportation pursuant to the sale made by the assessee. As such, it was the claim of the Id. A.R that the assessee did not assume any risks while undertaking its business. In order to fortify his aforesaid claim the Id. A.R had drawn our attention to the "house airway bill" that was issued by the assessee to its customer, which revealed that the assessee had executed the same as an agent of the carrier. Lastly, it was submitted by the Id. A.R that the functions (carriage of goods) and liabilities (indemnification of the loss etc.) assumed by the assessee vis-a-vis the customer (as per its standard terms and conditions) corresponded to those assumed by the carrier vis-à-vis the assessee. Accordingly, it was averred by the Id. A.R, that the functions and liabilities were effectively delegated by the assessee to the carrier and no part of the same was effectively assumed by the assessee. On a similar footing, it was submitted by the Id. A.R that in the case of "ocean business" also the assessee merely acted as an agent. Further, in order to support its claim that where in a case the assessee acts as an agent of the airliner/shipliner, and thus acting as an intermediary does not bear any transportation risk it would not be entitled to earn any mark-up on the transportation function, the OP/VAE should be accepted as an appropriate PLI, the Id. A.R had relied on certain judicial pronouncements. It was further submitted by the Id. A.R that the PLI of OP/VAE had been accepted by the revenue in the past

except for in A.Y 2006-07 where the matter was restored by the tribunal to the file of DRP. In support of his claim that PLI of OP/VAE was rightly applied by the assessee, the Id. A.R had relied on certain judicial pronouncements viz. (i). ACIT Vs. Agility Logistics Pvt. Ltd. (ITA No. 2000/Mum/2010, dated 25.01.2012)(Mumbai-Trib); (ii). DCIT Vs. M/s Cheil Communications Pvt. Ltd. (ITA No. 712/Del/2010, dated 30.11.2010)(Delhi- Trib); (iii). Fedex Express Transportation and Supply Chain Services India Pvt. Ltd. Vs. Dy. Cit (ITA No. 435/Mum/2014, dated 10.12.2014)(Mumbai-Trib); and (iv). Sumitomo Corporation India (P) Ltd. Vs. ACIT, Circle 24(2), New Delhi (2018) 99 taxmann.com 319(Delhi-Trib).

23. Per Contra, it was the claim of the Id. D.R that as per OECD guidelines OP/VAE is to be used as a PLI in rare cases where the tested party does not carry any risk at all, and also does not deploy any assets with respect to the costs embedded in the P& Loss account. It was the claim of the Id. D.R that PLI of OP/VAE is used in the case of pure risk free distributors (sogoshosha companies) who do not carry out any function other than merely being a conduit for the supply of the goods by the manufacturers in the territory of the distributor. On the basis of his aforesaid observations, it was submitted by the Id. D.R that the assessee in the field of logistics management had not merely facilitated the delivery of the consignments, but had in fact carried out part of the activities related to delivery of goods from one place to another. It was further submitted by the Id. D.R that the assessee assumed the entire responsibility, whether those were the goods received from the customer or from its AE, for delivery of the same to the consignee. Also, it was submitted by the Id. D.R that the assessee guaranteed proper, timely and safe delivery of the goods, as well as provided the details of current status of the goods to the client. Apart from that, it was averred by the Id. D.R that the assessee was responsible for managing the goods and handling complaints in case of loss/misdelivery of goods. On the basis of his aforesaid contentions, it was the claim of the Id. D.R that as the assessee in its field of logistic management was rendering functions by assuming responsibility for proper, safe and timely delivery of goods, providing details of current status of the consignment, and was also responsible for handling complaints in case of loss/misdelivery of goods, therefore, it could not be placed at par with the case of a pure risk free distributor. Accordingly, it was the claim of the Id. D.R before us that PLI of OP/VAE could not have been adopted for benchmarking the international transactions of the assessee. In support of his

aforesaid contentions the Id. D.R had relied on the order of the ITAT, Delhi in the case of Mitsubishi Corporation Pvt. Ltd. Vs. DCIT, Circle 6(1), New Delhi (ITA No. 5042/Del/2011, dated 21.10.2014).

24. We have deliberated at length on the issue under consideration i.e rejection by the lower authorities of the PLI of OP/VAE by the assessee and substitution of the same by PLI of OP/TC. As is discernible from the orders of the lower authorities the PLI of OP/VAE had been rejected for the reasons viz. (i). that, as the freight element booked in the books by the assessee has a component of profit (or value added), therefore, the assessee claiming the same as pass through costs had wrongly reduced the same from its turnover and costs while computing its margins; (ii). that, the recovery of third party costs at ports except for in few instances where invoices were produced by the assessee, in the absence of any evidence had wrongly been treated by the assessee as back to back costs; and (iii). that, the VAE could not be safely gathered from the 'books of account' of the comparables. We shall deliberate on the aforesaid aspects, as under:

(i). For a proper appreciation of the business module of the assessee, we shall briefly deliberate on the transactions undertaken by the assessee during the year under consideration:

(a). Inbound Collect – Air Shipments :

- Shipper (outside India) hands over the consignments to DHL India's AE to forward the same via air to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transactions with the shipper. The consignee is assigned by the shipper to pay for the International freight. Accordingly, DHL AE assigns the collection responsibility (from the consignee) to DHL India. DHL AE pays the freight to the carrier.
- DHL India invoices and collects from the consignee the Origin Charges ('OC'), Freight (Air) and Destination Charges ('DC').
- DHL AE invoices and collects from DHL India the OC and Freight. Only DC is considered as revenue for DHL India.

- Given that the actual amount of OC and Freight (Air) agreed between the Shipper and DHL AE are merely collected by DHL India from the consignee and passed on back to back basis to DHL AE, the OC and Freight (Air) are netted off in the Profit & Loss Account of DHL India i.e the assessee.

(b). Inbound Collect – Ocean Shipments :

- The Shipper (outside India) hands over the consignment to DHL AE to forward the same via ocean to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transaction with the Shipper. In this case, the consignee pays for the freight (ocean).
- DHL India invoices and collects from the consignee the OC, Freight (ocean) and the DC. Freight and DC are considered as revenue for DHL India.
- DHL AE invoices and collects from DHL India the OC and Freight (ocean).

(c). Inbound Prepaid :

- The Shipper (outside India) hands over the consignment to DHL AE to forward the same to the consignee in India. DHL AE takes the assistance of DHL India for the same.
- DHL AE negotiates the terms of the transaction with the Shipper. DHL AE invoices the shipper for OC and Freight. The Shipper pays for OC and Freight to DHL AE. DHL AE further pays the freight to the carrier.
- DHL India invoices and collects from the consignee the DC. The same is accounted as revenue by DHL India.

(d). Outbound Collect :

- Shipper (India) hands over the consignment to DHL India to forward the same to the consignee (outside India). DHL India takes the assistance of DHL AE for the same.
- DHL India negotiates the terms of the transaction with the Shipper. The consignee pays the freight to DHL AE.
- DHL India pays the freight to the carrier. DHL India invoices and collects from the Shipper the OC. The same is booked as revenue.

- DHL AE invoices and collects from the consignee the freight and DC.

(e). Outbound Prepaid :

- Shipper (India) hands over the consignment to DHL India to forward the same to the consignee (outside India). DHL India takes the assistance of DHL AE for the same.
- DHL India negotiates the terms of the transaction with the Shipper. In the present case the Shipper pays for the freight.
- DHL India invoices and collects from the Shipper the OC and freight. The same is considered as revenue for DHL India.
- DHL India further pays the Freight to the carrier company.
- DHL AE invoices and collects from the consignee the DC.

