

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCING)

ITA No.5533/Del/2015 for A.Y. 2010-11  
ITA No. 778/Del/2016 for A.Y. 2011-12

Toll Global Forwarding India Pvt. Ltd., G-A, Ground Floor, Golf View Corporate Tower-A, Sector-42, Golf Course Road, Gurgaon, Haryana – 122 002	Vs.	DCIT Circle- 25 (2) New Delhi
PAN No. AACCD 1028 Q		
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh. Ravi Sharma, Adv.
Respondent by	Sh. Mritunjay Baranwal, Sr. D.R.

Date of hearing:	06/07/2020
Date of Pronouncement:	17/07/2020

**ORDER**

**PER ANIL CHATURVEDI, AM:**

These two appeals filed by the assessee are directed against the orders dated 26.12.2014 and 30.11.2015 of the Dy. Commissioner of Income Tax, Circle – 25(1) & 25(2), New Delhi

pursuant to the directions of DRP, relating to Assessment Years 2010-11 & 2011-12.

2. Before us, at the outset, Learned AR submitted that though the appeals of the Assessee are for two different assessment years but the issues in both the appeals are identical and the submissions made by him for both the years would be common and therefore, both the appeals can be heard together. The aforesaid submissions of the Learned AR were not controverted by the Learned DR. We therefore, for the sake of convenience proceed to dispose of both the appeals by a consolidated order but however proceed with the facts for A.Y. 2010-11.

3. The relevant facts as culled from the material on records are as under:

4. Assessee is a company which is stated to be engaged in the business of international freight forwarding and providing logistics support services. Assessee electronically filed its return of income for A.Y. 2010-11 on 11.10.2010 declaring loss of Rs.63,80,691/-. The case was selected for scrutiny and accordingly, notice u/s 143(2) and questionnaire u/s 142(1) of the Act was issued. On the basis of the details furnished by the assessee, it was noticed that during the relevant assessment year, assessee had entered into international transactions with Associated Enterprises (AE's). Accordingly a reference was made

to the Transfer Pricing Officer (TPO) u/s 92CA(3) to determine the Arms Length Price (ALP) in respect of "International transactions". TPO vide order dated 30.01.2014 passed u/s 92CA(3) recommended an upward adjustment to the income to the extent of Rs.3,00,29,592/- on account of transfer pricing adjustment by inter alia rejecting the CUP method followed by the Assessee to benchmark the international transactions and adopting TNMM method. On the basis of the findings of TPO, the additions were made by the AO in the draft assessment order dtd 26.2.2014 passed u/s 144(C) of the Act. Aggrieved by the draft assessment order, assessee carried the matter before the DRP who vide directions issued u/s 144C(5) dated 05.11.2014 directed the TPO/AO to modify the assessment order as per the directions given therein. The TPO vide letter dated 19.12.2014 communicated the transfer pricing adjustments in terms of DRP's directions at Rs 39,87,670 (the details of which are noted by the AO in para 6 of the order dtd 26.12.2014). AO thereafter, vide order dated 26.12.2014 passed u/s 143(3) r.w.s 144C(13) assessed the total loss at Rs.23,93,020/-. Aggrieved by the order of AO pursuant to the directions of DRP, assessee is now before us and has raised following grounds:

- “1. *The assessment order passed by the Learned Deputy Commissioner of Income Tax, Circle 25(2) ('Ld. AO') pursuant to the directions of Honorable Dispute Resolution Panel ('Hon'ble DRP') is bad in facts and law.*
2. *The Ld. AO (following the directions of the Hon'ble DRP), erred on facts and in law, in reducing the loss claimed by the Appellant by Rs. 39,87,670 Crores on account of transfer pricing ('TP') adjustment u/s 92CA(3) of the Income Tax Act, 1961 ('Act') made by the Learned Deputy Director of Income-tax, Transfer Pricing Officer - II(7) ('Ld. TPO'), by*

*holding that the international transactions of provision / receipt of freight forwarding services to / from associated enterprises ('AEs') by the appellant during the relevant assessment year do not satisfy the arm's length principle envisaged under the Act and in doing so grossly erred in:*

