

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1': NEW DELHI
(Through Video Conferencing)**

**BEFORE,
SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**I.T.A No.5711/Del/2012
(ASSESSMENT YEAR 2008-09)**

Globe Ground India Pvt. Ltd. E-9, Connaught House, Connaught Place, New Delhi-110 001. PAN-AAACG 8313K	Vs.	Dy. CIT, Circle-12(1), New Delhi.
(Appellant)		(Respondent)

Appellant By	Sh. Tarandeep Singh, Adv.
Respondent by	Sh. Bhuvnesh Kulshrestha, CIT-DR
Date of Hearing	23.06.2021
Date of Pronouncement	30.06.2021

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This is an appeal filed by the assessee, against final order of assessment dated 31st August 2021 passed under section 143(3)/144C of the Income Tax Act, 1961 (hereinafter called 'the Act'). The Sole issue in dispute is the Transfer Pricing Adjustment of Rs 3,53,24,242/- which has been proposed by the Transfer Pricing

Officer (TPO) and sustained by the Ld Disputes Resolution Panel (DRP).

2.0 Briefly stated, the relevant facts of the case are that the assessee is an Indian company in which 51% equity is held by a German company by the name of Globe Ground Deutschland GmbH and the remaining 49% equity is held by an Indian resident individual in the name of Mrs. Radha Bhatia. The assessee is engaged in the business of providing Ground and Passenger Handling services to airlines. Since the assessee had entered into an international transaction of Rs32,26,71,057/- pertaining to ground handling services which were rendered to its Associated Enterprise (AE) along with other international transactions, case of the assessee was referred to the TPO to determine the Arm's-Length Price (ALP) of such international transaction. From the Transfer Pricing Study filed before the lower authorities, it is apparent that the assessee had benchmarked its international transactions by adopting the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). The assessee had selected a group of 13 comparable companies having a weighted average Profit Level

Indicator (PLI) of Operating Profit / Operating Cost (OP/OC) of 10.05%. As per the Transfer Pricing Study, the assessee's PLI as the Tested Party is 13.84%. It was hence claimed before the lower authorities that the value of international transactions executed were at ALP. The TPO, however, was unsatisfied. Vide order dated 31st October 2011, the TPO observed that the assessee has not properly narrated / understood its functional profile. In this regard, the TPO noted that the website of assessee depicted various activities. The TPO doubted the functional profile of the Tested Party by observing as under:

“The first ground that the assessee has taken is that this office has not appreciated that the activities of the assessee are in the nature of business support services. The assessee states that it is not providing any refueling services or any security services so it is neither a specialized service nor is it affected by the security concerns. I am afraid that the assessee has not appreciated its own functions properly. Had it done so it would not have liked to compare itself with companies that are engaged in event management, financial analysis, turnkey projects etc. the assessee's functions have been listed out at Para 2 of the show cause notice. If the assessee had looked

carefully it would have found 'fuelling supervision' and 'aircraft security' among its services. Therefore, the assessee's contentions are made in ignorance of its own functions."

2.1 The TPO, thereafter, conducted a fresh search for comparable companies and selected a set of 4 comparable companies whose OP/TC was found to be 27.99%. The TPO, thereafter, proposed a Transfer Pricing adjustment as under:

Total Cost	29,24,08,151
ALP@27.99%	37,42,53,192
Price received	32,26,71,057
Adjustment u/s 92CA	5,15,82,135

2.2 Being aggrieved, the assessee filed detailed objections before the Ld DRP. The Ld DRP partly allowed the objections raised by excluding M/s Cochin International Airport Ltd as a comparable. The Ld DRP however upheld the selection of other comparable companies. In this regard it was held by the Ld DRP vide order dated 14th June 2012 as under:

"Ground No.1 We find that TPO has relied on functional similarity under TNMM for identifying comparables. We have

also considered submissions dated 12.09.2011 of the assessee in this regard.