On a perusal of the aforesaid transactions carried out by the assessee in the course of its international logistic transactions, it can safely be gathered that the 'Origin charges' ('OC') in case of outbound shipments and 'Destination charges' ('DC') in case of inbound shipments, only form part of the revenue receipts/income of the assessee.

- (ii). As observed by the TPO, the main component of the income of the assessee is on account of differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner. It was observed by the TPO, that the carriers in view of heavy turnover of the assessee group would provide them very competitive rates which otherwise would not be available to a normal exporter or importer. TPO observed, that the assessee group in anticipation of the expected shipments would book cargo spaces in bulk around the world at the competitive rates so offered to them by the shipping companies. The TPO held a conviction that the assessee after making bulk bookings with the carriers would enter into bargains depending upon the time, space and the paying capacity of the client. It was observed by the TPO, that though the assessee would collect freight from the customers at an amount in excess of the rate it had negotiated with the shipping company, however, it would issue a "House Airway Bill" of a similar amount of fare and the difference would be collected as handling charges. On the basis of his aforesaid observations, it was concluded by the TPO that the additional amount charged by the assessee from its client would in fact represent the 'mark up' on freight. Accordingly, it is in

the backdrop of his aforesaid observations that the TPO had concluded that the handling charges which were charged by the assessee varied from customer to customer because they were dependent upon the 'mark up' on freight which it was obtaining from them on the basis of negotiations. Accordingly, it was observed by the TPO that the freight element booked by the assessee in its books of accounts had a component of profit in it. In order to fortify his aforesaid observations, it was further observed by the TPO that the fact that the assessee had debited the 'freight expenses' and credited the 'freight receipts' in its books of accounts revealed that the operating profit of the assessee comprised not only of its 'handling charges' but also the differential freight i.e the excess of the freight which it charged from its clients as against that paid to the shipping line. On the basis of the aforesaid observations, the TPO/DRP had rejected the adoption of PLI of OP/VAE by the assessee and had advocated the substitution of the same by PLI of OP/TC.

- (iii). We have perused the aforesaid observations of the TPO and are unable to persuade ourselves to subscribe to the same. As observed by us hereinabove, the costs pertaining to services obtained by the assessee from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same. In our considered view, the net margin realised by the assessee pursuant to its international transactions with its AE's are to be determined only with reference to the cost incurred directly by the assessee itself and its profit margin cannot be imputed on the basis of the cost incurred by the third party or unrelated parties. We are of the considered view that the payment made by the assessee to the third party for and on behalf of the AE which had thereafter been reimbursed by the AE, cannot be included in the total costs of the assessee for the purpose of determining its profit margin. In fact, we find that Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's 'net profit' margin for application of TNMM. Rule 10B(1)(e) provides that the 'net profit' margin realized by the enterprise from an international transaction entered into with an AE is to be computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise. As such, it contemplates determination of ALP with reference to the costs, assets, sales etc. of the

enterprise in question, i.e the assessee, as opposed to the AE or any third party. In our considered view, the considering of the freight cost of the airlines/ship liners in the total cost base of the assessee had resulted to a distorted picture of the 'net margin' realized by the assessee from its international transactions. Our aforesaid view is fortified by the order of the ITAT, Mumbai in the case of **FedEx Express Transportation and Supply Chain Services India Pvt. Ltd. Vs. Dy. CIT, Range 8(1), Mumbai [ITA No. 435/Mum/2014; dated 10.12.2014]**. In the said case, it was observed by the Tribunal that the payment made by the assessee to the third party for and on behalf of the AE which had been reimbursed by the AE, could not have been included in the total costs of the assessee for the purpose of determining its profit margin. Also, the **Hon'ble High Court of Delhi** in the case of **LI and Fung India Pvt. Ltd. Vs. CIT (2014) 361 ITR 85 (Del)**, had observed, that for applying the TNMM the assessee's net profit margin realised from the international transactions had to be calculated only with reference to the cost incurred by it and not by any other entity either third party vendors or the associated enterprise. It was further observed by the Hon'ble High Court, that Rule 10B(e)(i) of the Income-tax Rules, 1962, does not enable consideration or imputation of cost incurred by third parties or unrelated parties for the purpose of computing the assessee's 'net profit' margin for application of the TNMM. Accordingly, it was concluded by the Hon'ble High Court, that attribution by the TPO of the costs of the third party, when the assessee did not engage in that activity, and more importantly when those costs were clearly not the assessee's cost, but those of a third party, was clearly impermissible.

- (iv). Apart from that, we find that from a perusal of the 'agreements' which the assessee had entered into with various carriers (i.e airlines) who are members of IATA, and also the sample 'invoices' raised by the assessee on its clients, it can safely be concluded that the assessee while providing logistics support services in "air business" had merely acted as an agent of the airlines. A perusal of the terms and conditions of "Cargo agency agreements" which the assessee had entered into with various airline carriers which were members of IATA, reveals that the assessee was to act as an 'agent' for the various member carriers. [(Page 804) of the assessee's 'Paper book' (for short 'APB')]. As per the 'agreement', the assessee was vested with a limited authority to represent various member carriers while

selling the air cargo transportation services to the customers and was bound to adhere to the various terms and conditions imposed by the member carriers. (Page 805 of 'APB') In sum and substance, the assessee at all times was governed by the carriers. Also, as per the terms of the 'agreement' the assessee was bound to represent itself as an "agent" in all its communications viz. letterheads, telephone listings, office signs etc. with the customers, and was specifically prohibited from representing or projecting itself as a "Principal" (Page 806 of 'APB'). Further, the 'agreement' also provided for indemnification of the assessee by the member carrier in the event of a loss/damage arising in the course of transportation pursuant to the sale made by the assessee. (Page 807 of 'APB'). As such, the assessee did not assume any risks while undertaking its business. In order to fortify his aforesaid claim, the Id. A.R had drawn our attention to a sample "house airway bill" (Page 813-817 of 'APB') that was issued by the assessee to its customer which revealed that the assessee had executed the same as an agent of the carrier. Also, we find that the functions (carriage of goods) and liabilities (indemnification of the loss etc.) assumed by the assessee vis-a-vis the customer (as per its standard terms and conditions) corresponds to those assumed by the carrier vis-à-vis assessee. Accordingly, we are of the considered view that the functions and liabilities were effectively delegated by the assessee to the carrier and no part of the same was effectively assumed by the assessee. On a similar footing, we find that in the case of "ocean business" also the assessee had merely acted as an agent. Further, we find that all the 'agreements' entered into by the assessee with the carriers (under both air and ocean business) were soft block agreements which provided an option to the assessee to cancel the same without incurring any penalty, therefore, no inventory risk was assumed by the assessee. (Page 860 to 865 of 'APB'). As regards the observation of the TPO, that the main component of the income of the assessee is on account of the differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner, we are in agreement with the contention advanced by the Id. A.R that the advantage to the assessee on account of bulk booking was on account of its value addition activities i.e generating more customers and not on account of transportation function. In fact, we are persuaded to subscribe to the claim of the Id. A.R that transportation cost could have been included as a base only if the assessee had undertaken the transportation activity itself or would have undertaken the risks associated

with the transportation function. However, as in the present case, in the absence of either of the aforesaid factor there would be no justification for including the said third party costs i.e transportation costs as apart of the base.