- 2.1 not appreciating that none of the conditions set out in section 920(3) of the Act are satisfied in the instant case before proceeding to determine the arm's length price ("ALP") himself;*
  - 2.2 rejecting the economic analysis undertaken by the Appellant in its Transfer Pricing ("TP") Documentation for the year (maintained u/s 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 ("Rules")), considering Comparable Uncontrolled Price ("CUP") method as the most appropriate method to benchmark its international transactions with AEs without any cogent reasons, evidence, or basis whatsoever, and selecting the Transactional Net Margin Method ("TNMM") instead;*
  - 2.3 not appreciating that the pricing basis followed by the Appellant in respect of its international transactions of import/ export of freight forwarding services from/ to AEs is in line with well accepted/ prevalent business models followed in the global/ Indian freight forwarding industry by independent freight forwarding companies; and*
  - 2.4 not appreciating/ taking cognizance of the evidentiary documents submitted by the Appellant during the TP audit proceedings, to establish that the pricing basis followed by it in respect of its international transactions of import/ export of freight forwarding services from/ to AEs is same/ similar to the pricing basis followed by it while transacting with third parties for similar services.*
- 3. The Ld. AO (following the directions of the Hon'ble DRP) erred on facts and in law, by rejecting CUP as the most appropriate method and instead selecting the TNMM as most appropriate method and in doing so have, grossly erred in.*
- 3.1 not appreciating that the Appellant is operating as an independent service provider assuming entrepreneurial risks and its corresponding returns may be volatile depending upon various market factors and that the application of TNMM in such a case would not be most appropriate;*
  - 3.2 disregarding the ALP as determined by the Appellant in the fresh search sought by the Ld. TPO, and instead conducting a fresh*

*comparability analysis himself based on certain erroneous additional/ modified filters in determining the ALP for the Appellant's international transactions of import/ export of freight forwarding services from/ to AEs;*

- 3.3 considering the current year (i.e. FY 2010-11) data for comparability analysis despite the fact that such data was not available to the Appellant at the time of preparing its TP documentation report for the year;*
- 3.4 not appreciating the Functional-Asset-Risk ("FAR") profile of the Appellant and benchmarking the Appellant against companies which were not at all comparable to the Appellant in terms of their FAR profiles; and*
- 4. The Ld. AO (following the directions of the Hon'ble DRP), erred on facts and in law, in disregarding the various submissions and documentary evidences filed by the appellant during the course of the DRP proceedings to establish the arm's length nature of its pricing model for the international transactions of provision / receipt of freight forwarding services to / from AEs.*
- 5. The Hon'ble DRP and the Ld. AO (following the directions of the Hon'ble DRP), erred on facts and in law, in upholding the Ld. TPO's stand of considering other income as operating item while computing operating margin of the companies used as comparable by Ld. TPO.*
- 6. Without prejudice and notwithstanding the above grounds, the application of 'Other method in view of judgement in Appellant's own case for Assessment year 2006-07 and 2007-08 should be considered wherein the Hon'ble ITAT:*
  - 6.1 accepted the use of 'Other Method' as enumerated in Rule 10AB of Income Tax Rules, 1962;*
  - 6.2 held that the pricing basis followed by Appellant in respect of its international transactions of import/ export of freight forwarding services com similar to the pricing basis followed by it while transacting with third p services and as per industry norms.*

## **7. Other Grounds**

- 7.1 On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying penalty under section 271AA and 271(1)(c) read with section 274 of the Act.*

*That the above grounds of appeal are without prejudice to each other.*

*That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal”*

5. Similar grounds have been raised by the Assessee for AY 2011-12 which reads as under:

*“1. The Ld. Deputy Commissioner of Income-tax (‘Ld. AO’) / Transfer Pricing Officer (TPO) pursuant to directions of the Hon’ble Dispute Resolution Panel (‘DRP’) have erred in facts and in law in enhancing the income of Appellant by INR 1,12,05,372/-.*

*2. The Ld. AO / DRP erred in ignoring the favorable decision of the Hon’ble Income Tax Appellate Tribunal (ITAT) in Appellant’s own case for Assessment year 2006-07 and 2007-08, which was subsequently upheld by the Hon’ble High Court (‘HC’) by dismissing the appeal made by the department, wherein the Hon’ble ITAT:*

*2.1. accepted the use of ‘Other Method’ as enumerated in Rule 10AB of Income Tax Rules, 1962;*

*2.2. held that the pricing basis followed by Appellant in respect of its international transactions of import/ export of freight forwarding services from/ to AEs is same/ similar to the pricing basis followed by it while transacting with third parties for similar services and as per industry norms.*

*3. The Ld. AO (following the directions of the Hon’ble DRP), erred on facts and in law, in enhancing the returned income of the Appellant Rs. 1,12,05,372/- on account of transfer pricing (‘TP’) adjustment u/s 92CA(3) of the Income-tax Act, 1961 (‘Act’) made by the Learned Deputy Commissioner of Income-tax, Transfer Pricing Officer-III(1)(1) (‘Ld. TPO’), by holding that the international transactions of import/ export of freight forwarding services from/ to associated enterprises (AEs) during the year do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred in:*