6.11 Functionally, we find, the assessee providing is support services which are different from running an airport & providing such services as the owner of the airport. In our view there is more dissimilarity than similarity and so CIAL is not comparable functionally with the assessee at entity level. The annual report of CIAL shows income under the head traffic revenue which includes landing fee, parking and housing fee and terminal navigational landing charges. While non traffic revenue includes X' ray inspection charges, public admission fee royalty, cargo operations, seat interest income. The directors report shows key driver of growth in revenues has been duty free business which accounted for 30% of the income with traffic revenue being 23% royalty at 15%, Cargo lowest at 6%.

6.1.2 The employee expenses to total income account for 10% wherein in the case of assessee it is 60%. Thus we find there are functional dissimilarities. Annual report further states that, "the company is operating a composite airport with facilities for cargo movement and duty free shop. In the opinion of the management, this is the only primary reportable segments within the meaning of Accounting Standard 17 issued by the Institute of Chartered Accounts of India." (Schedule J)

6.1.3 If segmental data was available it may perhaps have been considered for comparison purpose but it is not. In the circumstances, CIAL cannot be considered as a comparable at entity level based on functional analysis and must be excluded from the list of comparables. TPO is directed to therefore exclude it as a comparable at entity level as segmental data is not available.

6.1.4 We have considered the annual reports of the other comparables submitted before DRP and have come to conclusion that based on functional test they are comparable to assessee as minor differences among them are taken care of under TNMM.”

2.3 The AO has, thereafter, passed the impugned final order of assessment dated 31st August 2012 making an adjustment under Chapter X of Income Tax Act of Rs 3,53,24,242/-.

2.4 Being further aggrieved, the assessee is now in appeal before us and has raised the following grounds of appeal:

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

1.1 That on facts and in law, the assumption of jurisdiction by the AO/TPO to determine Arm's length price is bad in law and void ab-initio.

2. That on facts and in law, the DRP erred in sustaining an adjustment to total income of Rs.3,53,24,242/- under Chapter-X of the Income Tax Act, 1961.

3. That on facts and in law, the DRP erred in holding that for the purpose of benchmarking the international transactions the TPO was justified in using current year data only while computing the Profit Level Indicator of the comparable companies.

4. That on facts and in law the TPO erred in observing that the assessee is providing following services :

- (a) Lounge Services
- (b) Ticketing
- (c) Crew briefing
- (d) Fueling Supervisions
- (e) Passenger Boarding Bridges Handling
- (f) Aircraft Security
- (g) Executive Aviation Handling
- (h) Floor Walker Service
- (i) Government aircraft handling

5. That on facts and in law the DRP erred in upholding and the TPO erred in proposing a fresh set of comparable companies.

5.1 That without prejudice on facts and in law the AO/TPO erred and the DRP inter alia erred in not appreciating that :

(a) the TPO should have applied a turnover filter of Rs.100 crores

(b) The four comparable companies selected by the TPO were not entirely service oriented (i.e., having a very low employee cost) and were deriving profits from other key assets.

(c) Companies having more than 25% related party transactions should not have been rejected.

5.2 that without prejudice on facts and in law the DRP/TPO erred in ignoring the alternate set comparable companies proposed vide written submissions dated 12th September, 2011.

6. That on facts and in law, the DRP erred in not adjudicating upon ground No.7 raised as an objection before it.

6.1 That on facts and in law, while computing the operating margins of the tested party the TRO/DRP erred in :

(i) not reducing the FBT cost of 39,00,000/- from the total operating cost

(ii) reducing the total operating revenues by Rs.98,00,361/-

7. *That on facts and in law, the DRP erred in not taking into consideration contentions of assessee relating to factual errors committed by the TPO in past and recapitulated by him in the year under consideration.*

8. *That on facts and in law the TPO erred in comparing the operating margins of the assessee with the mean operating margins of the alleged comparable companies.*

9. *That without prejudice on facts and in law the DRP erred in not directing the AO to allow the benefit for adjustment of the Arm's Length price ("ALP") by +- as per the proviso to section 92C(2).*

3.0 It was submitted by the Ld. AR that the TPO has not properly appreciated the functional profile of the assessee. It was submitted that the assessee is merely rendering few facets of Ground Handling Services to its AE. In support, the Ld AR relied upon the order passed by this Tribunal in the case of the assessee itself for AY 2007-08 reported in (2019) 103 taxmann.com 268(Del). The Ld AR submitted that once the functional profile of the assessee is correctly construed then it will be clear that M/s Container Corporation Of India Ltd. and M/s Sanco Trans Ltd cannot be selected as a comparable. In support, the Ld AR also relied upon

the Coordinate Bench decisions in case of Keehne + Nagel Pvt Ltd reported in 49 SOT 592(Del) and JAS Forwarding Worldwide reported in (2020) 113 taxmann.com 390(Del). It was submitted by the Ld AR that once these two companies are excluded, then the other grounds of appeal would become *in fructuous*.

3.1 The Ld AR also submitted that the TPO should have recomputed the PLI of the assessee once expenditure incurred on Fringe Benefit Tax was being considered as non-operating in case of comparable companies.

4.0 Per Contra, the Ld CIT (DR) vehemently supported the adjustment made by the TPO which has been partly upheld by Ld DRP. It was submitted by the Ld CIT (DR) that the lower authorities have justifiably selected M/s Container Corporation of India Ltd. and M/s Sanco Trans Ltd as a comparable. The Ld CIT (DR) invited our attention to the following observations of the TPO in this regard:

“Container Corporation of India Limited (“CONCOR”)

As per assessee, the services of the company can be categorized as transportation of containers, handling of

containers and parking of containers. The objection of the assessee is on verticals, this has been discussed in detail above.

Another objection of the assessee is on turnover. This issue has also been discussed in detail above that in a service industry, turnover does not play a major role. Therefore, this objection is also without merit. Therefore, this company will be taken as a comparable.

... ..

Sanco Trans Limited (“Sanco Trans”)

The assessee has objected to this comparable on the ground that the company has earned income from transport and handling charges. The assessee states that this does not imply that this income is from air cargo handling charges. It has never been the case of this office that this company is engaged in air cargo handling activities. This company has been chosen because it is involved in transport services and support systems. The assessee also runs the passenger buses, handles luggage, provides ramp services, loading and unloading etc. All these activities are akin to transport support services. Hence, this company can be used as a comparable.”

5.0 We have carefully considered the facts of the case and the material available on record. The first issue to be decided by us is as to what is the correct functional profile of the assessee.

The TPO has examined the website of the assessee on 26th August 2011 and has alleged that the assessee was rendering various other services which were not forming part of its functional profile stated in the TP Study. The Ld AR has submitted that during the year under consideration, the assessee was providing services to its AE as part of an agreement which has been analysed by the coordinate bench of this Tribunal in AY 2007-08. We have carefully perused the order dated 18th February 2019 passed by the coordinate bench for AY 2007-08. The coordinate bench has held as under:

“7. We have carefully considered the rival contentions and also perused the orders of the lower authorities. Firstly it is important to identify the exact nature of the services rendered by the assessee to understand the functional profile of the assessee. Such profile has been disputed by the assessee wide ground number 2.2 of the grounds of appeal. The functional profile stated in the transfer pricing study report prepared by the assessee is sketchy and does not deserve any mention. The learned transfer pricing officer in para number 2 is extracted the activities carried out by the assessee from the website of the assessee. On that basis the learned transfer pricing officer and stated that the assessee is providing a very specific mission services and having a specialized functions