- (v). As per the TPO, the element of freight could be considered as a pass through expense only if no profit or mark up is obtained on freight. However, as observed by the TPO, the case of the present assessee would not fall in the said category as the handling charges which were charged by the assessee varied from customer to customer, as they depended on the 'mark up' which it obtained from its customers based on negotiations. In our considered view, there is substantial force in the claim of the assessee that in order to characterize a particular item as pass through in nature an analysis has to be made with respect to the FAR of the assessee qua such activity. As the assessee does not perform any additional functions with respect to the third party cost, neither employs its assets, nor any risks are assumed for the same, therefore, it can safely be concluded that the assessee does not undertake any activity in relation to the said costs.
- (vi). As regards the observation of the TPO that PLI of OP/VAE could not be safely applied as the reporting of various companies as regards classification of various expenses is not uniform, we are unable to find favour with the same. In our considered view, the assessee had only selected companies which had provided their VAE separately.

Accordingly, in the backdrop of our aforesaid observations, we are of the considered view, that as in the case before us the costs pertaining to the services obtained by the assessee from the third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same, therefore, inclusion of the freight cost in the total cost base of the assessee by the TPO was not permissible. We thus are persuaded to subscribe to the claim of the assessee that the TPO/DRP were in error in rejecting the PLI of OP/VAE adopted by the assessee and substituting the same by PLI of OP/TC. As such, we herein restore the matter to the file of the A.O/TPO for the purpose of benchmarking the international transactions of the assessee by adopting the PLI of OP/VAE. **Grounds of appeal Nos. 1, 3.1 and 3.2** are allowed in terms of our aforesaid observations.

25.. We shall now advert to the claim of the Id. A.R that conceptually the TP adjustment made in the hands of the assessee could even otherwise not be sustained. The Id. A.R taking us through the computation of the T.P adjustment made by the TPO submitted, that while working out the same he had erroneously considered the costs at a gross level, as under:

Particulars	Assessee as per TPO	PLIs	
		OP/VAE	OP/TC
Sales/Operating Income (A)	10,928,389,995	11,602,964,757	11,429,051,634
AE Income	3,852,412,977	4,527,087,740	4,353,174,616
Non AE Income	7,075,877,018	7,075,877,018	7,075,877,018
Less: Cost of Operations (Direct Cost) – Constant	8,912,354,752	8,912,354,752	8,912,354,752
Less: Value Added Expenses (VAE) – Constant (B)	1,389,203,329	1,389,203,329	1,389,203,329
Total Cost (C)	10,301,558,081	10,301,558,081	10,301,558,081
Operating Profit (D)	626,831,914	1,301,406,676	1,127,493,553.06
OP/TC (D/C)	6.08%		10.94%
OP/VAE (D/B)	45.12%	93.68%	
Arm's Length Price		4,527,087,740	4,353,174,616
Transaction Value		3,852,512,977	3,852,512,977
Difference – Adjustment		674,574,763	500,661,639

It was submitted by the Id. A.R, that the TPO for working out the TP adjustment was obligated to consider only the operating costs attributable to the AE sales. In support of his aforesaid contention the Id. A.R had relied on the judgments of the **Hon'ble High Court of Bombay** in the case of **CIT-8, Mumbai Vs. Tara Jewells Exports Pvt. Ltd. (2016) 381 ITR 404 (Bom)** and **CIT Vs. Thyssen Crup Industries India (P) Ltd. (2016) 231 ITR 413 (Bom)**. Relying on the aforesaid judicial pronouncements, it was submitted by the Id. A.R that the Hon'ble High Court while approving the view taken by the Tribunal, had observed, that the entire exercise of determining the ALP in accordance with Chapter X of the Act and in particular Section 92A & 92B of the Act, requires that the transfer pricing adjustment is to be done only in respect of the transactions entered into between the assessee with its AEs and not with the non-AEs. Accordingly, it was the claim of the Id. A.R, that now when the adjustment mandated in terms of Chapter X is only in respect of the international transactions and not the transactions entered into by the assessee with independent unrelated third parties, therefore, the TPO was in error in computing the TP adjustment by adopting the total operating cost instead of the operating costs attributable to the AE sales. It was averred by the Id. A.R that if the TP adjustment is worked

out in respect of the AE sales after considering the operating costs attributable to such AE sales, then the same would work out as under :

Particulars	Non AE	AE	Total	ALP – AE
Sales	7,075,877,018	3,852,512,977	10,928,389,995	4,029,007,910
Costs proportionate to the sales	6,670,018,009	3,631,540,072	10,301,558,081	3,631,540,072
OP	405,859,009	220,972,905	626,831,914	397,467,838
OP/TC	6.08%	6.08%	6.08%	10.94%
ALP				4,029,007,910
TV				3,852,512,977
Difference				176,494,933
5% of TV				192,625,648

On the basis of his aforesaid submissions, it was the claim of the Id. A.R that the working of the TP adjustment in respect of the AE sales after considering the 'operating costs' attributable to such sales would be within the safe harbour range of +/- 5% and no TP adjustment would be called for in the hands of the assessee.

26. Per contra, the Id. D.R did not controvert the aforesaid contentions advanced by the counsel for the assessee. At the same time, it was averred by the Id. D.R that the aforesaid claim of the assessee could not be summarily accepted and would require to be verified on the part of the A.O/TPO.

27. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them in context of the issue under consideration. Admittedly, a TP adjustment envisaged in Chapter X is only in respect of the international transactions of the assessee and cannot be extended to the transactions entered into by the assessee with the independent unrelated third parties. Insofar the aforesaid settled position of law as had been so canvassed by the Id. A.R before us is concerned, we are persuaded to be in agreement with the same. In fact, we find that the **Hon'ble High Court of Bombay** in the case of **CIT-8, Mumbai Vs. Tara Jewells Export (P) Ltd. (2016) 381 ITR 404 (Bom)** and **CIT Vs. Thyssen Crup Industries India Pvt. Ltd. (2016) 381 ITR 413 (Bom)**, had clearly observed, that in terms of Chapter X of the Act the TP adjustment is mandated only in respect of International

transactions and not the transactions entered into by the assessee with independent unrelated parties. In fact, we find that in case if a TP adjustment is allowed in respect of transactions entered into by the assessee with unrelated third parties then the same would result into increasing of the profit in respect of such independent transactions which would be beyond the scope and ambit of Chapter X of the Act. Apparently, the claim of the Id. A.R that the TPO had wrongly worked out the TP adjustment in respect of the AE transactions by considering the total operating costs instead of the operating costs attributable to the AE sales prima facie is found to be correct. However, we are of the considered view that the claim of the Id. A.R that the TP adjustment worked out in respect of the AE sales of the assessee after considering the operating cost attributable to the same would be within the safe harbour range of +/- 5% of the ALP and no adjustment would be called for in its hands cannot be summarily accepted and would require verification on the part of the A.O/TPO. Accordingly, in all fairness, we restore the matter to the file of the A.O/TPO for the limited purpose of verifying the veracity of the aforesaid claim of the assessee. In case, the claim of the assessee that the TP adjustment worked out in respect of the AE sales of the assessee after considering the operating cost attributable to the same is found to be within the safe harbour range of +/- 5% of the ALP then no adjustment shall be called for in the hands of the assessee. **Grounds of appeal Nos. 1 r.w 3.11** are allowed in terms of our aforesaid observations.