*3.1 not appreciating that none of the conditions set out in section 92CC3) of the Act are satisfied in the instant case before proceeding to determine the arm’s length price (‘ALP’) himself;*

*3.2 rejecting the economic analysis undertaken by the Appellant in its*

*TP Documentation for the relevant previous year, which specified Comparable Uncontrolled Price ("CUP") method as the most appropriate method ("MAM"), without any cogent reasons, evidence, or basis whatsoever and, instead selecting the Transactional Net Margin Method ("TNMM");*

*3.3 not appreciating that the pricing basis followed by the Appellant in respect of its international transactions of import/ export of freight forwarding services from/ to AEs is in line with well accepted/ prevalent business models followed in the global/ Indian freight forwarding industry by independent freight forwarding companies; and;*

*3.4 not appreciating/ taking cognizance of the evidentiary documents submitted by the Appellant during the TP audit / DRP proceedings, to establish that the pricing basis followed by it in respect of its international transactions of import/ export of freight forwarding services from/ to AEs is same/ similar to the pricing basis followed by it while transacting with third parties for similar services.*

*4. The Ld. AO (following the directions of the Hon'ble DRP) erred on facts and in law, selecting the TNMM as most appropriate method and in doing so have grossly erred in.*

*4.1 not appreciating that the Appellant is operating as an independent service provider assuming entrepreneurial risks and its corresponding returns may be volatile depending upon various market factors and that the application of TNMM in such a case would not be most appropriate;*

*4.2 disregarding the ALP as determined by the Appellant in the fresh search sought by the Ld. TPO, and instead conducting a fresh comparability analysis himself based on certain erroneous additional/ modified filters in determining the ALP for the Appellant's international transactions of import/ export of freight forwarding services from/ to AEs;*

*4.3 considering the current year (i.e. FY 2010-11) data for comparability analysis despite the fact that such data was not available to the Appellant at the time of preparing its TP documentation report for the year;*

*4.4 not appreciating the Functional-Asset-Risk ("FAR") profile of the Appellant and benchmarking the Appellant against companies which were not at all comparable to the Appellant in terms of their FAR profiles; and*

5. *The Ld. AO/TPO has erred in incorrectly calculating the amount of proportionate adjustment whereby the total adjustment was computed at INR 1,12,05,372 instead of INR 61,55,070.*
6. *That the Ld. AO grossly erred in facts and in law in not allowing set off of previous years' losses claimed in the return of income.*
7. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*
8. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying interest under section 234 B of the Act.*

*That the above grounds of appeal are without prejudice to each other.*

*That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."*

6. Before us, at the outset, Learned AR submitted that though the assessee has raised various grounds in the appeal but the sole controversy is with respect to rejecting the Comparable Uncontrolled Price ("CUP") method followed by the assessee for the benchmarking of international transactions and selecting the Transactional Net Margin Method ("TNMM"). He further submitted the facts of the case in the year under consideration are similar in 2010-11 and AY 2011-12 and therefore, the arguments made by him while arguing the appeal for A.Y. 2010-11 will apply equally to A.Y. 2011-12.

7. Before us, Learned AR submitted that assessee is primarily engaged in freight forwarding through air and ocean transportation. The assessee does not own or operate vessels or aircraft but utilizes third party ocean/air carriers to transport goods from origin (where the goods are collected from) to the

destination (where the goods are delivered to). In conducting its freight forwarding business, the assessee sources shipments from its customers, consolidates the shipments for common destinations, arranges for transportation of shipments to various destinations and at the destination effects delivery to the consignees. For international shipments, the assessee also facilitates clearance of goods through customs at international points of entry. These freight forwarding services are offered to the customers by the assessee, Associated Entities ('AE') and Third Party Agents ('TPA'). In line with the global practice followed by similar companies engaged in the freight forwarding industry, the profits earned by the assessee and its AE or TPA in respect of the export and import of cargo, are split equally amongst the parties i.e. 50:50 business model. The same model was followed where the assessee engages (or is engaged by) third party agents for the forwarding activities. Since, sharing of profit in the equal proportion model i.e. 50:50 ratio was followed for both the AEs and unrelated third parties, CUP method was considered as the Most Appropriate Method ('MAM') by the assessee to benchmark the arm's length nature of the transfer prices of its transactions with its overseas AE's. TPO rejected the CUP method followed by the assessee as he was of the view that assessee did not benchmark all international transactions in the freight and forwarding segment, the impact of other transactions between the AE of the assessee and other distributors is not known, geographical locations differences impact not captured, and the

CUP method followed by the assessee was rejected in earlier years by the TPO. Thereafter, TPO used Transactional Net Margin Method (TNMM) to benchmark the assessee's international transactions with AEs. The action of TPO/AO was upheld by DRP. Aggrieved by the order consequent to the directions of DRP, assessee is now before us.

