

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

| |
|---------------------------|
| ITA No.3149/Bang/2018 |
| Assessment year : 2014-15 |

| | | |
|--|-----|---|
| Kintetsu World Express India Pvt. Ltd., B-102, Brigade Magnum, B Wing, First Floor, International Airport Road, Amrutahalli, Kodigehalli Gate, Hebbal, Bangalore – 560 092. PAN: AAACK 8804H | Vs. | The Assistant Commissioner of Income Tax, Circle 4(1)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

| | | |
|---------------|---|--|
| Appellant by | : | Shri T. Ravindra, CA |
| Respondent by | : | Dr. Manjunath Karkihalli, Jt.CIT(DR)(ITAT), Bengaluru. |

| | | |
|-----------------------|---|------------|
| Date of hearing | : | 02.12.2021 |
| Date of Pronouncement | : | 20.12.2021 |

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 28.9.2018 of the CIT(Appeals)-4, Bangalore relating to assessment year 2014-15 on the following grounds:-

- “1. That on the facts and circumstances of the case, the Learned Commissioner of Income-tax (Appeals)-4, Chennai [hereinafter referred to as 'Ld. CIT(A)'] has grossly erred in partly confirming the action of the Learned Assistant Commissioner of Income-tax, Circle 4(1)(1), Bangalore (Id. AO) by not accepting certain comparables chosen by the Company.

2. That on the facts & circumstances of the case, the Ld. CIT(A) erred in upholding the action of the Ld AO in rejecting the below mentioned comparables chosen by the Company that are functionally comparable to the business of the company:
 - a. Sindhu Cargo Services
 - b. Atlas Logistics Private Limited
 - c. Freight Systems India Private Limited
3. That on the facts & circumstances of the case, the Ld. CIT(A) erred in upholding the action of the Ld AO by including the below mentioned comparable company that is not functionally comparable to the business of the company:
 - a. Sravan Shipping Services Private Limited
4. That the appellant prays that direction be given to grant all such reliefs arising from the preceding grounds as also all reliefs consequential thereto.
5. That the appellant craves leave to add, amend, modify, rescind, supplement, or alter any of the grounds stated here-in-above, either before or at the time of hearing of this appeal.”

2. Admittedly, ground No.3 is an additional ground which was not raised before the lower authorities. The assessee has filed a petition stating that Sravan Shipping Services Pvt. Ltd. is not comparable to the assessee's case on the reason that it was not functionally comparable and did not have foreign exchange income and significant different asset base.

3. We have heard both the parties on this additional ground. In our opinion, the assessee has inadvertently not raised this ground before the lower authorities. Being so, we admit it for adjudication. However, the lower authorities had no occasion to consider the objections of the

assessee on this issue and therefore we remit this issue to the AO/TPO for fresh consideration.

4. The assessee company was formed in the year 1997 and providing services in freight, forwarding and logistics to its Associated Enterprises. It also provides facilities for storage, warehousing, carriage and distribution of merchandise. Majority of the shareholding is held by Kintetsu South Asia Development Pvt Ltd, Singapore which holds 99.99% and the rest 0.01% is held by Kintestu World Express HKG Pvt Ltd. The company offers standards air freight, sea freight, customs clearing & forwarding 3rd party logistics and worldwide door-to-door services. It is dedicated to provide fast and reliable services that exceed customers' expectations in all continents. To manage their supply chain and provide transportation solutions while taking advantage of the company's specialization in the movement of heavy weight packages and cargo of all shapes and sizes, the services rendered by KWE are as follows:-

Air Freight Forwarding Services

- Freight Forwarding to various destinations world wide
- Air Export Consolidation
- Customs Clearing & Forwarding
- Inland Transportation
- Door to door services
- Handling all cargo including On-line tracking

Sea Freight Forwarding Services:

- Sea Freight Forwarder
- Warehousing Services, Distribution and delivery
- Less Container load
- Full Container load
- Order follow-up tracking systems.
- Factory Stuffing