28. We shall now advert to the claim of the Id. A.R, wherein he had advocated the use of multiple year data by the assessee in its TP study report for benchmarking the international transactions. As observed by us hereinabove, the assessee for the purpose of benchmarking its international transactions had adopted multiple year data, for the reason, that by so doing it would ensure that the annual fluctuations are ironed out and the data so available would be more reliable. However, we are unable to persuade ourselves to subscribe to the aforesaid claim of the assessee. As per Rule 10B(4) of the Income Tax Rules, 1962, the data to be used for analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into. Only exception to the aforesaid rule as had been carved out in the *proviso* to Rule 10B(4) is that the data relating to a period of not being more than two years prior to such financial year may be used, if such data reveals facts which could have an influence on the determination of transfer prices in relation to the transactions being compared. We find that the

assessee had not been able to bring its case within the sweep of the aforesaid *proviso* to Rule 10B(4). In our considered view, the TPO/DRP had rightly concluded that as per Rule 10B(4) of the Income Tax Rules, it is only the data of the relevant year which is to be considered for the purpose of analysing the comparability of an uncontrolled transaction with an international transaction. Our aforesaid view is fortified by the order of the **ITAT, Delhi** in the case of **Actis Advisors (P) Ltd. Vs. Dy. CIT (2012) 34 CCH 40 (Del-Trib)** and the orders of **ITAT, Mumbai** in the case of **Symantec Software Solutions (P) Ltd. vs. ACIT (2011) 46 SOT 48 (Mum)** and **Lionbridge Technologies Pvt. Ltd. Vs. Dy. CIT (2012) 137 ITD 197 (Mum)**. Accordingly, in the backdrop of our aforesaid observations we approve the view taken by the TPO/DRP as regards usage of the current year data for benchmarking of the international transactions of the assessee. Resultantly, the aforesaid claim of the assessee is dismissed. **Ground of appeal No. 3.6** is dismissed.

29. We shall now advert to the alternative claim of the Id. A.R, that in case if the PLI of OP/VAE as adopted by the assessee was not to be accepted, then the grossing up of the pass through costs as mentioned in 'Note 9(a)' of the financial statements of the assessee viz. (i) custom duty (Rs.222.54 crores); (ii) third party charges (Rs.103.89 crores); and (iii) inbound freight (Rs.436.79 crores), which not being the costs of the assessee may therein be excluded while working out the PLI of OP/TC. On a perusal of the order of the DRP, we find that it had after upholding the rejection by the TPO of PLI of OP/VAE and substituting of the same by PLI of OP/TC, had after observing that as the segmental financial information was not provided by the assessee, directed the AO/TPO to compute the margins of the assessee as well as the comparable companies by excluding employee costs and other administrative costs. Also, the DRP had directed the AO/TPO to gross up to revenue/cost by an amount of Rs.763.23 crores in respect of viz. (i) freight on inbound shipments; (ii) custom duty; and (iii) other third party port related charges recoverable by the assessee. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the aforesaid issue under consideration. As can be gathered from a perusal of the letter dated 16.08.2013 that was filed by the assessee with the TPO (Page 294 of 'APB') [Copy of the said 'Segmental analysis' filed by the assessee with TPO had also separately been furnished with us], we find, that the assessee had provided the complete segmental financial information in respect of both of its segments viz. (i). DHL Global Forwarding Segment

('DGF'); and (ii). DHL Supply Chain Segment ('DSC') with the TPO. In fact, the TPO had accepted the aforesaid segmental information of the assessee and had considered only the 'DGF' segment for determining the arm's length price of its international transactions. In our considered view, as the segmental information was accepted by the TPO and the same was not the subject matter of dispute before the DRP, therefore, in the backdrop of the fact that the segmental accounts alongwith the accounts formed part of the submissions filed by the assessee with the TPO, the DRP was in error in not considering the said segmental information while passing the order. In fact, the DRP had absolutely proceeded with on the wrong premises that the aforesaid information was not provided by the assessee. As can be gathered from the records, not only the DRP had failed to consider the segmental information as was provided by the assessee with the TPO, but in fact had never raised the issue as regards the segmental accounts in the course of the proceedings before it. Rather, we are in agreement with the contentions advanced by the Id. A.R that now when the DRP as per the mandate of Sec. 144C(6)(e) while issuing the direction was obligated to consider the records relating to the 'draft order', therefore, it was incorrect on its part to have drawn adverse inferences as regards the segmental information of the assessee company bypassing the fact that the complete details as regards the same formed part of the record of the A.O. Be that as it may, in our considered view, as we have upheld the adoption of PLI of OP/VAE by the assessee, therefore, we refrain from advert to and therein adjudicating upon the observations of the DRP which have been recorded while upholding the adoption of PLI of OP/TC by the TPO. **Grounds of appeal Nos. 1, 2, 3, 3.3, 3.4, 3.5** and the **additional 'ground of appeal'** are disposed off in terms of our aforesaid observations.

30. We shall now advert to the inclusion/exclusion of comparables by the TPO/DRP, as under: .

(i) Sindhu Cargo Ltd. & Hindustan Cargo Ltd :

(a). As observed by us hereinabove, the TPO had declined the seeking of inclusion of the aforesaid company by the assessee in the final list of comparables. Observing, that the aforesaid companies were not identified by the assessee during the search process, therefore, the TPO holding a conviction that the assessee had resorted to cherry picking of comparables, had thus rejected its claim for considering the same for benchmarking purposes pertaining to the provision of logistic services. Aforesaid view of the TPO was thereafter upheld by the DRP.

We find that is the claim of the Id. A.R that the assessee in its TP study report had arrived at the comparable companies after using a methodical search process on the Capitaline & Prowess data bases. However, as the comparables that survived after applying a number of pre-defined filters i.e both quantitative (i.e system based) and qualitative (i.e manual based) filters/eliminations were less, therefore, the assessee in order to make the search process holistic and to get appropriate number of comparables had sought to include the aforesaid comparable companies which were selected by the TPO in its case in the previous year i.e A.Y 2007-08, and whose financial data was not available in the database but otherwise was available in the public domain. Accordingly, it was the claim of the Id. A.R, that as it had only included the aforesaid companies which were a part of the structured searches in its case in the preceding years, therefore, no cherry picking was resorted to on its part. On the other hand, the TPO was of the view, that now when the assessee had selected 4 comparables based on structured search which were sufficient to benchmark the international transactions, therefore, there was no justification for it to have selected the aforesaid companies as a comparable, despite the fact that they had not figured in its structured search. Also, it was averred by the Id. D.R that as every year is a separate year for income tax proceedings, therefore, the fact that the aforesaid companies were included in the final list of comparables by the TPO in A.Y. 2007-08, would not justify inclusion of the same in the list of comparables for the year under consideration. Apart therefrom, it was submitted by the Id. A.R that though the TPO had suggested inclusion of many other comparables but the assessee had not selected those and had rather cherry picked the aforesaid two companies as comparables, only for the reason that the average margin of the said comparables was within the limit of its arm's length.

(b). We have given a thoughtful consideration to the issue under consideration. Admittedly, as is discernible from the order of the TPO u/s 92CA(3), dated 15.10.2010 for A.Y 2007-08 in the assessee's own case, we find, that the assessee in its TP study report had included Hindustan Cargo Ltd. in the list of its comparables. On the basis of fresh search that was carried out by the assessee in the course of the TP proceedings, as per the directions of the TPO, Sindhu Cargo Services Limited was also included in the list of the comparables that was accepted by the TPO. At this stage, it would be relevant to observe that it is not the case of the TPO/DRP that either of the aforesaid company during the year under consideration was found

to be functionally incomparable to the assessee. In our considered view, as long as the claim of the Id. A.R that the aforesaid two companies were functionally comparable to the assessee company during the year under consideration is found to be in order, the data relating to the financial year of the said companies can safely be considered for determining the arm's length price of the international transactions of the assessee for the year under consideration. Accordingly, we restore the matter to the file of the A.O/TPO, who shall on being satisfied that the aforesaid two companies were functionally comparable to the assessee during the year under consideration, shall include the same in the final list of comparables. Needless to say, the A.O/TPO shall in the course of the 'set aside' proceedings afford a reasonable opportunity of being heard to the assessee, who shall provide the requisite details of the aforesaid companies in order to facilitate their functional analysis by the A.O/TPO. Also, the assessee would remain at a liberty to substantiate the functional comparability of the aforesaid two companies with the assessee company during the year under consideration.