8. Before us, Learned AR at the outset, submitted that identical issue arose in assessee's own case in A.Y. 2006-07 & 2007-08. The Co-ordinate bench of Tribunal vide order dated 18.11.2014, decided the issue in assessee's favour. He submitted that the Hon'ble Tribunal while deciding the issue in assessee's favour held that the arm's length price of services rendered to/or received from the associated enterprises and which was computed on the basis of 50:50 method by the assessee was as per the industry norm and was at arm's length and accordingly the adjustment was deleted. He submitted that against the order of the Tribunal, Revenue carried the matter before the Hon'ble Delhi High Court. Hon'ble Delhi High Court vide order dated 10.12.2015 in ITA Nos. 374/2015 and 396/2015 had dismissed the appeals of the Revenue. He pointed to the relevant orders which is placed in the paper book. He, therefore, submitted that since the issue is identical to that of earlier years the matters stand covered in favour of the assessee by the earlier year's decision. He, therefore, submitted that the addition made by the TPO/AO be set aside.

9. Learned DR on the other hand has filed written submission which reads as under:

*“In its appeal for both the AYrs the appellant has raised several ground of appeals (GOA) and all such GOA emerge from one fundamental issue as to justification of rejection of the CUP method, applied by the appellant in its TP study and application of TNMM by the TPO for benchmarking of international transactions. In its synopsis, the appellant has stated that the issue is covered by the order of Hon'ble Delhi High Court and Hon'ble ITAT in assessee's own case for AY 2006-07 & 2007-08. In this regard it is stated that the res-judicata is not applicable to the income-tax proceedings and in the name of consistency, the decision of Hon'ble Higher authorities may not be followed without examining the entire facts, the ratio of the relevant case-laws and the compliances made by the appellant before the TPO/AO/DRP. There are vital facts which have been noticed in the instant case and need to be considered in wholistic manner before a final decision is taken and also to ensure that there is no miscarriage of justice. With this request, following written submissions are made on the TP issues in connection with the above mentioned appeal :*

*1.It is an admitted fact that complete relevant information w.r.to pricing was neither available in the TP study of the assessee nor the same was provided by the assessee to the TPO during the course of TP proceedings to examine the applicability of CUP method. A detailed showcause was issued to the assessee which forms part of the TP order [show-cause dt.13.12.2013 at page 140-150 of appeal set of AY 2010-11 and dt.12.01.2015 at page 164-172 of appeal set of AY 2011-12 as ].*

*2. Even copy of relevant agreements were not provided by the assessee to the TPO [para-8 of showcause dt.13.12.2013, page-143 of appeal set for AY 2010-11].*

*3. The assessee was specifically asked to file 3 bills for each month in r/o its international transactions with both AE and non-AE so as applicability of CUP method can be examined. However in compliance the assessee expressed its inability to provide the same [TPO order for AY 2011-12, P/181 of appeal-set for AY 2011-12]. Thus it may be seen that even sample verification could not be carried out by the TPO in absence of requisite detail.*

*4. Instead of providing relevant detail/evidences w.r.to 'Price' in accordance with I.T. Rule 10B(1)(a), the assessee insisted that he has followed the industry norms of profit sharing in ratio of 50-50 after deducting expenses in the cases of both AE and non-AE. The assessee stated that the logistics business is an integrated operations where*

*origin company & the destination company have to work in tandem to provide logistic solutions to the clients.*

*5. In para-6 of the order of TPO (both AY 2010-11 & 2011-12), he has discussed in detail as to why the CUP method could not be considered in absence of complete relevant information and why the TPO was constrained under such circumstances to apply TNMM for benchmarking. [at page 157-164 of appeal set for AY 2010-11 and page 176-182 of appeal-set for AY 2011-12]. The discussions of the TPO may kindly be referred to & for the sake of brevity the same are not reproduced here. The assessee has himself stated that it also facilitates clearance of goods through Customs at international port of entry in India in respect of incoming international shipments. The assessee has not stated anything about its impact on pricing. In nutshell the TPO observed that products similarity, market comparability, contractual terms, impact of geographical locations/territories of origin/destination and other factors influencing comparability e.g. market strategies, fewer economies of scale, higher operating expenses are required to be compared to apply CUP method. In case of difference necessary comparability adjustments are required to be carried out to eliminate to eliminate material differences between controlled and uncontrolled transactions and as per Rule 10B(3)(ii) only reasonable accurate adjustment can be made. Undeniably this is not the case of the assessee.*