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

<i>LH SGHA 1st Feb 2002 to 31st Dec 2006</i>		
<i>SGHA Version 1998</i>		
<i>Section 1</i>	<i>Representation and accommodation</i>	
	<i>1.1.3</i>	<i>Indicate that the Handling Company is acting as handling agent for the Carrier.</i>
	<i>1.1.4</i>	<i>Inform all interested Parties concerning movements of the Carrier's aircraft.</i>
<i>Section 2</i>	<i>Load Control & Communications and Departure Control System</i>	
	<i>2.1</i>	<i>Load Control</i>
	<i>2.1.2</i>	<i>(c) Distribute</i>
		<i>as appropriate, documents, including but not limited to, loading instructions, loadsheets, balance charts, Captain's load information and manifests, in accordance with local or international regulations or as reasonably required by the Carrier.</i>
	<i>2.3</i>	<i>Departure Control System (DCS)</i>
	<i>2.3.1</i>	<i>(b) Operate</i>
		<i>equipment and facilities to allow the Handling Company access to the Carrier's DCS, as mutually agreed.</i>
	<i>2.3.2</i>	<i>Access the following facilities in the Carrier's DCS</i>
		<i>(b) Check-in.</i>

		<i>(c) Boarding Control</i>
		<i>(d) Baggage reconciliation.</i>
		<i>(e) Baggage tracing</i>
<i>Section 3</i>	<i>Unit Load Device Control</i>	
	<i>3.1</i>	<i>Handling</i>
	<i>3.1.</i>	<i>(b) Arrange for</i>
	<i>1</i>	
		<i>suitable storage space for ULD's, as mutually agreed.</i>
	<i>3.1. 2</i>	<i>Apply correct storage and handling techniques in accordance with the Carrier's requirements.</i>
	<i>3.1. 3</i>	<i>Take appropriate action to prevent theft or unauthorized use of, or damage to the Carrier's ULD's in the custody of the Handling Company. Notify the Carrier immediately of any damage to or loss of such items.</i>
	<i>3.2</i>	<i>Administration</i>
	<i>3.2. 3</i>	<i>(a) Take physical inventory of ULD stock and maintain a stock record.</i>
		<i>(b) Compile and dispatch ULD Control Messages (UCM), according to UCM procedure.</i>
		<i>(c) Compile and dispatch Stock Check Messages (SCM), as mutually agreed.</i>
<i>Section 4</i>	<i>Passengers and Baggage</i>	

	4.1	General
	4.1. 3	When requested by the Carrier
		(a) Provide
		or
		(b) Arrange for
		special equipment, facilities and specially trained personnel, as available, for assistance to
		(1) Unaccompanied minors.
		(2) Disabled passengers.
		(3) VIP's.
		(4) Transit without visa passengers (TWOV's).
		(5) Deportees.
		(6) Others, as specified.
		Additional costs may be recharged to the Carrier.

According to the above extraction the assessee does not provide any lounge service, ticketing services, Crew briefing, fuelling supervisions, aircraft Security services, other than listed above. Therefore it is apparent that the learned transfer pricing officer has wrongly interpreted the functions provided by the assessee. The assessee is providing mainly the passengers and baggage handling services as listed in section 4 of the above version. The other services provided are the informative services such as informing the airport activities

concerning the specific carriers' aircraft to the concerned persons/ agencies/ other operators and to operate certain facilities available at the airport for these passenger and baggage services. Therefore according to the above finding the functional profile of the assessee is now undisputed. In the revenue profile of the assessee it derives income from providing ground services inclusive of all type of cargo and passenger handling services to the airlines at Indian airports. In its asset base it does not have any immovable property but the total asset base is INR 25,76,70,389/-."

5.1 The Ld CIT (DR) has not been able to highlight any distinguishable fact. Therefore, respectfully following the findings of coordinate bench for AY 2007-08, it held that the TPO, in the year under consideration also, has not properly appreciated the functional profile of the assessee. From the facts on record, it is discernible that the assessee is mainly providing passengers and baggage handling services to its AE and is not providing other specialized airport services as alleged by the TPO. For rendering such services, the assessee has a Net Gross Asset Base of Rs 31,22,65,835/- which comprises of Know How/ Royalty, Temporary Structures, Office equipment, safety equipment's, air-conditioners,

data processing equipment, electrical equipment, furniture and fittings, Motor Car, and Plant and Machinery. In the year under consideration, the assessee has incurred total expenditure of Rs 34,73,49,275/- out of which Personnel Expenditure incurred is Rs 20,16,09,112/- which is 60% of the total expense. Therefore, clearly the assessee is a service oriented company deriving its sole stream of income from providing passengers and baggage handling services at the airport.

5.2 Once the functional profile of the assessee is clear, we proceed to examine whether the over authorities were correct in selecting M/s Container Corporation Of India Ltd. and M/s Sanco Trans Ltd as a comparable. Before specifically analysing the FAR of these comparable companies, we would like to reiterate the ratio propounded by the coordinate bench in case of JAS Forwarding Worldwide (*supra*) as under:

“BIC LOGISTICS LIMITED

29. This company is also engaged in road transportation. As mentioned elsewhere, the appellant is engaged as non vessel owning freight forwarding company providing logistics services

which is very different from the transportation business. The co-ordinate bench in the case of Kuehne + Nagel (P.) Ltd. v. Asstt, CIT [2012] 17 taxmann.com 97/49 SOT 592 (Delhi) has held that companies owning trucks/airplanes and other assets useful for transportation cannot be compared to freight forwarding companies which do not own such assets.

30. Similar view was taken by the co-ordinate bench in the case of CEVA Freight India (P.) Ltd. v. Dy. CIT [2018] 90 taxmann.com 120 (Delhi -Trib.) wherein the Tribunal has held that road transportation company is functionally dissimilar to freight forwarding companies. It would not be out of place to mention here that the DRP itself excluded Agarwal Industrial Corporation on this count. Considering the functional profile of this company with that of the appellant, in the light of the decision of the co-ordinate bench [supra], we direct for exclusion of this company from the final list of comparables.”

5.3.0 Keeping the above distinction into consideration highlighted by us above, our observations in this regard are as under:

5.3.1.0 M/s Container Corpn. Of India Ltd:

With assistance from both the sides, we have perusal the annual accounts of this company. It is apparent that this is a Government

Company. Container Corporation of India's income from operation is from Freight, Handling, Terminal Service charges, Demurrage and others of Rs. 3,347 crores. There are no segmental accounts prepared. It is now trite law that in absence of segmental data, a company should be rejected as a comparable. In this regard we draw support from wisdom of the Hon'ble Jurisdictional High Court in case of M/s Saxo India Limited reported in 397 ITR 160(Del) and M/s SEZ Gurgaon reported in 416 ITR 51(Del). Moreover, we find that Container Corporation of India is also not a service-oriented company as the ratio of employee cost is merely 1.65% (i.e. 55cr/3347cr). This is an important fact which merits consideration. The Ld DRP has itself made this as a ground while excluding M/s Cochin International Airport (CIAL) as a comparable which was originally proposed by the TPO. From perusal of the annual accounts of this company, we also find that Container Corporation of India is a Giant Company with turnover of more than Rs. 3,300/- crores, fixed asset base of around Rs.2,244/- crores, Container fleet of 13,517 units, Speed Wagons of 6,722 and owning Terminals. The assessee, on the other hand, is a service-oriented company with

turnover of Rs 33.24 cr and fixed asset base (gross) of only Rs 31.22 crores. Container Corporation of India is also operating in Virtual Monopoly conditions. From the above cumulative reasons, we find that FAR of Container Corporation of India is not akin to that of the assessee. It should, therefore, be rejected as a comparable. We direct accordingly.

5.3.2.0 M/s Sanco Trans Ltd:

M/s Sanco Trans is a company, which per audited accounts, is principally engaged in a single business segment viz. Customs Clearing & Forwarding, container freight station and related activities. Director's Report acknowledges that the main growth area for the company was business of Container Freight Station (CFS) and therefore, the future strategies are as under:

“Strategies and future plans

The operations in CFS is expected to show favourable results in the current year as well. Your company is therefore, taking necessary steps to augment the operating fleet further by the acquisition of Reach Stockers of a cost of nearly Rs.300 lakhs and trailers and forklifts at a cost of Rs.200 lakhs which will make the CFS one of the most modernized and state of the art

facilitates of world class in this part of the country. Apart from the above, your Company is planning to replace certain operating equipments which will go a long way to improve its operating efficiency and also result in reduction in operation cost. These affirmative actions, it is hoped will have a favourable impact on productivity and profitability of the CFS operations.

Apart from the above, your Company is planning to develop the existing warehousing facilities by acquiring similar facilities on outright / lease basis and also creating enhanced volumes in the existing facility, which, it is hoped, will improve its capability to meet the anticipated increase in the volume of business in the sold operations and also result in reduced operating cost. With these actions, planned and anticipated, your directors are confident, barring unforeseen circumstances of reporting better working results in the current year.

5.3.2.1 This clearly highlights the nature of business of this company is primarily in from earning passive income.

Revenue shown in Profit & Loss Account is as under:

Operating earnings (Rs Lakhs)	2008	2007
Handling charges earned	1760.18	1387.48
Equipment and fleet hire charges earned	822.90	803.88
Agency and other charges earned	136.23	130.22
Warehousing charges earned	<u>1577.05</u>	<u>947.56</u>

4296.363269.14

5.3.2.2 Handling charges earned is 40.96% of the total revenue and balance is passive income i.e., hire charges earned and warehouse charges earned which is 59.03%. There are no segmental accounts prepared. M/s Sanco Trans has earned total operating revenue of Rs.4296.36 lakh and total employee cost incurred is 511.96 lakhs which in ratio terms is 11.91%. This shows that this is also not a service-oriented company. For reasons akin to that stated above we, therefore, hold that M/s Sanco Trans cannot be selected as a comparable. We direct accordingly.

5.4.0 Before us, the Ld AR has also submitted that the TPO had computed the PLI of companies selected by him by presuming that FBT expense is a non-operating item. In this regard we note that at page 28 his order it is held by the TPO as under:

“The computations made by the assessee have been considered. It is seen that the assessee has considered fringe benefit tax as of operating nature, which is incorrect. The figures of operating income and operating expenses are being adopted as submitted by the assessee but after excluding FBT.”

5.4.1 It is submitted by the Ld AR that while the PLI of comparable companies has been computed by the TPO adopting FBT expense as non-operating, in the case of assessee in its TP Study it has computed a PLI of 13.84% by taking FBT expense as an operating item. In this regard, the Ld AR has invited our attention to page 202 of the paper book before us. It was also submitted that before the Ld. DRP, the assessee had raised a specific objection vide ground no 7 in this regard and had also made detailed submissions for which Ld AR invited our attention to pages 87 and 88 of the paper book. We have perused the material on record and it is seen that there is no adjudication by the Ld DRP on this issue. We, therefore, direct the TPO to adopt a uniform policy. Once FBT expense is taken as non-operating while computing the PLI of comparable companies, a similar effect should also be given while computing PLI of the tested party. We, therefore, direct the TPO to re-compute the PLI of assessee excluding FBT expense.

6.0 In the final result, the appeal is allowed with directions as above.

Order pronounced on 30.06.2021.

Sd/-

(R.K.PANDA)

ACCOUNTANT MEMBER

Dated: 30/06/2021

dragon

Copy forwarded to:

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

Sd/-

(SUDHANSHU SRIVASTAVA)

JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT DEHRADUN