(ii) Shreyas Relay Systems Ltd.:

(a). It was observed by the TPO that the aforesaid company was consistently selected by the assessee as a comparable for financial year 2007-08 onwards. However, the assessee had sought the exclusion of the aforesaid company as a comparable, for the reason, that unlike the assessee it owned transportation assets. Rebutting the aforesaid claim of the assessee, it was observed by the TPO that as could be gathered from the 'annual report' of the aforesaid company for financial years 2008-09 and 2009-10, the composition of its assets had remained the same. In fact, it was noticed by the TPO that the assets of the aforesaid company were more in financial year 2008-09 as in comparison to the year under consideration i.e financial year 2009-10. Apart therefrom, the TPO was of the view, that the operations as well as the background of the aforesaid company during the year had remained the same as in the last two preceding years. Accordingly, the seeking of exclusion of the aforesaid company as a comparable by the assessee was declined by the TPO. Also, the claim of the assessee that the comparability analysis should be carried out on the basis of direct cost to total cost ratio was also rejected by the TPO. Insofar the claim of the assessee that the aforesaid company was having super profit, it was observed by the TPO that merely for the said reason the same could not have been held to be inappropriate for comparability analysis. It was observed by the TPO,

that it was only where the assessee could show that there were exceptional events or circumstances leading to higher than normal profit that the exclusion of a company as a comparable on the ground that it was having super profit could be accepted. Apart therefrom, it was observed by the TPO that as the OP/TC of the aforesaid company was near about normal margin range, therefore, the claim of the assessee that it was earning any super profit stood negated. Rather, the TPO was of the view that as the aforesaid company in the last two years had been making either loss or showing meagre profits, therefore, the assessee had taken it as a comparable, but when the said company had made break even it was sought to be rejected as a comparable by the assessee. On the basis of his aforesaid deliberations the TPO had declined to accept the claim of the assessee that the aforesaid company be excluded as a comparable for benchmarking its international transactions.

(b). We have deliberated at length and are persuaded to subscribe to the claim of the Id. A.R that the aforesaid company could not be selected as a comparable for benchmarking the international transactions of the assessee. Admittedly, the aforesaid company was selected by the assessee in its TP study report, but then as observed by us hereinabove, an assessee cannot be barred in law from withdrawing from its list of comparables, a company, which had either been included on account of a mistake on facts or is not found to be comparable. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **The Commissioner of Income-tax-7 Vs. M/s Tata Power Solar Systems Ltd. (2017) 245 Taxman 93 (Bom)** and **Pr. CIT Vs. J.P Morgan India Pvt. Ltd. (ITA No. 912 of 2016, dated 14.01.2019)(Bom)**. It is in the backdrop of our aforesaid conviction, that we shall deliberate upon the aspect as to how the aforesaid company could not have been feasibly selected as a comparable for determining the arm's length price of the international transactions of the assessee for the year under consideration. On a perusal of the financial results of the aforesaid company, it stands proved beyond doubt that its profitability was significantly fluctuating in the past years, which fact on a standalone basis in our considered view would not render the said company as unfit for being selected as a comparable for benchmarking the international transactions of the assessee for the year under consideration. For the sake of clarity, the trends of the margin movements of the aforesaid company during the year are culled out as under:

OP/VAE	F.Y 07-08	F.Y 08-09	F.Y 09-10	F.Y 10-11	F.Y 11-12
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Shreyas Relay System Limited	0.61%	-37.82%	148.22%	123.28%	46.24%
OP/TC	F.Y 07-08	F.Y 08-09	F.Y 09-10	F.Y 10-11	F.Y 11-12
Shreyas Relay System Limited	0.06%	-5.03%	8.59%	5.83%	2.90%

In the backdrop of the aforesaid facts and figures, we are in agreement with the claim of the Id. A.R, that the aforesaid company had over the years experienced a significant fluctuation in its margins, which is spread over from negative margins to exceptionally high margins, and thereafter is witnessed by steep reduction of the same. As such, we find substantial force in the claim of the Id. A.R, that the aforesaid company cannot be said to represent the normal margins earned by the players in the industry. In fact, we would not hesitate to observe that as the financial results of the aforesaid company indicate an abnormality in its operational behaviour, therefore, the same on the said count itself cannot be safely considered as a comparable for determining the arm's length of the international transactions of the assessee for the year under consideration. Our aforesaid view that a company witnessing significant fluctuating margins over the years cannot be adopted as a comparable is supported by the order of the **ITAT, Ahmedabad in Allscripts (India) P. Ltd. Vs. Dy. CIT, Circle 1(1), Baroda [ITA No. 771/Ahd/2014]**.

(c). Apart therefrom, we find that the aforesaid company is found to be functionally different as in comparison to the assessee company. On a perusal of the financial data of the aforesaid company for the year under consideration, we find, that the said company has significant asset base in the form of containers and trailers. For the sake of clarity, the extract of the 'Fixed assets' schedule of the aforesaid company is reproduced as under :

Description	Gross Block				Depreciation				Net Block	
	Cost as at 01.04.2009	Additions	Deductions /Adjustments	Cost as at 31.03.2010	AS at 01.04.2010	For the year	Deductions /Adjustments	As at 31.03.2010	As at 31.03.2010	As at 31.03.2009
Containers	167,691,2009	-	2,675,220	165,016,661	19,461,901	7,905,126	19,654	27,347,373	137,669,288	148,229,980
Furniture & Fixture	1,423,640	106,882	90,479	1,440,043	763,828	52,489	47,289	769,028	671,015	659,812
Computers	1,730,427	94,647	9,050	1,816,024	497,462	293,194	2,007	788,649	1,027,375	659,812
Office Equipments	905,521	276,692	64,490	1,117,723	122,971	48,897	7,880	163,988	953,735	782,550
Trailer (vehicles)	2,332,268	-	-	2,332,268	985,823	492,883	-	1,478,706	853,562	1,346,445
Motor Vehicles	-	46,596	-	46,596	-	2,814	-	2,814	43,782	-
Total as	174,083,737	524,817	2,839,239	171,769,315	21,831,985	8,795,403	76,830	30,550,558	141,218,757	152,251,752

on 31.03.2010										
Total as on 31.03.2009	167,155,974	14,343,860	7,416,097	174,083,737	12,942,339	9,783,556	893,910	21,831,985	152,251,752	

As is discernible from the aforesaid facts and figures, we find, that out of 'total assets' of Rs. 15.25 crores of the aforesaid company, the containers and trailers account for Rs. 14.95 crores. In other words, the containers and trailers of the aforesaid company comprise 98% of its total assets. Now, insofar the assessee company is concerned, we find, that it does not own significant assets. As such, on the basis of the aforesaid facts, it can safely be concluded that the aforesaid company which unlike the assessee company has a significant asset base cannot be adopted as a comparable for benchmarking the international transactions of the assessee. In fact, we find, that as claimed by the assessee, the aforesaid company had been rejected as a comparable by the DRP in the immediately succeeding year viz. A.Y 2011-12. On the basis of our aforesaid observations, we are of the considered view that the aforesaid company viz. M/s Shreyas Relay Systems Limited could not be selected as a comparable for determining the arm's length price of the international transactions of the assessee. Accordingly, we direct the A.O/TPO to exclude the said company from the final list of the comparables for the purpose of benchmarking the international transactions of the assessee company for the year under consideration.