*6. In his discussions in the TP order, the TPO has also discussed the decision of Hon'ble Mumbai ITAT in the case of UCB India (P) Ltd vs ACIT [2009] 30 SOT 95. [page 159 -160 of appeal set for AY 2010-11]. The same has also been discussed in TP order for AY 2011-12. While upholding that CUP method requires a high degree of comparability along certain dimensions (dimensions mentioned in the order) Hon'ble ITAT has observed that under the CUP method the properties of a product and accompanying circumstances & conditions have to be evaluated for comparison. Even a minor change in the properties of the product, circumstances of the trading (billing period, amount of credit etc.) may have a significant impact on the price. Product comparability is absolutely key, in particular physical features such as size, weight, appearance alongwith volume, reliability, storage requirement, regulatory requirements etc. Pricing of a product is a very subjective exercise and is true value, as received by the receiver, can differ from that received by others in the market place. This decision of Hon'ble ITAT Mumbai has not been discussed in the order of Hon'ble ITAT in its order dt. 18.11.2014 for AY 2006-07 & 2007-08 (ITA No. 5025/Del/2010 and 774/Del/2012; available in paper-book) in the case of the assessee which have been cited by the appellant with a claim that the issue is covered. This needs to be examined & adjudicated accordingly.*

7. Before the order of Hon'ble ITAT in assessee's own case for AY 2006-07 & 2007-08 is discussed, kind attention of Hon'ble Bench is drawn to one more crucial fact. The entire share holding of the assessee company is held by M/s Toll Global Forwarding International (BVI) Ltd which is a company registered in BVI. It is a common knowledge that BVI is a known tax heaven. Further out of the 3 directors of the assessee company, two of them are non-resident - the address in one case is in Australia and in the case of another it is Hongkong. [Ref. page-42 of paper-book]. In the given situation, the assessee must be directed to discharge its onus to prove that the international transactions with AE is at Arm's length.

8. Discussions in brief on order dt. 18.11.2014 of Hon'ble ITAT for AY 2006-07 & 2007-08 in assessee's case which have been cited with a claim that the issue is covered :-

(i) Hon'ble ITAT also recorded that the data regarding precise amount charged or received from AE for precisely same services rendered to non-AE are not available. Therefore the TPO rejected CUP method and applied TNMM. [page-14 of PB]

(ii) Hon'ble ITAT also recorded the controversy with respect to dimension in terms of ALP price charged by the assessee in accordance with Rule 10B(1)(a). [page-14 & 15 of PB]

(iii) Despite the above discussed deficiencies, Hon'ble ITAT observed that the assessee's case was on profit sharing formulae prevalent in the logistics industry. Thereafter Hon'ble ITAT proceeded to evaluate the scope/ambit of 'Price', defined in the Rule. [page-15& 16 of PB]

(iv) In its discussion to examine the scope/ambit of 'Price' Hon'ble ITAT discussed the order of Hon'ble ITAT, Delhi in a similar case i.e. M/s Agility Logistics Pvt. Ltd. [136 ITD 46] wherein the CUP method was upheld on the basis of 'Pricing method' to include profit sharing ratio in the logistics industry. Hon'ble ITAT also discussed the decision of Hon'ble ITAT, Mumbai in a similar case i.e. M/s DHL Danzas Lemuir Pvt. Ltd [TS-752- ITAT -Mumb (2012) TP] which was passed relying the case decision of Hon'ble ITAT in the case M/s Agility Logistics Pvt. Ltd. [page 16 to 20 of PB]. Therefore, it was basically one case law which formed the foundation of belief of Hon'ble ITAT in this regard. Here Hon'ble ITAT observed that the stand of lower authorities with respect to applicability of CUP method loses its relevance. [Para-18, page-22 of PB] It may be seen that the Revenue stand to be deprived from the benefit of the decision of Hon'ble Mumbai ITAT in the case of UCB India (P) Ltd vs ACIT [2009] 30 SOT 95 from being considered at that stage. [page 159 -

160 of appeal set for AY 2010-11]. This needs to be examined & adjudicated accordingly.

(v) Thereafter Hon'ble ITAT also discussed CBDT notification dt.23.05.2012 wherein 'Additional method' was introduced for benchmarking in addition to CUP, RPM, CPM, PSM & TNMM. [page-24 to 28 of PB]. Hon'ble ITAT discussed certain case-laws and finally relying on the observations of Hon'ble SC in para-33 of its order in the case of M/s Vatika Township Ltd [2014 TIOL 78 SC] held that in view of the CBDT notification, Rule 10BA is held to be effective from 01.04.2002 i.e. the time when TP provisions were introduced in India. Hon'ble ITAT also held that the additional method relaxes the rigors of CUP method. [page-24 to 28 of PB]. On this ground the addition was deleted.

