

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI (THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER**

**SA No. 144/DEL/2021 [A.Y 2010-11]  
ITA No. 2162/DEL/2015**

JAS Forwarding Worldwide Pvt. Ltd 1 <sup>st</sup> Floor, A - Wing Commercial Complex Radisson Hotel, New Delhi	Vs.	The D.C.I.T. Circle -13(1) New Delhi
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PAN: AABCJ 5546 A

[Appellant]

[Respondent]

**Date of Hearing : 30.09.2021  
Date of Pronouncement : 30.09.2021**

Assessee by : Shri Salil Kapoor  
Shri Sumit Lalchandani  
Shri Vansh Pandya, Adv

Revenue by : Shri Surenderpal, CIT- DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

This appeal by the assessee is preferred against order dated 13.02.2015 framed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The grievances of the assessee read as under:

"The addition amounting to Rs. 39,596,975 undertaken by the Learned Deputy Commissioner of Income-Tax, Circle 13(1), New Delhi ("the Ld. AO") [confirming additions by the Learned Additional Commissioner of Income-tax, Transfer Pricing Officer-1 (3) ("the Ld. TPO")] vide final assessment order dated February 13, 2015 passed under Section 143(3) read with Section 144C of the Income Tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.

That the Hon'ble Dispute Resolution Panel, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order passed by the Ld. AO under Section 143(3) read with Section 144C(1) of the Act ("the draft assessment order").

The Hon'ble DRP while issuing directions under Section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the erstwhile Hon'ble DRP vide directions issued under Section 144C(5) of the Act for AY 2009-10, reasoning given by the Ld. TPO in his order passed under Section 92CA(3) of the Act.

On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and Hon'ble DRP has further erred in confirming the adjustment of Rs. 39,596,975 as Transfer Pricing Adjustment without due application of mind and without affording a reasonable opportunity of being heard in the matter.

#### Transfer Pricing Adjustments - Rs. 39,596,975

1. The Ld. TPO erred in the facts and circumstances of the case and in law by making modification to the set of comparable companies identified by the Appellant for its freight forwarding services based on his own conjectures and surmises.

Specifically, the Ld. TPO erred by using an approach that had an inherent upward bias and employed erroneous filters, that were designed to select only high margin comparable companies. The Ld. TPO also overlooked the fact that the results were falling within permissible limits in accordance with proviso to Section 92C(2) of the Act.

1.1 The Ld. TPO misconstrued the functional profile of the Appellant. In this connection, the Ld. TPO grossly erred, in following inconsistent approach while accepting/ rejecting companies comparable to the business profile of the Appellant.

1.2 The Hon'ble DRP has not adjudicated on the issue pertaining to erroneous approach followed by the Ld. TPO by considering functionally dissimilar Companies as comparable to the Appellant.

As the Ld. TPO erred on facts by comparing dissimilar companies as comparable to the Appellant, the relevant ground relating to this issue had been discussed before the DRP in our hearing on November 14, 2014 through DRP objection dated April 25, 2014 (Para 1.2.11.7).

The DRP erred in not dealing with objections filed by the Appellant. In this regard, DRP blindly relied upon the directions issued for AY 2009-10 without considering the facts and arguments of the year under consideration.

1.3 The Ld. TPO erred by relying upon data of the comparables for financial year 2009-10 only for determination of the arm's length price, disregarding the multiple year data approach followed by the Appellant.

The Ld. TPO also erred by relying upon updated data of the Comparables which was not available to the Appellant at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Rules.

2. The Ld. TPO has erred in law and on facts by summarily disregarding the approach followed by the Appellant for benchmarking international transaction pertaining to receipt of management services without assigning any cogent reasons.

In this regard, the Ld. TPO has artificially created separate business segments on fallacious assumptions, contrary to the fact that management services are received in the course of routine business activity and are integral part /inextricably linked to the business model of the Appellant (viz. freight forwarding services).

3. The Ld. TPO has erred in law and on facts by assigning NIL value to the value of international transaction in relation to receipt of management services. Further, the Ld. TPO has failed to provide the detailed methodology/ reasoning or CUP data for assigning NIL value to the underlying transaction.

Further the DRP, based on its conjectures, erroneously stated that CUP method was used by the Appellant in AY 2009-10 and also that no cost allocation methodology was provided.

4. The Ld. TPO has erred in law by summarily disregarding the Appellant's submission dated January 21, 2014 in response to the queries raised vide show-cause notice dated January 4, 2014 filed in relation to intra group services and by not addressing Appellant's submission dated January 29, 2014 in relation to selection of comparables for freight forwarding services.

5. The Ld. TPO has erred in law by violating the principal of natural justice by issuing revised show cause notice (RSCN) dated January 23, 2014 which was received by the Appellant on January 29, 2014 when the Appellant was required to file its written response to RSCN by January 28, 2014."

3. Ground No. 1, with all its sub-grounds, relates to the TP adjustment of Rs. 3,95,96,975/-.

4. BUSINESS PROFILE OF THE APPELLANT COMPANY.

JAS India's business involves provision of freight forwarding services for delivery of cargo outside India (export business) and into India (Import business). In this regard the company has entered into an agreement with JAS World wide Group of companies. In relation to all the transactions of export, and import, a part of the services is provided by JAS India in the Indian Territory and part of the services is provided by JAS counterpart of the respective countries. For each transaction there is a profit sharing of approximately 50% of the freight with the counterpart of JAS i.e JAS India. For each of the above sharing the bills are raised and/ or received by JAS for sharing of the profit. If the counterpart of JAS is not in existence in any part of the country, then the billing is done with the outside agency. The bill will be raised based on the terms of shipping material.

5. International transactions undertaken by the assessee during the year under consideration are as under:

S.No.	Nature of International Transaction	Amount (in Rs)	Most Appropriate
1	Freight & Forwarding Services rendered to the Associated Enterprises	334,827,873	TNMM
2	Freight & Forwarding Services received from Associated Enterprises	266,695,164	TNMM
3	Management Fee	13,655,302	TNMM
4	Reimbursement of Microsoft License fee	1,393,125	TNMM
5	Reimbursement of Server Maintenance Charges	640,861	TNMM
6	Reimbursement of Corporate Guarantee charges	307,414	TNMM
7	EDI Charges	120,024	TNMM
8	Reimbursement of Soft Mart	71,942	TNMM
9	Preference Dividend	2,436,000	TNMM
10	Recovery of expenses	1,991,380	TNMM
11	Recovery of travel expenses	63,595	TNMM
12	Insurance Charges	524,369	TNMM

6. The assessee has selected TNMM as the most appropriate method, which was accepted by the TPO. However, the TPO was of the opinion that PLI should be OP/OC for benchmarking of international transaction relating to freight forwarding business.

7. Comparables selected by the assessee are as under:

<i>Sl.</i>	<i>Name of the Comparable</i>	<i>Margin</i>
1.	<i>Aqua Logistics</i>	<i>9.72%</i>
<sup>^</sup> 2.	<i>Arshiya International Ltd.</i>	<i>7.90%</i>
3.	<i>EITA</i>	<i>2.08%</i>
4.	<i>Hindustan Cargo Ltd.</i>	<i>2.92%</i>
5.	<i>NYK Logistics (India) Ltd.</i>	<i>-10.67%</i>
6.	<i>P L Shipping &amp; Logistics Ltd.</i>	<i>3.27%</i>
7.	<i>Rediff Freight &amp; Logistics Pvt. Ltd.</i>	<i>4.49%</i>

8. The TPO accepted only two comparables, namely, Aqua Logistics and Arshiya International Ltd. The TPO, after accepting the two comparables of the assessee, proceeded by doing fresh search and finally selected the following comparables:

1.	Aqua Logistics
2	Arshiya International Ltd.
3	! A B G Kandla Container Terminal Ltd.
4	Associated Road Carriers Ltd.
5	CG U Loajistic Ltd.
6	Chartered Loajistics Ltd.
7	Coastal Roadways Ltd.
8	DHL Lemuir Loajistics Pvt. Ltd.
9	Dahei Harbour & Infrastructure Ltd.
10	Indo Arya Central Transport Ltd.
11	Kakinada Seaports Ltd.
12	On-Dot Couriers & Carao Ltd.
13	Prime Air Global Ltd.
14	Ripley & Co. Ltd.
15	Seamec Ltd.
16	Speedy Multimodes Ltd.
17	Spencers Travel Services Ltd.
18	T K M Global Loajistics Ltd.
19	Tolani Shipping Co. Ltd.
20	Transport Corporation Of India Ltd.
21	V R L Logistics Ltd.

9. The assessee strongly raised objections for the proposed comparables stating that the comparables selected are functionally different.

10. Objections of the assessee did not find any favour with the TPO who proceeded by computing the upward adjustment and made addition of Rs. 8,31,85, 477/-.

11. The assessee raised objections before the DRP and reiterated that the TPO has selected comparables which are functionally different.

12. After considering the facts and submissions, the DRP was of the view that since the facts of the case in hand are similar to the facts for Assessment Year 2009 -10, accordingly followed its own order for Assessment Year 2009 -10.

13. Before us, the learned counsel for the assessee vehemently stated that the comparables selected by the TPO/DRP are functionally different. It is the say of the learned counsel that that the assessee does not own significant vehicles and, therefore, comparable companies which have significant ownership of vehicles should not be used. The learned counsel prayed for removal of the two comparables and inclusion of three comparables.

14. In the alternative, the learned counsel pleaded for restoration of the appeal to the file of the TPO for fresh search in parity with business profile of the assessee, strongly stating that the comparables who are owning vehicles should not be selected.

15. Per contra the Id DR stated that under the TNMM, verticals have to be considered and some similarity in functional profile should be sufficient to make the comparable valid for comparison.

16. We have carefully considered the rival contentions. It is true that the DRP has followed its directions issued in Assessment Year 2009 -10. We have the benefit of the order of this Tribunal for Assessment Year 2009-10 and 2011-12 in ITA No. 2484/DEL/2014 and 1687/DEL/2016. Since the business profile of the Assessee has not changed and since the comparable selected in Assessment Year 2009-10 have been accepted, we are of the opinion that those comparables must have been accepted finding the business profile similar to that of the assessee.

17. A perusal of this order of the Tribunal shows that in Assessment Year 2009 -10, the only objection was in respect to selection of the comparables where the assessee was seeking exclusion of Om Logistics Arcadia Shipping Ltd, Good Earth Maritime Ltd and Sun Mar Shipping Limited. The Tribunal has directed the exclusion of all these companies from the comparability analysis finding that the aforesaid stated comparable companies owned dedicated fleet of vehicles for

local destinations in addition to the logistics mix of rail and road, whereas the assessee company is not having fleet of trucks, etc. for transportation.

18. We are of the considered view that once this view has been accepted by the Tribunal we do not find any reason to deviate from the findings given in Assessment Years 2009-10 and 2011-12 by this Tribunal. We, therefore, restore this issue to the file of the TPO. The TPO is directed to do his fresh search in line of findings given by this Tribunal in Assessment Years 2009-10 and 2011-12 [supra] in respect of business profile of the assessee. The assessee would be at liberty to raise suitable objections and the TPO is at liberty of bringing fresh comparables in line with the business profile of the assessee.

19. Needless to mention the TPO shall give reasonable and sufficient opportunity of being heard to the assessee. Ground No. 1 with all its sub-grounds is treated as allowed for statistical purposes.

20. Ground Nos. 2 and 3 relate to benchmarking of international transactions pertaining to receipt of management services. We find that this Tribunal had considered a similar quarrel in Assessment Years

2009-10 and 2011-12 in ITA Nos. 2484/DEL/2014 and 1687/DEL/2016.

The relevant findings of the Tribunal read as under:

"With respect to the adjustment made by the learned transfer pricing officer with respect to the intragroup services we find that the issue squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 2008 - 09 [ ITA No 5410/DEL/2015 [AY 2008-09] dated 14/10/2019 wherein the coordinate bench dealt with this issue as Under:-

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

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

39. The Hon'ble High Court of Delhi in the case of EKL Appliances Ltd in ITA No. 1068 & 1070/DEL/201 1 after considering the decision of the Hon'ble Supreme Court in the case of Sassoon J. David Pvt Ltd, 1 18 ITR 261 referred to the legislative history and noted that:

"when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction.

Pursuant to public protest, the word "necessarily" was omitted from the section.

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

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The

quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised."

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

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

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

*Therefore respectfully following the decision of the coordinate bench in - 'assessee's own case for earlier year we also set-aside the whole issue of determination of the arm's-length price of the intragroup services back to the file of the learned transfer pricing officer with similar direction to the assessee and the learned transfer pricing officer. Accordingly ground number 3 - 4 of the appeal of the assessee is allowed with above directions for statistical purposes."*

21. A perusal of the order of the DRP shows that the DRP has followed its own orders for Assessment Year 2009 -10. The relevant findings of the DRP read as under:

"Since the facts and submissions of the present case are quite similar to the assessee's own case in AY 2009-10; therefore, we are of the considered view that the assessee's case is squarely covered by the DRP's order in the assessee's case for AY 2009-10. Accordingly, following the finding and reasoning given by the DRP in its order in the assessee's case for AY 2009-10, in view of finding in para 9.1 of the DRP's order in the assessee's case for AY 2009-10, it is hereby held that there is merit in the assessee's objection No. 1.1 and therefore, the AO/TPO is directed to compute the adjustment on proportionate basis, taking into consideration the proposition of the goods purchased from the AE to the total cost."

22. As mentioned elsewhere, this Tribunal has restored this issue to the file of the TPO with similar directions given by this Tribunal (supra). Respectfully following the decision of the Tribunal (supra), we direct accordingly.

23. In the result, the appeal filed by the assessee in ITA No. 2162/DEL/2015 is allowed for statistical purposes.

SA No. 144/DEL/2021 becomes infructuous.

The order is pronounced in the open court on 30.09.2021.

Sd/-

**[LALIET KUMAR]  
JUDICIAL MEMBER**

Sd/-

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

Dated: 30<sup>th</sup> September, 2021

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi

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