(iii) Om Logistics Ltd:

(a). It was the claim of the assessee that as the aforesaid company owned transportation assets and had started warehousing business, therefore, it could not have been selected as a comparable to the assessee. However, the TPO had observed that the 'annual report' of the aforesaid company for financial year 2008-09 and financial year 2009-10 revealed that its composition of assets had remained the same. In fact, it was observed by the TPO that in financial year 2008-09 the assets of the aforesaid company were more than those during the year under consideration i.e financial year 2009-10. Also, it was observed by the TPO that the operations as well as the background of the aforesaid company had remained the same as in the last two preceding years. Accordingly, on the basis of his aforesaid observations the aforesaid claim of the assessee was rejected by the TPO. As regards the claim of the assessee

that the aforesaid company was having super profit, it was observed by the TPO that merely for the said reason the same could not be rejected as a comparable. In fact, the TPO had observed that for rejecting a company as a comparable, for the reason, that it had shown super profit, it has to be shown by the assessee that there were exceptional events or situation leading to higher than the normal profits in the case of such comparable. Accordingly, it was observed by the TPO that as no such exceptional circumstances or events had been shown by the assessee, therefore, the plea of the assessee that the aforesaid company be rejected as a comparable did not merit acceptance. Apart therefrom, it was observed by the TPO that as the OP/TC margin of the company was ranging from 9.76% to 17.37%, and in fact the same had gone down to 14.46% in the next year, therefore, there was no pattern to suggest any abnormality in the profit of the assessee. On the basis of his aforesaid deliberations the TPO had declined to accept the claim of the assessee that the aforesaid company was to be excluded from the final list of comparables.

(b). Admittedly, the aforesaid company was selected by the assessee in its TP study report, but then as observed by us hereinabove, an assessee cannot be barred in law from withdrawing from its list of comparables a company, which had either been included on account of a mistake on facts or is not found to be comparable. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **The Commissioner of Income-tax-7 Vs. M/s Tata Power Solar Systems Ltd. (2017) 245 Taxman 93 (Bom)** and **Pr. CIT Vs. J.P Morgan India Pvt. Ltd. (ITA No. 912 of 2016, dated 14.01.2019)(Bom)**. It is in the backdrop of our aforesaid conviction, that we shall deliberate upon the aspect as to how the aforesaid company could not have been feasibly selected as a comparable for determining the arm's length price of its international transactions for the year under consideration. On a perusal of the 'annual report' of the aforesaid company for the year under consideration viz. F.Y 2009-10, we find, that unlike the assessee company it has a significant asset base. For the sake of clarity, the 'Fixed asset' schedule of the aforesaid company for the F.Y 2009-10 is reproduced as under:

"Schedule 5: Fixed assets

Land	4,377.42	231.16	-	4,808.58	-	-	-	-	4,608.58	4,377.42
Building	3,739.99	909.10	-	4,649.09	89.90	69.45	-	159.35	4,489.74	3,850.09
Plant and Machinery	359.32	95.34	14.14	440.52	58.18	20.50	7.11	71.57	368.95	301.14
Computer and	317.44	39.29	76.79	279.94	178.55	41.35	76.78	143.12	136.82	138.89

equipment										
Furniture and fixtures	241.06	12.80	7.53	246.33	29.32	15.54	4.05	40.81	205.52	211.74
Leasehold Improvement	96.21	114.48	-	210.69	5.31	24.77	-	30.08	180.81	90.90
Vehicles	1,823.15	121.89	53.47	1,891.57	453.45	283.69	19.56	717.59	1,173.98	1,389.70
Previous Year	1,984.59	1,524.08	151.93	12,328.72	814.71	455.30	107.49	1,162.52	11,164.20	10,138.88
	5,506.98	5,493.95	48.34	10,954.59	472.40	378.53	38.22	814.71	10,139.88	

Schedule 6: Intangible assets

Computer Software	29.01	-	-	29.01	12.97	9.67	-	22.64	6.37	18.04
	29.01	-	-	29.01	12.97	9.57	-	22.64	6.37	16.04
Previous year	22.01	7.00	-	29.01	3.93	9.04	-	12.97	18.04	

Also, a perusal of the 'annual report' of the aforesaid company reveals that unlike the assessee it has various warehouses across the country and has increased the fleet of its vehicles. In order to fortify his aforesaid claim, the Id. A.R had drawn our attention to Page No. 7 of the 'annual report' of the aforesaid company, which reads as under :

"Strengthening the Infrastructure

As envisaged in the last report, Your company has taken various steps during the year to strengthen its infrastructure base across the country. We have successfully launched the warehouses at Jamalpur (Delhi NCR region), Sanad near Ahmedabad and Sriperambadur near Chennai and plan to setup more warehouses in near future at strategic locations throughout the country.

Your company also set up about 20 more branches at strategic locations. Further the fleet strength owned by the company was also increased to smoothen the operational activities."

As observed by us hereinabove, as the assessee company is not an asset owning company, therefore, the aforesaid company viz. M/s Om Logistics Limited which has a significant asset base, thus being functionally different could not have been feasibly selected as a comparable for the purpose of determining the arm's length price of its international transactions for the year under consideration. Accordingly, we direct the A.O/TPO to exclude the aforesaid company from the final list of comparables for the purpose of benchmarking its international transactions for the year under consideration.

31. In terms of our aforesaid observations, we herein direct the A.O/TPO to include/exclude the aforesaid companies from the final list of comparables for the purpose of benchmarking its international transactions for the year under consideration. **Grounds of appeal Nos. 3.7 to 3.10** are allowed in terms of our aforesaid observations.

32. We shall now advert to the claim of the assessee that the A.O/DRP had erred in disallowing the assessee's claim for 'depreciation' of Rs. 22,36,07,813/- on the intangible assets (i.e goodwill). Briefly stated, the assessee i.e DHL Lemuir Logistics Pvt. Ltd. (DLLPL), presently known as DHL Logistics Pvt. Ltd., had as on 01.05.2007 purchased the business of customs clearance, warehousing and distribution of general cargo from Lee & Muirhead Pvt. Ltd. on a slump sale basis as per the terms of a 'Business Transfer Agreement', dated 04.04.2007. As per the arrangement, the assessee had taken over all the assets and liabilities of the aforesaid business on a going concern basis. As per the terms of the 'transfer agreement' a lump sum amount of Rs.181.50 crores (equivalent to Euros 32,562,000/-) was agreed as the purchase consideration for the transfer of business. As per the audited financial statements for the year ended March 31, 2008, the total purchase consideration of Rs.181.50 crores was apportioned to 'Movable assets' and 'Net current assets'. Movable assets were valued at Rs.3.67 crores, which in turn were apportioned over various 'fixed assets' based on the independent valuers report, dated 01.05.2007. On the other hand, the 'Net current assets' were valued at Rs.14.22 crores as per the details provided by the aforesaid transferor i.e Lee & Muirhead Pvt. Ltd. The difference of Rs.163.61 crores between the total purchase consideration of Rs.181.50 crores and the value apportioned to fixed assets of Rs.3.67 crores and Net current assets of Rs.14.22 crores was recognised by the assessee company as 'goodwill' in its 'books of accounts'. Accordingly, the amount of goodwill (which consisted of various components such as right to use trade name, contracts and customers relationships etc.) was recorded in the books of assessee at Rs.163.61 crores.

33. Assessee in its return of income for A.Y. 2008-09 had not claimed any depreciation on the aforesaid amount of goodwill of Rs.163.61 crores. However, the assessee had thereafter obtained the 'valuation report' dated 29.07.2011, which therein set out the individual valuation of the specified components/intangibles (included in the goodwill of Rs.163.61 crores), which formed part of the total consideration that was paid by the assessee for the business purchased from Lee & Muirhead Pvt. Ltd. As per the valuation report the following intangibles formed part of the goodwill of Rs.163.61 crores :

- (a) Contract and Customers Relationship:Rs.33.76 crores
- (b) Right to use trade name: Rs.13.60 crores
- (c) Work force: Rs.4.60 crores
- (d) Residual category including goodwill favourable lease contracts etc: Rs.111.71 crores.

On the basis of the aforesaid details the assessee company filed its 'revised' computation of income for A.Y. 2008-09, wherein it raised two fold claim in respect of the amount of goodwill (which consisted of various components such as right to use trade name, contract and customers relationship etc) viz. (i) that, the 'Work force' of Lee & Muirhead Pvt. Ltd. of Rs.4.60 crores was claimed as a revenue expenditure; and (ii) that, claim for depreciation of Rs.39.75 crores i.e @ 25% on the other intangible of Rs.159.01 crores was raised.. Also, the assessee after filing the revised computation of income for A.Y. 2008-09, thereafter revised its return of income for subsequent years i.e for A.Y. 2009-10 and A.Y. 2010-11, wherein on a similar footing it had raised its claim for depreciation on goodwill comprising of intangible assets.

34. As the assessee company had claimed depreciation on the total cost incurred towards intangible assets of Rs.159.01 crores viz .(i) in A.Y. 2008-09 (on the basis of a revised computation of income) : Rs.39,75,25,000/-; and (ii) in A.Y. 2009-10 (by filing a revised return of income): Rs.29,81,43,750/-, therefore, on the balance WDV as on 31.03.2010 of Rs.89,44,31,250/- it had claimed depreciation of Rs.22,36,07,813/- during the year under consideration i.e A.Y. 2010-11.

35. In the course of the assessment proceedings, the A.O called upon the assessee to justify the allowability of its claim of depreciation of Rs.22,36,07,813/- in respect of intangible assets (i.e goodwill) that was claimed by it in its revised 'return of income' filed on 14.11.2011. However, the reply of the assessee in support of its claim of depreciation on intangible assets (i.e goodwill) did not find favour with the A.O. The A.O was of the view that though "goodwill" is an intangible asset, but as the same was not of a similar nature as that of knowhow, patent, copyright, trademarks, license, and franchises, therefore, it was not eligible for depreciation. On the basis of his aforesaid deliberations the A.O declined the assessee's claim for depreciation of Rs.22,36,07,813/- on goodwill. At the time of declining of the aforesaid claim for depreciation on goodwill, it was observed by the A.O, that a similar view was taken by his predecessor in the assessee's own case for A.Y. 2008-09, and the appeal on the said issue was pending before the CIT(A). Accordingly, it was observed by the A.O that in order to keep the issue alive and for the sake of consistency insofar the departmental stand was concerned, the aforesaid claim of depreciation on goodwill of Rs.22,36,07,813/- raised by the assessee by filing a revised return of income was liable to be disallowed.

36. On objection filed by the assessee before the DRP, the latter observed that as the 'goodwill' and intangible were not recorded in the books of the assessee separately as asset, therefore, since their value was arbitrary and in fact indeterminate, the assessee's claim for depreciation on the same would not be admissible.

37. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the orders/judicial pronouncements relied upon by them in context of the aforesaid issue under consideration. As observed by us hereinabove, the assessee under identical circumstances had raised its claim for depreciation on the aforesaid intangibles (i.e goodwill) in A.Y. 2008-09 (on the basis of a revised computation of income) and in A.Y. 2009-10 (on the basis of a revised 'return of income'). As the assessee had raised its claim for depreciation on intangibles (i.e goodwill) on the basis of a revised computation of income in A.Y. 2008-09, therefore, the A.O had declined the same, for the reason, that that in the backdrop of the judgment of the **Hon'ble Supreme Court** in the case of **Goetze India Ltd. Vs. CIT (2006) 284 ITR 323 (SC)** the assessee was not entitled for raising of such fresh claim on the basis of a revised computation. On appeal, the CIT(A) allowed the assessee's claim for depreciation on the intangible assets (i.e goodwill). Further, the Tribunal while disposing off the appeal of the revenue for A.Y 2008-09, vide its order i.e **Dy. CIT (OSD), Range-8(1), Mumbai, s. M/s DHL Lamuir Logistics Pvt. Ltd. (ITA No.6762/Mum/2013, dated 24.08.2016)**, had relied on the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Smifs Securities Ltd. (2012) 348 ITR 302 (SC)**, and upheld the view taken by the CIT(A). Observing, that the Hon'ble Supreme Court in *Smifs Securities Ltd.* (supra) had concluded that as goodwill was an intangible asset under Sec.32, therefore, the same was eligible for claim of depreciation, it was held by the Tribunal that the aforesaid issue was no more res integra. In fact, the Tribunal while observing that the assessee was duly entitled for claim of depreciation on intangibles (i.e goodwill) under Sec.32 of the Act, had observed as under:

"12. Having held so, now we have to consider whether goodwill is an intangible asset under section 32, hence, eligible for claim of depreciation. In our view, this issue is no more res integra in view of the decision of Hon'ble Supreme Court in *Smifs Securities Ltd.* (supra) where the Hon'ble Supreme Court has held that goodwill is in the nature of any other business or commercial rights as provided under Explanation-3(b) of section 32(i) r/w section 32(1)(ii). The other decisions of the Tribunal relied upon by learned Authorised Representative also express similar view. Therefore, respectfully following the ratio

laid down in the decision referred to above, we uphold the order of the learned Commissioner (Appeals) on the issue. Accordingly, grounds raised by the Department are dismissed.”

Further, the Tribunal while disposing off the appeal of the revenue for A.Y. 2009-10 i.e Dy. CIT 9(3)(4), Mumbai Vs. M/s DHL Lemuir Logistics Pvt .Ltd. (ITA No.2146/Mum/2015, dated 25.07.2016) had followed the view earlier taken by it in context of the issue under consideration in the assessee's own case for A.Y 2009-09. Accordingly, it was observed by the Tribunal that the assessee was duly entitled for claim of depreciation on the intangibles (i.e Goodwill) as was so raised by it in its revised 'return of income' for A.Y. 2009-10. Apart therefrom, we find that the Tribunal while disposing off the appeal of the assessee for A.Y 2012-13, had relied on its earlier view taken in the assessee's own case for A.Y 2008-09, ITA No. 6272/Mum/2013, dated 24.08.2016 and A.Y 2009-10, ITA No. 2146/Mum/2015, dated 25.07.2016, and had concluded that the assessee's claim for depreciation on intangibles (i.e goodwill) was in order.

38. We find that the issue as regards the entitlement of the assessee towards claim of depreciation on intangible (i.e goodwill) is squarely covered by the orders of the coordinate benches of the Tribunal in the assessee's own case for A.Y. 2008-09, A.Y. 2009-10 and A.Y 2012-13. Accordingly, finding no reason to take a different view, we respectfully follow the view taken by the Tribunal as regards the entitlement of the assessee towards claim for depreciation on intangibles (i.e goodwill) during the year under consideration i.e A.Y. 2010-11. On the basis of our aforesaid observations, the disallowance of depreciation on intangibles (i.e goodwill) of Rs.22,36,07,813/- made by the A.O/DRP is deleted. **Ground of appeal No. 5** is allowed in terms of our aforesaid observations.

39. We shall now advert to the grievance of the assessee that the TPO/DRP have erred in making/sustaining the TP adjustment of Rs.29,21,028/- in respect of its ITeS segment. As observed by us hereinabove, the assessee had provided services like invoicing, data entry, tariff management and also monitoring the goods in transit to its AE. As can be gathered from the orders of the lower authorities, the assessee had in its TP study report selected 15 comparables for the purpose of benchmarking the Information technology related support services. As per the TP study report, the assessee during the year had entered into the following international transactions with its AEs in respect of ITeS enabled services :

Nature of Services	Amount (Rs.)
IT Enabled Support services	87,24,774/-

Assessee had benchmarked the aforesaid international transactions by applying TNMM as the most appropriate method and had adopted PLI of OP/TC. Assessee had worked out its PLI at (-)14.66%, while for the weighted average margin of the comparables was worked out at 14.27%. However, the PLI of the aforesaid comparables was worked out by the assessee on the basis of weighted average margin of 3 years data. TPO after deliberating at length on the acceptance/rejection matrix adopted by the assessee had came up with certain additional filters or criteria for facilitating selection of proper comparables which would be functionally similar to the assessee. Observing, that the information as well as data used by the assessee for computing its arm's length price was not reliable and correct, the TPO had rejected the same and invoked the provision of Sec.92C(3)(c) for carrying out the comparability analysis. Finally, the TPO selected the following three comparables for benchmarking the ALP of the ITeS services provided by the assessee to its AEs :

Sr. No.	Name of the Company	OP/TC
1.	Cosmic Global Ltd.	14.97%
2.	Informed Technologies India Ltd.	26.15%
3.	Infosys BPO Ltd.	31.20%
	Average	24.11%

Applying the average mean PLI of 24.11% of the aforementioned comparables the TPO worked out a TP adjustment of Rs.29,21,028/-. As it was the claim of the assessee that it had voluntarily offered an adjustment of Rs.22,49,874/-, therefore, the TPO observed that the A.O shall verify the veracity of the aforesaid claim and in case if it was found correct then credit may be given for the same. Objections filed by the assessee in context of the TP adjustment as regards ITeS segment did not find favour with the DRP, who upheld the view taken by the TPO.

40. The assessee has assailed the TP adjustment made by the TPO/DRP in respect of the Information technology related support services provided by the assessee to its AEs during the year under consideration. Before us, the solitary ground raised by the Id. A.R is the exclusion of one of the comparables viz. Infosys BPO Ltd. from the final list of comparables. It is the claim of the Id. A.R that as the turnover of the aforesaid comparable i.e Infosys BPO Ltd. during the year was substantially high at an amount of Rs.1,126.64 crores vis-à-vis the assessee's turnover of the ITeS segment of Rs.0.87 crores, therefore, the same could not have been feasibly selected

as a comparable. Apart therefrom, it was submitted by the Id. A.R that the aforesaid company unlike the assessee owns significant brand value. Last but not the least, it was averred by the Id. A.R that as the aforesaid comparable i.e Infosys BPO Ltd. was a software development company, therefore, it being functionally incomparable to the assessee which was providing back end I.T support services to its AE, thus, could not have been selected as a comparable..

41. Per contra, the Id. D.R relied on the orders of the lower authorities. It was averred by the Id. D.R, that as the aforesaid company i.e Infosys BPO Limited was in itself selected as a comparable by the assessee in its TP study report, therefore, it was incorrect on its part to now seek exclusion of the same from the final list of the comparables.

42. Rebutting the aforesaid claim of the counsel for the revenue, it was submitted by the Id. A.R, that merely because the assessee had included a comparable in its TP study report which was accepted by the TPO would not mean that the assessee cannot resile from its original claim at a latter stage. In support of his aforesaid contention, the Id. A.R had relied on the certain judicial pronouncements viz. (i). **Quark Systems Privated Limited (ITA No. 100?Chd/2009 and ITA No. 115/Chd/2009)**; (ii). **A.M Tod Company India Pvt. Ltd. Vs ITO (ITA No. 492/Mum/2006)**; and (iii). **Alcatel Lucent Technologies Vs. DCIT (ITA No. 2297 & 2298/Del/2008)**.

43. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. We shall first deal with the objection of the Id. D.R that as the aforesaid company i.e Infosys BPO Limited (supra) was in itself selected as a comparable by the assessee in its TP study report, therefore, it was not permissible for it to thereafter seek exclusion of the same from the final list of the comparables. We have given a thoughtful consideration to the aforesaid contention of the Id. D.R and are unable to persuade ourselves to subscribe to the same. In our considered view, merely because an assessee had included a company in its list of comparables, it would not estop it from establishing thereafter that the said company was not a comparable. In fact, we are of the view, that an assessee cannot be barred in law from withdrawing from its list of comparables, a company, which had either been included on account of a mistake on facts or is not found to be comparable. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of

The Commissioner of Income-tax-7 Vs. M/s Tata Power Solar Systems Ltd. (2017) 245 Taxman 93 (Bom) and Pr. CIT Vs. J.P Morgan India Pvt. Ltd. (ITA No. 912 of 2016, dated 14.01.2019)(Bom). Accordingly, we are in agreement with the claim of the assessee that merely because it had selected Infosys BPO Ltd. as a comparable, it would not estop it from thereafter establishing that the said company was not a comparable.

44. We shall now take up the merits of the claim of the assessee on the basis of which it has sought exclusion of the aforesaid company viz. Infosys BPO Ltd. from the final list of comparables. We have given a thoughtful consideration and find substantial force in the claim of the assessee that the aforesaid company i.e Infosys BPO Ltd. could not have been feasibly taken as a comparable for benchmarking the IT enabled support services provided by the assessee to its AEs. As observed by us hereinabove, the fact that the turnover of the aforesaid comparable i.e Infosys BPO Ltd. during the year was Rs.1,126.64 crores, as in comparison to the turnover of Rs. 0.87 crores of the assessee ITeS i.e.1291 times to the turnover of the assessee in itself establishes that on the said count itself the said company could not have been selected as a comparable. Also, we are persuaded to subscribe to the claim of the Id. A.R, that as the aforesaid company unlike the assessee owned a brand value, therefore, the said aspect would also support his claim for exclusion of the said company from the final list of comparables. Apart therefrom, we find that the aforesaid company i.e Infosys BPO Ltd. is also not functionally comparable to the assessee. As observed by us hereinabove, while for the aforesaid company i.e Infosys BPO Ltd. operates as a software development company, the assessee on the other hand provides back end IT support services to its AEs. On the basis of the aforesaid observations, we are of a strong conviction that the aforesaid company i.e Infosys BPO Ltd. for the aforesaid reasons could not have been included in the final list of comparables for benchmarking the Information technology related support services provided by the assessee to its AEs during the year under consideration. Our aforesaid view is supported by various judicial pronouncements viz. **(i) Agnity India Pvt. Technologies Pvt. Ltd. (Delhi High Court) and ITA 1204/2011); (ii) Maersk Global Services (I) Pvt. Ltd. (ITA No. 3774/Mum/2011); and (iii) Tel Cordia Technologies India Pvt. Ltd. Vs. ACIT (ITA No.7821/Mum/2011).** Accordingly, in the backdrop of our aforesaid observations, we direct the A.O/TPO to exclude the aforesaid comparable i.e Infosys BPO Ltd. from the final list of comparables for the purpose of benchmarking the Information technology related support services provided by the assessee

to its AEs during the year under consideration. **Ground of appeal No. 4** is allowed in terms of our aforesaid observations.

45. The assessee had assailed the initiation of penalty proceedings u/s 271(1)(c) by way of ground of appeal No. 6. As the said grievance of the assessee is premature, therefore, the **Ground of appeal No. 6** is dismissed for the said reason.

46. As regards the claim of the assessee that interest under Sec. 234B be computed on the basis of the relief granted in the present appeal, the same being consequential in nature, the A.O is directed accordingly.

47. Resultantly, the appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 20/12/2019.

Sd/-
(M. Balaganesh)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 20.12.2019
PS. Rohit

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