5. The international transactions of services provided and services received along with Domestic Transactions Trucking charges paid are benchmarked under TNMM on an entity level. The assessee selected 5 comparables with arithmetic mean of 2.44%. The TPO was of the view that the assessee has selected the comparables arbitrarily. He was of the view that TNMM is the most appropriate method for determining the ALP of the international transactions of the assessee. Therefore TPO carried out a fresh search for uncontrolled comparables in Prowess database. For the services rendered by the assessee the TPO determined average PLI of 2.86% and OP/OC at 2.94%. After considering the assessee's submissions, he arrived at 7 final set of comparables viz., J T B Jupiter Express Services Pvt. Ltd., Samsara Shipping Pvt. Ltd., Seabridge Maritime Agencies Pvt. Ltd., Sharaf Cargo Pvt. Ltd., Sravan Shipping Services Pvt. Ltd., Hindustan Cargo Ltd. & Gordon Wood Roffe Logistics Ltd. with an average mean of 23.80%. The computation of arm's length price determining adjustment of Rs.5606,58,153 u/s. 92CA was as follows:-

| | |
|--|---------------------------------|
| Operating Revenue | Rs.210,29,58,284 |
| Arm's Length Margin of Operating Revenue | 23.80% of the operating revenue |
| ALP @ 23.80% of operating revenue | Rs.260,34,62,355 |
| Operating Cost | Rs.204,28,04,202 |
| Excess being adjustment u/s. 92CA | Rs.5606,58,153 |

6. As against this, the Id. AR submitted that the TPO has disregarded the judicial precedents, the principles contained in the CBDT circular and has disregarded the statutory provisions before rejecting the TP study of the Assessee. The TPO has grossly erred in not discharging the onus of proving that the methodology followed by the Assessee is erroneous in any manner, before rejecting the same. The TPO has only mentioned that details of comparables accepted/rejected by Assessee is not provided. However, it was submitted that such details are contained in the TP study

that was furnished during the course of proceedings before the TPO, which the TPO seems to have not factored before coming to the above conclusion.

7. The Assessee had considered 5 comparables in its TP study, of which the TPO accepted only 2 comparables and rejected the balance 3 comparables merely on the ground that the said comparables are not functionally comparable. It is therefore humbly submitted that the following comparables considered by Assessee may be reinstated and considered as comparable for the reasons stated/submissions below :-

| Comparable in TP study | Reasons for rejection by TPO | Assessee's submissions |
|---------------------------------------|--|---|
| Sindhu Cargo Services Private Limited | Its services include road transportation, hence not accepted as a comparable | The TPO has not brought anything on record to justify that this comparable is only engaged in road transportation. In this regard, reference is made Annexure 1, the website extract of the comparable that clearly indicates it is engaged in end to end logistics solutions, which is exactly similar to profile of assessee as indicated in page 4 and paragraph 3.1 of the TP study as well as reproduced by TPO in his order on page 3 of the TPO order. In addition, from the annual report (i.e., Page number 76) of this comparable [Annexure 2], clearly indicates that it is in the business of customs clearance, freight, forwarding, warehousing and transportation. which also is similar to activities undertaken in KWE. In addition, pages 1 and 2 of the profit and loss statement in the annual report of the comparable (extract enclosed as Annexure) indicates the ITC code of the principal services of the company which includes warehouse charges, transportation charges. freight charges, air freight charges and other related services which is also similar to KWE. Given this, it is humbly |

| | | |
|---------------------------------------|---|---|
| | | submitted that this company be reinstated and action of TPO of rejecting this comparable may be set aside. |
| Atlas Logistics Private Limited | Its services include Road logistics services (Padded van Transportation) and rail logistics services, hence not accepted as comparable. | Reference is made to website extract of the company enclosed as Annexure 4, that clearly indicates that it is engaged in providing comprehensive logistics solutions and further that its services include freight management, customs brokerage, warehousing and distribution, project logistics, supply chain solutions, etc. In addition, page 10 and 1 of the annual report of the comparable enclosed as Annexure 5, indicates that its primary revenue is from freight and service charges and that its ITC code belongs to freight transport services, respectively. It must be noted that even KWE's primary source of revenue is from freight charges, hence it is amply clear that this company is functionally similar to KWE and hence, it is submitted that reasons provided by TPO to reject this as a comparable is not tenable and ought to be set aside, thereby including this company as a comparable. |
| Freight Systems India Private Limited | Its services include land freight and rail Freight forwarding, hence not accepted as comparable. | Extract from the website enclosed as Annexure 6 of this comparable indicates that the company is an international freight forwarding company engaged in sea freight, air freight and clearance services, hence similar to the functional profile of KWE. Page 74 of the annual report of the company and page 1 of profit and loss account of the company (enclosed as Annexure 7) shows that the company is engaged in total logistics solution and that the primary service category of ITC Code is that of Logistics services. Hence, it is submitted that this company is functionally similar to KWE and in the absence of any concrete justification/evidence to the contrary by the TPO to support that it is |

| | | |
|--|--|--|
| | | not functionally comparable, his action of rejecting this comparable must be set aside, thereby directing that this company be included in the final set of comparables. |
|--|--|--|

8. The Id. AR further submitted that in the order passed for AY 2012-13 and AY 2013-14 the TPO has not made any such observations and it may be noted that there has been no change in business of the Assessee in the subject financial year as well. In this regard, reliance is placed on the Mumbai Tribunal decision in the case of *Agility Logistics (P) Limited vs Assistant Commissioner of Income-tax (2013) 36 Taxmann 556* wherein it was held that where no transfer pricing adjustment was made in assessee's own case for previous year, same was to be followed. Accordingly, it is prayed that all the above 3 comparables rejected by TPO be reinstated and considered as comparables.

9. We have heard both the parties and perused the material on record. The assessee seeks exclusion of 3 comparables viz., Sindhu Cargo Services Pvt. Ltd., Atlas Logistics Pvt. Ltd. and Freight Systems India Pvt. Ltd. These comparables were considered by the CIT(Appeals) with the following observations:-

“ The observations and contentions made in this regard by the assessee are not found to be acceptable. The argument that the aforesaid companies were accepted in the previous years is not conclusive in itself. The principle of res-judicata does not apply to the Income Tax proceedings which is an accepted legal tenet. In any event it has not been brought forth adequately, as to how the previous T.P. orders are equally and squarely applicable to the current year under consideration. the assessee's contention is also not supported with the T.P. Studies / T.P. orders relevant to the issues at hand, in the assessment-period under consideration.

The assessee, has attempted to explain that the nature of activity conducted by the above said 3 companies are similar to the assessee. It has not however been in a position to rebut the specific findings and observations of the T.P. order in this regard. The T.P.O. in his order in respect of M/s Sindhu Cargo Services Private Limited, Atlas Logistics Private Limited and Freight Systems India Private Limited, has observed that these companies are majority involved in ground / road-transportation activity. It is amply clear from the available facts that, the assessee's activity on the contrary is primarily focused on Air and shipping logistical / cargo handling activities, at an international level. It clearly emerges from the T.P.O's order that, in respect of M/s Sindhu Cargo Services Private Limited and M/s Atlas Logistics Private Limited, the core activity includes road-logistical services (Padded van transportation) and rail logistical services. The assessee under reference is not involved in rail / road transportation activity in any substantive measure. The T.P.O has also noted in the T.P. order that M/s Freight Systems India Private Limited is also involved in land-freight and rail-freight forwarding activity, which is definitely not the primary activity of the present assessee.

In background of the above discussion and facts & circumstances of the factual matrix in the present case, the assessee's contention for retention / inclusion se 3 comparable is not found to be acceptable. The T.P.O's action is therefore upheld. The assessee's grounds of appeal in this regard are therefore disallowed.”

10. We have heard both the parties and perused the material on record. As seen from the above, the findings of the CIT(Appeals) are contrary to the argument of the Id. AR and these facts are to be examined with reference to the financials of the comparables. Accordingly this issue is remitted back to the file of AO/TPO for decision afresh, after considering the financials of the comparables.

11. In the result, the assessee's appeal is allowed for statistical purposes.

Pronounced in the open court on this 20th day of December, 2021.

Sd/-

Sd/-

(GEORGE GEORGE K.)
JUDICIAL MEMBER

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 20th December, 2021.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.