(a) In first place the reliance of ITAT on the decision of Hon'ble SC in the case of Vatika Township Ltd. to hold the retrospective operation of Rule 10BA need to be revisited in the light of detailed observation of Hon'ble SC in para31 to para-36 (in place of only para-32) of its order. Copy of order of Hon'ble SC is attached.

(b) Secondly the CBDT notification in no way can be said to have relaxed the rigors of CUP method. It has added the 'Additional Method' in Rule 10B(10(f) and a plain reading of the same takes us to Rule 10AB which reads as under:

"10AB. For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.]"

On a harmonious interpretation of these provisions clearly states that the comparability is on price charged/received for same / similar uncontrolled transactions with or between non-AE under similar circumstances, considering all the relevant facts. Accordingly, the price, similarity of products/services, prevailing circumstances and the differences due to various other factors (as briefly mentioned above and discussed by TPO in his order) which may have an impact on the 'Price' have to be considered/examined.

In the light of the above discussions, the issue may not be said to be squarely covered and the appeal may be decided on merit accordingly. 8. Discussions in brief on order dt. 10.12.2015 of Hon'ble High Court for

AY 2006-07 & 2007-08 in assessee's case which have been cited with a claim that the issue is covered:

- (i) *Though the Revenue's appeal were dismissed, Hon'ble High Court was requested that the matter may at least be remanded to the AO/TPO with a direction to the assessee to provide complete requisite detail which would help the TPO to determine whether the price charged by the assessee for the international transactions from AE is at arm's length. [para-11 of the order] However, the issue has been left open for consideration by Hon'ble Delhi High Court (para-12 of order dt.10.12.2015, at page 1 to 7 of paper book)*
  
- (ii) *that due to paucity of time, coupled with certain disruptions in functioning of offices although it could not be ascertained the status of acceptance or otherwise of order dt.10.12.2015 of Hon'ble Delhi High Court for AY 2006-07 & 2007-08 in the case of the assessee but it is understood that due to the tax-effect being below the prescribed limit, no SLP may have been preferred. Under these circumstances, this may not be construed as acceptance of the order of Hon'ble High Court by the Department on merit. The issue may accordingly be considered keeping this into consideration. In view of the detailed discussions in the order of TPO/AO, order of Hon'ble DRP and the above submissions, it is requested that the rejection of CUP method & application of TNMM by the TPO and consequently the addition made on account of adjustment on TP issues may kindly be upheld. Without prejudice to the same, if the Hon'ble Bench is still inclined to uphold the applicability of the CUP method, then alternatively the matter may at least kindly be remanded to the AO/TPO with a direction to the assessee to provide complete requisite detail which would help the TPO to determine whether the price charged by the assessee for the international transactions from AE is at arm's length, the issue which has been left open for consideration by Hon'ble Delhi High Court (para-12 of order dt.10.12.2015, at page 1 to 7 of paper book)) in assessee's own case for AY 2006-07 & 2007-08."*

10. Ld DR pointing from the aforesaid written submissions *inter alia* submitted that assessee had not filed the relevant information like providing TP study before the TPO to examine the applicability of CUP method, the copy of the agreements were also not provided by the assessee. He further submitted that the entire

share holding of the assessee company is held by M/s Toll Global Forwarding International (BVI) Ltd which is a company registered in BVI and BVI is a known tax heaven. He submitted that out of the three directors of the assessee company, two of them are non-resident. He therefore submitted that in these situation, the assessee be directed to discharge the onus to prove that the international transactions with its AE's are at arms length. He therefore submitted that the order of the AO be upheld. Learned AR in the rejoinder submitted that the submissions of the Learned DR about the non-submissions of the complete relevant information in the TP report/ the non-submission of the relevant agreements before the TPO is factually incorrect and in support he pointed to the copy of the documents which are placed in the paper book evidencing its submissions before the TPO. He further submitted that the order of Hon'ble High Court in Assessee's own case for earlier years has attained finality as no SLP has been filed by the Revenue.

11. We have heard the rival submissions and perused the material available on record. The issue in the present grounds is with respect to the rejection of CUP method followed by the assessee and holding the TNMM method as the most appropriate method to benchmark the international transactions with AE's. We find that the assessee has been following the CUP method for benchmarking the international transactions which is an accepted industry norm in the year under consideration and the

same method was also followed by it in earlier years. We find that the Co-ordinate Bench of Tribunal while deciding assessee's appeal for AY 2006-07 & 2007-08 had on identical facts decided the issue in assessee's favour. Against the order of the Tribunal for AY 2006-07 and AY 2007-08, Revenue had carried the matter before the Hon'ble Delhi Court. The Hon'ble High Court vide order dated 10.12.2015 (ITA No 374/2015 and ITA No 396/2015) had dismissed the appeals of the Revenue. The observations of the Hon'ble High Court are reproduced hereunder for ready reference:

*“1. These are two appeals by the Revenue under Section 260A of the Income Tax Act 1961.*

*2. ITA No. 374/2015 is directed against the impugned order dated 18th November, 2014 passed by the Income Tax Appellate Tribunal (‘ITAT’) in ITA No.5025/Del/2010 for Assessment Year (‘AY’) 2006-07. ITA No. 396/2015 is directed against the impugned order dated 18th November, 2014 passed by the ITAT in ITA No. 774/DEL/2012 for the AY 2007-08.*

*3. The Respondent Assessee is a logistics service provider, offering a bouquet of international and domestic freight handling services including time defined air and ocean transport and freight forwarding services. The Assessee has been using the Comparable Uncontrolled Price (‘CUP’) Method for benchmarking its international transactions with its Associated Enterprises (‘AEs’). The residual profits were split between the Assessee and the AEs in the ratio of 50:50.*

*4. A reference was made by the Assessing Officer (AO) to the Transfer Pricing Officer (‘TPO’) to determine the Arm’s Length Price (ALP) under Section 92CA(3) in respect of the international transactions entered into by the Assessee during the financial years in question. In the order 21st August, 2009, the TPO observed that initially the Assessee only submitted its audited financials along with the auditor’s tax audit report, computation of total income and the previous assessment orders. Pursuant to notices issued by the TPO, a Transfer Pricing Study was also furnished by the Assessee. The TPO was not persuaded to adopt the CUP Method since according to the TPO the Assessee was required to “furnish the documents/vouchers related to third party for export and import transactions related to controlled and uncontrolled transactions.” The TPO, therefore, proceeded to adopt the Transactional Net Margin Method (‘TNMM’) and benchmarked the profitability of the Assessee with*

*comparable companies engaged in a similar business by application of the TNMM at the entity level by using operating margin as the profit level indicator. On this methodology, the TPO determined that there was a difference of Rs.20,900,179/- between the booked value and the ALP and since the same was more than 5%, the said difference was added back to the income of the Assessee.*

*5. On the basis of the above order of the TPO for AY 2006-07 the AO passed a draft assessment order on 26th November, 2009 which was taken up before the Dispute Resolution Panel (DRP) by the Assessee unsuccessfully. Ultimately, the AO passed the final assessment order on 20th September, 2010 in line with the order of the TPO. A similar exercise was performed for AY 2007-08 and against both the orders of the AO appeals were filed before the ITAT.*

*6. The impugned order of the ITAT for AY 2006-07 noted at the outset in para 5 as under:*

*“We find that in the present case it is not really even in dispute that in this field of business activity, the 50:50 business model (i.e. the business model of sharing residual profits in equal ratio with the service provider at the other end of the transaction i.e. at the consignee’s end in the case of export transaction and at consigner’s end in the case of import transaction), is a standard practice. In other words, even with respect to the transaction with unrelated parties in this line of activity, it is admitted practice to share the residual profit in equal ratio and that is precisely the assessee claimed to have been adopted with the associated enterprise as well.”*

*7. The ITAT acknowledged that where a standard formula is adopted, the data regarding the precise amount charged or received for precisely the same services may not be available. Since the Assessee failed to furnish data to show that exactly the same amount was charged for the same service in the uncontrolled transactions, the TPO rejected the CUP method and instead adopted the TNMM, which is normally deployed as a method of last resort for computation of ALP.*

*8. The ITAT then proceeded to examine, in light of Rule 10B(1)(a), the appropriateness of adopting the CUP Method in the present case notwithstanding that the Assessee “has not even made any efforts to demonstrate nor claimed that actual amount charged for comparable services rendered to, or received from, associated enterprise is the same as in the case of the independent enterprise.” What the Assessee fell back on, and was accepted by the ITAT as sufficient for arriving at the conclusion that the price charged was at arm’s length, was the fact that the profit sharing ratio of the transaction between the Assessee and the*

*AEs was no different from that with a third party, viz., 50:50. In para 19 of the impugned order of the ITAT, it was observed as under:*

*“19. It is also important to bear in mind the fact that what we are dealing with at present is a classic case in which while there is no, and there cannot be any, dispute even at the assessment stage, that the terms at which the assessee has entered into the arrangements with the AEs are the same as the terms at which the assessee has entered into arrangements with the independent enterprise, there are still some procedural issues, with regard to application of methods of determining arm’s length price as set out in Rule 10B. Here is a case in which there is no dispute that the price determination for all business associates, whether associated enterprises or independent enterprises, is on the same terms and as per the same business model, which is admittedly unique to that line of business, but, owing to the limitations of the methods prescribed under Rule 10B(1)(a) to (e), as the prescribed method of determining the arm’s length price existed at the relevant point of time, there are certain, what can at best be described as, unresolved procedural issues.”*

*9. The ITAT concluded in para 29 of the impugned order as under:*

*“We hold that the assessee’s contention to the effect that the arm’s length price of services rendered to, or received from, the associated enterprises, which was computed on the basis of the same 50:50 model as is the industry norm and as has been employed by the assessee for computing similar services to the independent enterprises, was at arm’s length. Accordingly, the impugned arm’s length price adjustment of Rs.2,09,00,179/- stands deleted.”*

*10. Accordingly, the ALP adjustment for the AY 2006-07 was deleted. The same result followed in the Assessee's appeal AY 2007-08.*

*11. It was urged by Ms Suruchi Aggarwal, learned Senior Standing Counsel for the Revenue, that even if it is accepted that CUP is the most appropriate method to be adopted as per the prevailing industry norm, the matter should nevertheless be sent back to the TPO for the Assessee to furnish the relevant details which would help the TPO determine whether the price charged for the international transaction with the AE was an ALP.*

*12. The Court finds that in the present appeals the questions projected for the Court’s consideration by the Revenue are only regarding the appropriateness of adopting CUP method as against the TNMM for*

*determination of the ALP. The question urged before the Court, not having been projected in the present appeals, is left open for consideration in an appropriate case where it is properly raised consideration in accordance with law.*

*13. As far as the present appeals are concerned, the Court finds the impugned order of the ITAT to be well reasoned and researched. The legal principles governing the determination of ALP in a TP adjustment exercise have been expounded lucidly by the ITAT in the impugned orders.*

*14. The Court does not find any substantial question of law arising from the impugned orders of the ITAT.*

*15. The appeals are accordingly dismissed.”*

12. Before us, in the written submissions, Learned DR has tried to point out the reasons as to why the order of the Hon'ble Delhi High Court need not be followed in the year under consideration. We do not find much force in the argument placed by the Revenue. We further find that the aforesaid decision of Hon'ble High Court has not been stayed/overruled/set-aside by higher judicial forum. Considering the totality of the aforesaid facts, we are of the view that the ratio of the decision of Hon'ble High Court in assessee's own case for A.Y. 2006-07 and 2007-08 would be applicable to the facts of the case in the year under consideration. In such a situation, we are of the view that the AO/TPO was not justified in directing the adjustment to the arm's length price. We, accordingly direct the deletion of adjustment of Rs.39,87,670/-.

**Thus, the ground of appeal of the assessee is allowed.**

**ITA No.778/Del/2016 for A.Y 2011-12**

13. Learned AR submitted that as far as A.Y. 2011-12 is concerned, all the grounds are similar to that of AY 2010-11 except ground no.6, which is a new ground, where the AO has not allowed the setting off of previous years' losses claimed by the Assessee in the return of income. He fairly agreed that the necessary directions be given to the AO for verification before allowing the assessee's claim. Ld DR did not controvert the submissions of Ld AR.

14. We have heard the rival submissions and perused the material on record. As far the grounds raised by the Assessee on transfer pricing issues are concerned, since it is admitted by both the parties before us that the facts of the case on the grounds relating to transfer pricing issues are identical to that of AY 2010-11, we for the reasons stated herein while deciding the appeal of the assessee for AY 2010-11 and for similar reasons hold that the AO/TPO was not justified in making the addition on account of transfer pricing adjustments. **Thus the grounds of the Assessee are allowed.**

15. As far the ground no 6 is concerned, it is w.r.t not allowing the setoff of previous year's losses claimed in the return of income. In view of the submissions of the Ld AR, we restore the issue to the file of AO. If the contentions of the assessee are found

correct by the AO, then the AO is directed to grant set off of previous years' losses in accordance with law. Assessee is also directed to furnish the necessary details as called for by the AO.

**Thus ground of appeal of the assessee is allowed.**

**16. In the result, both the appeals filed by the assessee are allowed.**

**Order pronounced in the open court on 17.07.2020**

**Sd/-**

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

*\*Priti Yadav, Sr.PS\**

*Date:- 17.07.2020*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**Sd/-**

**(ANIL CHATURVEDI)  
ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI