

IN THE INCOME TAX APPELLATE TRIBUNAL
“K ” BENCH, MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 7286/Mum/2018
(A.Y: 2014-15)

DHL Logistics Pvt Ltd 201A, Silver Utopia, Cardinal Gracias Road Chakala, Andheri (E) Mumbai – 400099	Vs.	ACIT – 9(3)(1) Room No. 215, 2 nd Floor, Aayakar Bhavan, M.K.Road, Mumbai – 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACM6824A		
Appellant	..	Respondent

Appellant by :	Shri. Madhur Agarwal.AR
Respondent by :	Dr. Yogesh Kamat.CIT.DR

Date of Hearing	27.01.2022
Date of Pronouncement	15.03.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the final assessment order u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 passed in pursuance to directions of the Dispute Resolution Panel (DRP) u/s 144C(5) of the Act. The assessee has raised the following grounds of appeal:

- 1. On the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP') erred in upholding the action of the Ld. Assessing Officer ('AO') / Ld. Transfer Pricing*

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Officer (TPO) in confirming the addition of INR 37,53,73,494 /- to the income of the Appellant by holding that its international transactions pertaining to its freight forwarding segment do not satisfy the arms length principle envisaged under the Income Tax Act, 1961 ('the Act').

2. In doing so, The Ld. DRP / Ld. TPO/Ld. AO grossly erred in:

2.1. disregarding the arm's length price ('ALP') and the scientific benchmarking process carried out by the Appellant in the Transfer Pricing ('TP') documentation maintained by the Appellant in terms of section 92D of the Act read with Rule ioD of the Income-tax Rules, 1962 ('Rules');

2.2. failing to appreciate the economic rationale of using "Operating Profit/ Value Added Expenses" as the Profit Level Indicator ('PL'), and instead using "Operating Profit/ Total Cost" ('OP/TC') as the PU.

2.3. not allowing the exclusion of pass through costs as mentioned in Note 18.1 to the Notes to the Financial Statements of the appellant for AY 2014-15 and thereby enhancing the cost base for the purpose of computing the operating margin (OP/TC) of the assessee;

2.4. not restricting the TP adjustment to the extent of the value of the international transaction undertaken by the assessee.

2.5- not allowing the use of multiple year data as prescribed under Rule 1013(4) of the Rules read with the OECD TP Guidelines, and determining the arm's length price on the basis of financial information of the comparables for the year ended March 31, 2014

2.6 disregarding all comparable companies selected by the Appellant in its TP documentation and further disregarding three out of four additional comparable companies identified by the Appellant by conducting a fresh search.

2.7 including Om Logistics Limited which is a functionally incomparable company in the final set of comparable

companies.

The Appellant prays that the book value of the international transactions pertaining to the freight forwarding segment of the Appellant should be held to be the arm's length price of the said transactions as per the Appellant's TP documentation, and the addition made on account of the above grounds should be deleted.

3. On the facts and in the circumstances of the case and in law, the learned A.O. erred in not allowing Depreciation of Rs. 4,26,46,129/- on the balance of WDV of Rs. 17,05,84,517/- [Net of WDV of Rs. 11,24,19,120/- transferred to DHL Supply Chain India Pvt. Ltd. in terms of D-Merger under Court Order]

Seventh Year claim for Depreciation On Goodwill Resulting From Acquisition Of Business Unit Of Lee & Muirhead Pvt. Ltd. In A.Y. 2008-09.

3.1 On the facts and in the circumstances of the case and in law, the Ld. A.O. erred in not allowing depreciation of Rs. 4,26,46,129/- on the balance of WDV of Rs. 17,05,84,517/- [Net of WDV of Rs. 11,24,19,120/- transferred to DHL Supply Chain India Pvt. Ltd. in terms of D-Merger under Court Order] claimed @ 25% under applicable provisions of Section-32 of IT Act, under the Head Intangible Assets-Goodwill consisting of various Intangible Assets arising out of the acquisition of business unit of Lee & Muirhead Pvt. Ltd in the F.Y 2007-08

3.2. On the facts and in the circumstances of the case and in law, the Ld. A.O. erred in holding that the ratio laid by the Hon'ble Supreme Court in case of Smifs Securities Ltd. (348 ITR 302) is not applicable in the present case and consequently erred in disallowing depreciation on intangible assets including goodwill.

3.3. On the facts and in the circumstances of the case and in law, the DRP erred in rejecting the valuation

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2. The Brief facts of the case are that, the assessee company is engaged in the business of transportation as principal, agent at home and overseas, customs clearing agents, to provide every kind of operations in connection with transportation, import, export, packing, warehousing and handling of goods by sea and air or land. The assessee has filed the return of income electronically for the A.Y 2014-15 on 29.11.2014 disclosing a total income of Rs. 94,44,89,320/-. The assessee has filed the revised return of income on 05.10.2015 with a total income of Rs.99,38,72,270/-.Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and the information. The A.O find that the assessee has international transactions exceeding Rs.15crores with its Associate Enterprises(A.E), therefore the matter was referred to the Transfer Pricing Officer (TPO) for determination of Arms length price (ALP) in relation to international transactions with its associate enterprises (AE). The TPO has perused the international transactions and

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specified domestic transactions as per Form-3CEB. The TPO dealt on the international transactions with its AEs referred at page 2 Para 4 of the order as under:

International transactions and specified domestic transactions (SDT) (as mentioned in the Form 3CEB):

S. No .	Description of the transactions	2014-15	2013-14	Method Used
1	Freight Revenue	4,964,045,743	5,329,216,144	Transaction 1 Net Mrgin Method (TNMM)
2	Freight Express	7,202,693,840	7,763,645,253	TNMM
3	Management and IT Service	483,270,358	572,226,560	TNMM
4	Provisions of Warehousing support service	NA	5,886,168	Internal TMM
5	Provisions of support service	540,176,824	220,966,117	TNMM
6	Purchase of supplies	689,182	38,306	TNMM
7	Other allocated costs	56,507,682	155,361,378	Comparable uncontrolle d price (CUP)
8	Reimbursemen t (Payments)	53,100,998	45,201,747	CUP
9	Reimbursement (Receipts)	767,47,157	84,824,021	CUP
10	Advance to service providers	10,47,56,773	NA	Other method

3. The specified domestic transactions entered by the assessee referred at page 3 as under:

During the year, the assessee has entered into the following specified Domestic Transactions (SDT's):

S. No.	Description of the transactions	2014-15	Method Used
1	Provisions of Manpower support service	3,38,81,829	TNMM
2	Provisions of Transportation Services	2,16,46,605	Other method
3	Provision of Customs Clearance services	3,68,55,435	Other method
4	Payments related to Directors remunerations	93,39,752	Other method
5	Reimbursement of expenses	14,35,949	Other method

4. The TPO has considered the adjustments in respect of the international transactions for the earlier assessment years (A.Y)2004-05to2012-13.The TPO has made analysis of freight levy, freight expenses and management services. The TPO considered the functional facts and the nature of transactions and observed that the assessee has adopted TNMM as Most Appropriated Method (MAM) and PLI (OP/VAE) @ 31.18%. The assessee as per transfer pricing study report has selected comparables for services as under:

Comparables selected

The margin of the comparable companies as per the TP study is as follows.

S. No.	Name of Company	Data Source	OP/VAE
1	TKM Global Logistics Ltd	P	14.31%
2	SRS Frieght Management Ltd	P	-4.68%
3	Gordon Woodroffe Logistics	C	25.99%

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	<i>Ltd</i>		
4	<i>Hindustan Cargo Ltd</i>	C	2.66%
5	<i>Trade-Wings Ltd (Cargo)</i>	P-Seg	-4.08%
6	<i>AW Travel & Logistic services Ltd</i>	AR	12.03%
7	<i>Balurghat Technologies Ltd., (Transportation Operation / Travel Division)</i>	AR-Seg	24.08%
	<i>Mean</i>		10.15%

The assessee compared its OP/VAE margin of 31.18% with that of the comparable 10.15%.

The assessee vide its submission dated 8 August 2017 provided the OP/TC and OP/VAE margin of the comparables selected in the TP study for the FY 2013-14 considering the financial date of only FY 2013-14 from the annual reports of the comparable companies.

S. No.	Name of Company	OP/VAE	OP/TC
1	<i>TKM Global Logistics Ltd</i>	-9.87%	-0.93%
2	<i>SRS Frieght Management Ltd</i>	38.36%	2.22%
3	<i>Gordon Woodroffe Logistics Ltd</i>	16.32%	3.20%
4	<i>Hindustan Cargo Ltd</i>	8.22%	0.75%
5	<i>Trade-Wings Ltd (Cargo)</i>	-46.33%	-46.33%
6	<i>AW Travel & Logistic services Ltd</i>	18.03%	3.18%
7	<i>Balurghat Technologies Ltd., (Transportation Operation / Travel Division)</i>	35.26%	5.29%
	<i>Mean</i>	8.57%	-4.67%

5. The TPO find the operating profit to VAE margin at 31.18%. Further the assessee has selected OP/VAE margin of comparables in TP study considering the financial data for F.Y 2013-14 as per the annual report of the comparable companies. The TPO has

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issued notice u/s92CA(2) of the Act along with questionnaire to submit the details and documents in support of the determination of ALP. The TPO on perusal of the details and Form-3CEB find that the assessee has selected 7 comparable companies based on the one year financial data and dealt on the functional profile, margins and applied the filters and determined the OP/TC margin of @ 8.95%. The TPO has selected the final set of comparables referred at page 16 of the order as under:

S. No.	Name of Company	OP/TC (in %)
1	Arishya International Ltd	-6.46
2	Om Logistics Ltd	8.95
3	Sical Logistics Ltd	5.32
4	GATI Ltd	3.71

6. Further, the TPO has called for the information on OP/VAE and various costs pertaining to logistic segment. The TPO find the assessee is working with OP/VAE margin @ 31.18% and OP/PC margin @ 3.95% and computed the ALP of international transactions at page 19 Para 6.15 as under:

6.15 The working of adjustment comes out to be as under:

Total revenue		15,59,97,91,699
Non-AE Revenue		10,58,34,25,634
AE Revenue	A	5,01,63,66,065
ALP Revenue	B	5,60,79,71,620
Difference	$C=B-A$	59,16,05,555
3% of Assessee's Txn	$D=A \times 3\%$	15,04,90,982
Adjustment	Since $D < C$	59,16,05,555

7. The TPO with these adjustments of international transactions of freight revenue and freight expenses of Rs.59,16,05,555/- has passed the order u/s 92CA(3) of the Act on 31.10.2017. The A.O. after receiving the TPO order has passed the draft assessment order u/s 143(3) r.w.s 144C(1) of the Act dated 13.12.2017 with the transfer pricing adjustment, disallowance of depreciation on goodwill, disallowance of employees contribution to PF and ESI and interest on delayed payments of TDS. The assessee has filed the objections in Form No.35A against the draft assessment order with the DRP. Whereas the DRP after considering the findings of the TPO and objections of the assessee and the earlier year orders on similar disputes has issued directions in respect of the comparables and partly allowed the objections of the assessee. As per the directions of the DRP, the AO has determined the total income with TP adjustments and disallowance of depreciation on goodwill and

assessed the total income of Rs. 141,19,37,436/- and passed order u/s 143(3) r.w.s 144C(13) of the Act dated 30.11.2018. Aggrieved by the final assessment order, the assessee has filed an appeal before the Hon'ble Tribunal.

8. At the time of hearing, the Ld. AR has restricted the submissions on the issues and filed the synopsis chart. The contentions of the Ld.AR are that the transfer pricing issues are covered by the earlier Honble ITAT orders in the assessee's own case and there is no change in functions performed and risk assumed. The Ld.AR substantiated the submissions with the judicial decisions and voluminous paper book. Contra, the Ld.DR supported the order of the lower authorities.

9. We heard the rival submissions and perused the material on record. First, we consider the grounds of appeal No. 2.1 and 2.2 in respect of selection of profit level indicator(PLI) basis being operating profit by value add expenses instead of operating profit by total cost adopted by the TPO and DRP. The Ld.AR has furnished the decisions in assessee's own case on this grounds of appeal for the A.Y 2010-11, 2011-12 and

2015-16. We find the observations of the Hon'ble ITAT for the A.Y 2015-16 in ITA No. 7166/Mum/2019 at page 7 Para 4 are read as under:

4. *Upon careful consideration of rival submissions and material on record, we find that it is admitted position that the coordinate bench in assessee's own case for A.Y 2010-11 in ITA No. 1030/Mum/2015 detailed order dated 20.12.2019 upheld the application of PLI using OP/VAE by observing as under:*

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

(a). Inbound Collect – Air Shipments :

Shipper (outside India) hands over the consignments to DHL India's AE to forward the same via air to the consignee in India. DHL AE takes the assistance of DHL India for the same. DHL AE negotiates the terms of the transactions with the shipper. The consignee is assigned by the shipper to pay for the International freight. Accordingly, DHL AE assigns the

collection responsibility (from the consignee) to DHL India. DHL AE pays the freight to the carrier.

DHL India invoices and collects from the consignee the Origin Charges („OC“), Freight (Air) and Destination Charges („DC“).

DHL AE invoices and collects from DHL India the OC and Freight. Only DC is considered as revenue for DHL India.

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

(b). Inbound Collect – Ocean Shipments :

The Shipper (outside India) hands over the consignment to DHL AE to forward the same via ocean to the consignee in India. DHL AE takes the assistance of DHL India for the same. DHL AE negotiates the terms of the transaction with the Shipper. In this case, the consignee pays for the freight (ocean).

DHL India invoices and collects from the consignee the OC, Freight (ocean) and the DC. Freight and DC are considered as revenue for DHL India.

DHL AE invoices and collects from DHL India the OC and Freight (ocean).

(c). Inbound Prepaid :

The Shipper (outside India) hands over the consignment to DHL AE to forward the same to the consignee in India. DHL AE takes the assistance of DHL India for the same.

DHL AE negotiates the terms of the transaction with the Shipper. DHL AE invoices the shipper for OC and Freight. The Shipper pays for OC and Freight to DHL AE. DHL AE further pays the freight to the carrier.

DHL India invoices and collects from the consignee the DC. The same is accounted as revenue by DHL India.

(d). Outbound Collect :

Shipper (India) hands over the consignment to DHL India to forward the same to the consignee (outside India). DHL India takes the assistance of DHL AE for the same.

DHL India negotiates the terms of the transaction with the Shipper. The consignee pays→ the freight to DHL AE.

DHL India pays the freight to the carrier. DHL India invoices and collects from the→ Shipper the OC. The same is booked as revenue.

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

(e). Outbound Prepaid :

Shipper (India) hands over the consignment to DHL India to forward the same to the→ consignee (outside India). DHL India takes the assistance of DHL AE for the same.

DHL India negotiates the terms of the transaction with the Shipper. In the present case→ the Shipper pays for the freight.

DHL India invoices and collects from the Shipper the OC and freight. The same is→ considered as revenue for DHL India.

DHL India further pays the Freight to the carrier company.→

DHL AE invoices and collects from the consignee the DC.→

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

(ii). As observed by the TPO, the main component of the income of the assessee is on account of differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner. It was observed by the TPO, that the carriers in view of heavy turnover of the assessee group would provide them very competitive rates which otherwise would not be available to a normal exporter or importer. TPO observed, that the assessee group in anticipation of the expected shipments would book cargo spaces in bulk around the world at the competitive rates so offered to them by the shipping companies. The TPO held a conviction that the assessee after making bulk bookings with the carriers would enter into bargains depending upon the time, space and the paying capacity of the client. It was observed by the TPO, that though the assessee would collect

freight from the customers at an amount in excess of the rate it had negotiated with the shipping company, however, it would issue a "House Airway Bill" of a similar amount of fare and the difference would be collected as handling charges. On the basis of his aforesaid observations, it was concluded by the TPO that the additional amount charged by the assessee from its client would in fact represent the „mark up" on freight. Accordingly, it is in the backdrop of his aforesaid observations that the TPO had concluded that the handling charges which were charged by the assessee varied from customer to customer because they were dependent upon the „mark up" on freight which it was obtaining from them on the basis of negotiations. Accordingly, it was observed by the TPO that the freight element booked by the assessee in its books of accounts had a component of profit in it. In order to fortify his aforesaid observations, it was further observed by the TPO that the fact that the assessee had debited the „freight expenses" and credited the „freight receipts" in its books of accounts revealed that the operating profit of the assessee comprised not only of its „handling charges" but also the differential freight i.e the excess of the freight which it charged from its clients as against that paid to the shipping line. On the basis of the aforesaid observations, the TPO/DRP had rejected the adoption of PLI of OP/VAE by the assessee and had advocated the substitution of the same by PLI of OP/TC.

(iii). We have perused the aforesaid observations of the TPO and are unable to persuade ourselves to subscribe to the same. As observed by us hereinabove, the costs pertaining to services obtained by the assessee from third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same. In our considered view, the net margin realised by the assessee pursuant to its international transactions with its AE"s are to be determined only with reference to the cost incurred directly by the assessee itself and its profit margin cannot be imputed

on the basis of the cost incurred by the third party or unrelated parties. We are of the considered view that the payment made by the assessee to the third party for and on behalf of the AE which had thereafter been reimbursed by the AE, cannot be included in the total costs of the assessee for the purpose of determining its profit margin. In fact, we find that Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's „net profit" margin for application of TNMM. Rule 10B(1)(e) provides that the „net profit" margin realized by the enterprise from an international transaction entered into with an AE is to be computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise. As such, it contemplates determination of ALP with reference to the costs, assets, sales etc. of the enterprise in question, i.e the assessee, as opposed to the AE or any third party. In our considered view, the considering of the freight cost of the airlines/ship liners in the total cost base of the assessee had resulted to a distorted picture of the „net margin" realized by the assessee from its international transactions. Our aforesaid view is fortified by the order of the ITAT, Mumbai in the case of FedEx Express Transportation and Supply Chain Services India Pvt. Ltd. Vs. Dy. CIT, Range 8(1), Mumbai [ITA No. 435/Mum/2014; dated 10.12.2014]. In the said case, it was observed by the Tribunal that the payment made by the assessee to the third party for and on behalf of the AE which had been reimbursed by the AE, could not have been included in the total costs of the assessee for the purpose of determining its profit margin. Also, the Hon"ble High Court of Delhi in the case of LI and Fung India Pvt. Ltd. Vs. CIT (2014) 361 ITR 85 (Del), had observed, that for applying the TNMM the assessee's net profit margin realised from the international transactions had to be calculated only with reference to the cost incurred by it and not by any other entity either third party vendors or the associated enterprise. It was further observed by the Hon"ble High Court, that Rule 10B(e)(i) of the Income-tax Rules, 1962, does not enable consideration or imputation of cost incurred

by third parties or unrelated parties for the purpose of computing the assessee's „net profit" margin for application of the TNMM. Accordingly, it was concluded by the Hon"ble High Court, that attribution by the TPO of the costs of the third party, when the assessee did not engage in that activity, and more importantly when those costs were clearly not the assessee's cost, but those of a third party, was clearly impermissible.

(iv). Apart from that, we find that from a perusal of the „agreements" which the assessee had entered into with various carriers (i.e airlines) who are members of IATA, and also the sample „invoices" raised by the assessee on its clients, it can safely be concluded that the assessee while providing logistics support services in "air business" had merely acted as an agent of the airlines. A perusal of the terms and conditions of "Cargo agency agreements" which the assessee had entered into with various airline carriers which were members of IATA, reveals that the assessee was to act as an „agent" for the various member carriers. [(Page 804) of the assessee's „Paper book" (for short „APB")]. As per the „agreement", the assessee was vested with a limited authority to represent various member carriers while selling the air cargo transportation services to the customers and was bound to adhere to the various terms and conditions imposed by the member carriers.(Page 805 of „APB") In sum and substance, the assessee at all times was governed by the carriers. Also, as per the terms of the „agreement" the assessee was bound to represent itself as an "agent" in all its communications viz. letterheads, telephone listings, office signs etc. with the customers, and was specifically prohibited from representing or projecting itself as a "Principal" (Page 806 of „APB"). Further, the „agreement" also provided for indemnification of the assessee by the member carrier in the event of a loss/damage arising in the course of transportation pursuant to the sale made by the assessee.(Page 807 of „APB"). As such, the assessee did not assume any risks while undertaking its business. In order to fortify his aforesaid claim, the ld. A.R had drawn our attention to a sample "house

airway bill" (Page 813-817 of „APB") that was issued by the assessee to its customer which revealed that the assessee had executed the same as an agent of the carrier. Also, we find that the functions (carriage of goods) and liabilities (indemnification of the loss etc.) assumed by the assessee vis-a-vis the customer (as per its standard terms and conditions) corresponds to those assumed by the carrier vis-à-vis assessee. Accordingly, we are of the considered view that the functions and liabilities were effectively delegated by the assessee to the carrier and no part of the same was effectively assumed by the assessee. On a similar footing, we find that in the case of "ocean business" also the assessee had merely acted as an agent. Further, we find that all the „agreements" entered into by the assessee with the carriers (under both air and ocean business) were soft block agreements which provided an option to the assessee to cancel the same without incurring any penalty, therefore, no inventory risk was assumed by the assessee. (Page 860 to 865 of „APB"). As regards the observation of the TPO, that the main component of the income of the assessee is on account of the differential freight element which it is able to obtain from the shipping companies on account of bulk booking of space on the liner, we are in agreement with the contention advanced by the Id. A.R that the advantage to the assessee on account of bulk booking was on account of its value addition activities i.e generating more customers and not on account of transportation function. In fact, we are persuaded to subscribe to the claim of the Id. A.R that transportation cost could have been included as a base only if the assessee had undertaken the transportation activity itself or would have undertaken the risks associated with the transportation function. However, as in the present case, in the absence of either of the aforesaid factor there would be no justification for including the said third party costs i.e transportation costs as apart of the base. (v). As per the TPO, the element of freight could be considered as a pass through expense only if no profit or mark up is obtained on freight. However, as observed by the TPO, the case of the present assessee would not fall in the said

category as the handling charges which were charged by the assessee varied from customer to customer, as they depended on the „mark up“ which it obtained from its customers based on negotiations. In our considered view, there is substantial force in the claim of the assessee that in order to characterize a particular item as pass through in nature an analysis has to be made with respect to the FAR of the assessee qua such activity. As the assessee does not perform any additional functions with respect to the third party cost, neither employs its assets, nor any risks are assumed for the same, therefore, it can safely be concluded that the assessee does not undertake any activity in relation to the said costs. (vi). As regards the observation of the TPO that PLI of OP/VAE could not be safely applied as the reporting of various companies as regards classification of various expenses is not uniform, we are unable to find favour with the same. In our considered view, the assessee had only selected companies which had provided their VAE separately. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view, that as in the case before us the costs pertaining to the services obtained by the assessee from the third parties viz. shippers/airliners, clearing and forwarding agents, transport service provider etc. neither involved any service element of the assessee nor the assessee had carried any risk or employed any of its assets with respect to the same, therefore, inclusion of the freight cost in the total cost base of the assessee by the TPO was not permissible. We thus are persuaded to subscribe to the claim of the assessee that the TPO/DRP were in error in rejecting the PLI of OP/VAE adopted by the assessee and substituting the same by PLI of OP/TC. As such, we herein restore the matter to the file of the A.O/TPO for the purpose of benchmarking the international transactions of the assessee by adopting the PLI of OP/VAE. Grounds of appeal Nos. 1, 3.1 and 3.2 are allowed in terms of our aforesaid observations

The same findings have been applied by the bench in assessee's own case for Assessment Year 2011-12 vide ITA

Nos. 1385/Mum/2016 & ors; order dated 10.08.2020. No change in assessee's business model has been demonstrated before us. Also no distinguishing facts/ features has been pointed out by the revenue in this year. Therefore, respectfully following the same consistent stand of Tribunal, we restore the matter to the file of Ld. AO / TPO on similar lines as above for the purpose of benchmarking the impugned international transactions adopting the PLI of OP/VAE. Ground No. 2.1, 2.2 & 2.3 stands disallowed to the extent.

10. We find the facts narrated are identical and the selection of operating profits by value added expenses has to be considered as there is no change in assessee's business model. We follow the judicial precedence and considering the facts presented in the course of hearing restore the disputed issue to the file of the AO / TPO with similar directions in respect of bench marking and adopting of PLI and allow the grounds of appeal for statistical purposes.

11. With regard to ground of appeal No. 2.3, since the ground of appeal No.2.1 and 2.2 deals with the consistency and adoption of the revenue model was restored to the file of TPO. Again considering the nature of freight shipment and revenue becomes academic and treated as not pressed and dismissed.

12. The Ground of appeal No. 2.4 deals with respect to restrictions of TP adjustments to the extent of value of international transactions. We find the Hon'ble Tribunal in assessee's own case for the A.Y 2015-16 has restored the matter to the file of the Assessing officer referred at page 12 Para 5 of the order as under:

5. In Ground No. 2.4, the Ld. AR submitted that TP adjustment, if any, should be restricted only to the extent of value of international transaction undertaken by the assessee. We find that is issue is also covered by para 27 of Tribunal order for Assessment Year 2010-11 wherein following directions have been rendered.

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

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

Facts and issue being identical, we remit the issue back to the file of Ld. AO/TPO on similar lines. This ground of stands allowed to that extent.

13. We considering the similar line of working and directions restore the disputed issue to the file of the A.O to consider the proportionate adjustments in respect of the income to the extent of international

transactions and allow the ground of appeal for statistical purposes.

14. The ground of appeal No. 2.5 is not pressed and is treated as withdrawn and dismissed

15. In respect of ground of appeal No. 2.6 for inclusion of comparables, the Ld. AR submitted that if the comparable the M/s Hindusthan Corgo Ltd is included in determination of the ALP, which covers the revenue aspects of the assessee and inclusion of other comparables is not pressed. The Ld.AR submitted that the TPO/DRP has rejected the comparable as it was not selected in the A.Y 2013-14. The Ld. AR submitted that it is functional comparable and was accepted in A.Y 2011-12 & 2012-13 by the Income Tax Department. Whereas in the A.Y 2013-14, due to an extraordinary event the comparable was rejected. The Ld AR referred to the observations and submissions before the TPO and DRP on the export earnings and the logistic transport services. We find the comparable was functionally accepted in earlier A.Y 2011-12 & 2012-13 and for A.Y 2013-14 it was rejected as it has some extraordinary event and no segmental information was available and further the

TPO has rejected the comparable on the export operations. We considering the facts, submissions, information and judicial decisions in the assessee's own case and the department accepted it as comparable in the earlier years as discussed. Accordingly, we direct the TPO to include the comparable in determination of ALP. Since, one comparable is included and there are no arguments made by the Ld.AR on other comparables hence they are left open and allow the grounds of appeal for statistical purposes.

16. Whereas, the ground of appeal No. 2.7 pertains to exclusion of comparable Om Logistic Ltd. The Ld. AR submitted that the comparable company is engaged in the transportation and logistics services of vehicle and tangible assets and in the assessee's own case for A.Y 2015-16 it was excluded and dealt at page 13 Para 6 of the order as under:

6. In grounds Nos. 2.5 & 2.6, the assessee has contested the issue of comparable entities. However, Ld. AR during hearing, pleaded for exclusion of one comparable entity namely Om logistics Ltd in terms of Tribunal order for Assessment Year 2010-11. We find that vide para 30 & 31 of the order for Ay 2010-11, a finding has been rendered by the bench that though the assessee was not an asset owning company, M/s Om Logistics Ltd had significant asset and

hence, functionally different and therefore, to be excluded from the list of comparable entities. Respectfully following the same, we direct for exclusion of the said entity from the list of comparable entities. These grounds stand allowed to the extent.

Accordingly, we direct the TPO to exclude the comparable in determination of ALP and allow the ground of appeal of the assessee.

17. Whereas the grounds of appeal 3 to 3.10 deals with allowance of claim of depreciation on goodwill resulting from acquisition of business unit. The Ld. AR submitted that, the claim was allowed by the coordinate bench of the Honble Tribunal in the assessee's own case for A.Y 2010-11 and 2011-12. The Hon'ble Tribunal in ITA No. 1923/Mum/2016 A.Y 2011-12 has observed at page 26 Para 25, which is read as under:

25. Considering the decision of Tribunal for earlier years, which was followed by Co-ordinate bench in appeal for A.Y 2010-11, therefore, respectfully following the same, this ground of appeal is also allowed. In view of the aforesaid discussion on various issues raised by assessee, the AO/TPO is directed to recomputed the adjustment in accordance with the directions hereinabove.

18. Accordingly, we find the facts are identical and similar. Accordingly, we follow the judicial precedence, and direct the Assessing officer to allow

the claim of depreciation on good will and allow the grounds of appeal in favour of the Assessee.

19. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 15.03.2022.

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 15.03.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai