

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM AND SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 3036/Mum/2012
(Assessment Year 2007-08)

The Asst. Commissioner of Income-tax, Circle-30 R.No. 403, 4 th Floor, Aayakar Bhavan, M.K. Marg, Mumbai-400 020 (Appellant)	Vs.	United Shippers Ltd. United India Bldg, 2 nd Floor, Sir P.M. Road , Fort, Mumbai-400 001 (Respondent)
PAN No. AAACU0764C		

ITA No. 2986/Mum/2012
(Assessment Year 2007-08)

United Shippers Ltd. United India Bldg, 2 nd Floor, Sir P.M. Road , Fort, Mumbai-400 001 (Appellant)	Vs.	The Asst. Commissioner of Income-tax, Circle-30 R.No. 403, 4 th Floor, Ayakar Bhavan, M.K. Marg, Mumbai-400 020 (Respondent)
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Assessee by	:	Shri Madhur Agarwal, Advocate
Department by	:	Shri Ms. Vatsalaa Jha, CIT DR

Date of hearing:	31.01.2022
Date of pronouncement :	26.04.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the cross appeals filed by both the parties against the order passed by The Learned Commissioner of Income Tax (Appeals) – 15, Mumbai (The Learned CIT – A) dated 29th of February 2012 for assessment year 2007 – 08.

02. Assessee has challenged certain additions confirmed by the learned CIT – A in appeal number 2986/M/2012 and the Asst Commissioner of income tax, central circle – 30, Mumbai (the Learned AO) has challenged the additions deleted by the learned CIT – A in ITA number 3036/M/2012.
03. Assessee has raised following grounds of appeal in ITA number 2986/M/2012 :-

"A. Relating to transfer pricing adjustment:

1. (a) The Ld. CIT (A) grossly erred, in facts and in law, in rejecting appellants grounds of natural justice by stating that data used by appellant for determining arms length price were not reliable and thereby suo moto deciding that appellants case is covered by clause (c) of section 92C(3) of the Income tax Act, 1961 (ITA) without there being any finding by the Transfer Pricing Officer (TPO) or the Assessing Officer (AO)

(b) The Ld. CIT (A) further erred in upholding the action of TPO of neither giving mandatory show cause notice to appellant u/s 92CA(3) rw.s 92C(3) of ITA nor confronting the appellant with data and information on the basis of which TPO made transfer pricing adjustment.

2. The Ld. CIT (A) grossly erred, in facts and in law, in upholding the upward transfer pricing adjustment u/s. 92 of the Act to the extent of Rs. 2,80,52,480/- in respect of appellant's international transactions of procurement of ship chartering services from its associated enterprise (AE) USL Shipping FZE.

3. The Ld. CIT (A) grossly erred in not appreciating that the appellant has earned higher profit margin of 7.91% when the ship chartering services are procured from AE and given to unrelated enterprise(s) as compared to profit margin of 7.43% earned by the appellant when the ship chartering services are procured from unrelated enterprises and given to unrelated enterprise(s) and thereby rejecting the appellants ground of adopting Internal Transactional Net Margin Method (TNMM") as most appropriate method and also erred in upholding the arm's length profit margin ratio at 13.84% as determined by TPO applying the 'external TNMM by holding that eight (8) companies selected by TPO as comparables are functionally comparable in the context of subject international transaction of ship chartering services.

4. The Ld. CIT (A) grossly erred, in facts and in law, in applying alleged arm's length profit margin ratio of 13.84% on appellant's total sales of ship chartering business segment of Rs. 47.22 crores instead of only on Rs. 42.32 crores being sales arising from international transactions with AE, while calculating transfer pricing adjustment to the extent of Rs. 2,80,52,480/- and thereby erred in working out the transfer pricing adjustment not only on appellant's international transactions with its AE but also on appellant's transactions with Non AEs.

5. The Ld. CIT (A) grossly erred, in facts and in law, in not appreciating that the profit margin of 7.91% earned by appellant in the subject international transactions is higher than the profit margin of 6.76% earned by AE in the subject international transactions and also erred in not appreciating that profits at Rs 6,15,40.110/- allocated to

appellant after considering transfer pricing adjustment of Rs. 2,80,52,480/- upheld by Ld. CIT(A) can not exceed actual combined profit earned by the AE and appellant together of Rs. 5,98,31,781/-.

B. Relating to disallowances u/s. 14A:

6. The Ld. CIT (A) grossly erred, in facts and in law, in upholding disallowance of Rs. 9,65,162/ u/s. 14A of the Act, without regard to the fact that appellant has suo moto and voluntarily disallowed Rs. 1,92,920/- on fair and just basis towards indirect expenses."

04. The learned assessing officer in ITA number 3036/MU/2012 has raised following grounds of appeal :-

"1. On the facts and circumstances and in law, the Ld CIT(A) has erred in reducing the adjustment made to international Transactions pertaining to payment of Ship Chartering Services by the assessee to its AE, from Rs. 13,22,81,411/- to Rs. 2,80,52,480/- thereby granting a relief of Rs. 10,42,28,931/- to the assessee.

2. On the facts and circumstances and in law, the Ld CIT(A) has erred in holding that the adjustments should be done considering the ship chartering business of the appellant (assessee) which contains the international transaction" without appreciating the fact that the assessee does not carry on a distinct ship) chartering business and that its business of ship operation & related services is conducted in an integrated manner, which necessitated application of ALP to the entity level business to compute the adjustment to international transactions.

3. *On the facts and circumstances and in law, the Ld CIT(A) has erred in grossly contradicting himself by upholding on the one hand, the TPO/AO's action of rejecting assessee's internal TNMM for want of reliable segmental accounting results in the audited accounts thereby confirming the benchmarking of ALP at entity level while for computing the adjustment he takes an opposite view to consider only the ship chartering business although no such business can be segregated from the accounts for reasons stated by him in his order.*

4. *On the facts and circumstances and in law and in view of the afore-stated grounds, the conclusion drawn by the CIT(A) to make the adjustments by considering only ship chartering business is factually flawed and against the transfer pricing provisions of the Income tax act, hence is liable to be dismissed.*

5. *On the facts and circumstances and in law, the Ld CIT(A) has erred in directing the AO/TPO to grant benefit of +/- 5% to assessee in terms of proviso to section 92C(2) in the manner of a standard deduction without appreciating that the provisions of the said section does not permit any standard deduction to the assessee as claimed by it.*

6. *On the facts and circumstances and in law, the Ld CIT(A) has erred in deleting the adjustment made to the guarantee fee without considering the issue on merit and by erroneously holding that no adjustment has been made in subsequent A.Y. 2008-9 and facts of earlier years remain the same, which is factually incorrect and not tenable under law.*

7. *On the facts and circumstances and in law, the Ld CIT(A) has erred in ignoring the fact that the assessee has granted a fresh guarantee during the year under consideration which was subjected to benchmarking of guarantee fee hence, has no bearing on the earlier years*

8. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the disallowance u/s 14A on reasonable basis by following the decision of Bombay High Court in the case of M/s. Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT wherein it has held that provision of Rule 8D does not have retrospective effect when this finding of Bombay High Court has not be accepted and department is in appeal before the Supreme Court on this issue.*

9. *On the facts and circumstances and in law, the Ld CIT(A) has erred in holding that provisions of section 41(1) of the I.T. Act are not applicable to unproved liabilities shown in the balance sheet on the ground that the assessee has offered these liabilities to tax in the F.Y. 2010-11.*

10. *On the facts and circumstances and in law, the Ld CIT(A) has erred in holding that unproved liabilities cannot be brought to tax in the current year as it will amount to double taxation as the assessee has offered these liabilities to tax in the F.Y. 2010-11."*

05. Brief facts of the case shows that assessee is a company engaged in the business of operation of ships and barges and business of developing, maintaining and operating infrastructure facility of a port. It filed its return of income on 31/10/2007 showing total income of ₹ 134,358,252/-.

06. During the course of assessment proceedings, on examination of Form 3CEB, it was found that assessee has entered into certain international transaction and therefore the learned assessing officer made a reference to The Additional Commissioner Of Income Tax, Transfer Pricing Officer – 1 (ii) (3) (Learned Transfer Pricing Officer) for determination of arm's-length price [ALP] of international transactions [IT] .
07. Assessee has entered into an international transaction of ship chartering services of ₹ 38,96,90,370/- the assessee is carrying on the business of transportation of cargo by barges used for transporting of goods from mother vessel to port and port to mother vessel at minor ports in India. Where the assessee gets handling cum Chartering contracts from its customers, it uses chartering services of its associated enterprises. Assessee charters vessel as per requirement of the customers and for this the assessee take services of its associated enterprises. To benchmark above transaction, assessee has used Transactional Net Margin Method [TNMM] as the most appropriate method, using internal I comparable, where it has compared the gross profit margin realized from international transaction with its associated enterprises with the gross profit margin realized from unrelated parties. Associated enterprise also takes certain times the ships on time charter basis and in turn gives the vessels to the assessee on voyage charter basis; therefore, associated enterprise takes more risk as compared to the assessee. Assessee submits that profit on chartering of ships from its associated enterprises is 7.91 percentages and the profit earned by chartering of ships from unrelated entities is at 7.43%. Assessee also submitted that the net profit margin of 7.91% is also comparable with the net profit margin earned by the associated enterprise at 5.39%. Therefore, assessee

submitted that its international transaction of ship chartering services is at arm's-length.

08. The learned transfer-pricing officer asked the assessee to provide detailed calculation of profit level indicator along with any segmental details as per the profit and loss account. Learned transfer pricing officer found that assessee has operating income of ₹ 2,058,797,018/-, operating cost of ₹ 1,906,140,922/- and thereby resulting into an operating profit of ₹ 152,656,096/- resulting into the profit level indicator of 7.41%. Therefore the learned transfer pricing officer held that the contention of the assessee are not acceptable for the reason that assessee does not maintain any segmental audited accounts and therefore the information provided by the assessee is insufficient and not acceptable. For this proposition the learned transfer pricing officer looked at the notes on accounts wherein note number 12 in segment information it was stated that company is in the business of operation of Shipping related services incidental to the shipping and looking at nature of business and risk and return profile the business of the company is considered as a single segment. The learned transfer-pricing officer further held that the additional operational and general administrative expenses are not taken into consideration for benchmarking the international transaction and assessee has merely considered the gross profit/total cost as the profit level indicator. The learned TPO was of the view that assessee is having only 18.93% of the total turnover as transaction with the associated enterprises and therefore it is not comparable with the third party transactions because of significant difference in the volumes. Therefore, the learned transfer-pricing officer considered the transactional net margin method as the most appropriate method and adopted the profit level

indicator of operating profit to operating income/sales considering assessee as a tested party selected eight comparable companies. The assessee was given an opportunity to rebut the computation made by the learned transfer-pricing officer. After considering the objection of the assessee, the learned transfer pricing officer considered that all these eight comparable companies are having similar functional profile, whose arithmetic mean PLI was 13.84% and therefore the learned transfer pricing officer adopted the operating profit level indicator of 13.84% on the gross revenue of Rs. 205,87,97,018/- and determined the operating profit of 28,49,37,507/-. Resultant operating cost derived was Rs. 177,38,59,511/-, applying the above profit level indicator. Consequently the cost for ship chartering services of associated enterprise was determined at ₹ 257,408,959/- which was paid by the assessee at ₹ 389,690,370/- and therefore there was an adjustment of ₹ 132,281,411/- because of the international transaction of ship chartering services.

09. Further as in the annual report, it was mentioned that the company has provided corporate guarantee of US\$ 0.3 million in favour of a bank for working capital limits sanctioned to USL sipping FZE Dubai [being 100% subsidiary of the assessee]. Assessee has received a sum of ₹ 62,670/- on account of corporate guarantee charges at the rate of 0.5%. Assessee adopted CUP method as the most appropriate method and stated that assessee itself has taken a bank guarantee from third parties at a commission rate of 0.5% per annum; therefore, international transaction of receipt of 0.5% from its associated enterprises on corporate guarantee is at arm's-length.

010. Ld transfer pricing officer rejected benchmarking made by the assessee and submitted that as assessee is exposed itself to a greater risk compared to the bank and therefore the rate of 4.75% on the value of bank guarantee is an appropriate benchmarking of the transaction. Accordingly he determined arm's-length guarantee fee of ₹ 641,250/-. As assessee has already charged ₹ 62,670 , therefore, addition of ₹ 578,580/- was made. Accordingly, the learned TPO passed an order u/s 92CA (3) of the act proposing an adjustment of the arm's-length price of the international transaction by ₹ 132,859,991/-.
011. The learned AO further examined that assessee is earning both taxable as well as exempt income and therefore it was asked that why disallowance u/s 14A should not be made. The assessee submitted that it has a total investment of ₹ 13.06 crores whereas the share capital and free reserves amounted to Rs. 111.69 crores and therefore there cannot be any investment made by the assessee from any borrowings. Hence, interest expenditure cannot be disallowed u/r 8D [2][I] and [I]. On account of the administrative expenses, assessee submitted that it has disallowed a sum of ₹ 192,920/- as 1% of the dividend received which is a reasonable figure of such disallowance.
012. Ld assessing officer rejected the contention of the assessee, recording the satisfaction that on the objective basis the assessee is unable to establish the correctness of the claim and therefore he worked out the disallowance of administrative expenditure ₹ 1,657,476/- on account of expenses incurred for earning the exempt income. He disallowed the same u/s 14 A of the act applying the provisions of rule 8D.

013. The learned assessing officer further examined the transshipment charges showing the credit balance of ₹ 2,628,351/- as liability provision 2006 - 07 in the balance sheet. On taking the explanation of the assessee, the learned AO noted that there are unpaid settlement charges of ₹ 1,816,155/-, which has not been claimed by any agent until date and still shown as outstanding. Therefore, he held that as the above transshipment charges are pertaining to assessment year, 2007 - 08 have not been paid until the date of passing of the assessment order, and there is no material proof or corroborative evidence of its existence, he added the above sum.
014. Accordingly the draft assessment order was passed. Assessee did not file any objection. Therefore, final order u/s 143 (3) of the act was passed on 14/2/2011 determining the total income of the assessee at ₹ 270,691,874/- against the returned income of the assessee at ₹ 134,358,252/-.
015. Aggrieved by assessment order, assessee preferred an appeal before the learned CIT - A who passed an order on 29/2/2012. The assessee contested the arm's-length price of the ship chartering services stating that assessee has adopted the internal transactional net margin method whereas the learned transfer-pricing officer has adopted the external transactional net margin method at entity level. Assessee also objected to the profit level indicator adopted by the learned transfer-pricing officer at 13.84% in the selection of the comparable companies. Assessee also submitted that there are extraordinary transactions during the year, if the impact of those two transactions are removed, margin of the assessee would be comparable. The learned CIT - A with detailed reason that the application of the transactional net margin

method has to be considered at net profit level and not the gross profit level as computed by the assessee. However, he accepted the contention of the assessee that adjustment should be made only on transaction with AE i.e. International Transactions only. He held that ship chartering business of appellant with AE is ₹ 47.22 crores and the adjustment thereon comes to only ₹ 28,052,418/- . He therefore granted relief to the assessee of ₹ 104,228,931/- holding that the adjustment would only be made to the extent of ₹ 28,052,480/-. The learned CIT – A directed learned transfer pricing officer to give the benefit to the assessee of +_5% as per the proviso to Section 92C (2) of the act. With respect to the arm's-length price of the corporate guarantee, he following the decision of his predecessor in earlier assessment year held that corporate guarantee fees of 0.5% charged to its associated enterprise based on the past action of the learned transfer-pricing officer, it is at arm's-length. Therefore, he deleted the addition/adjustment of ₹ 5,78,580/-.

016. With respect to disallowance u/s 14 A of the income tax act, he found that disallowance worked out by the assessee is ₹ 687,883/- out of the administrative expenditure and disallowance out of the interest expenditure of ₹ 277,279/-. Accordingly the total disallowance was upheld of ₹ 965,162/- against disallowance made by the learned assessing officer of ₹ 1,657,476/.

017. With Respect to the addition of Rs 18,16,155/- , he noted that the amount disallowed as Transshipment charges provision has been offered to taxation by the assessee himself in financial year 2010 – 11 by writing back as per the consistent policy of the appellant and also on the basis three years were elapsed since provision was made, therefore he deleted the addition.

018. Therefore, both parties are aggrieved with the order of Id CIT (A) and are in appeal before us.
019. We first address the appeal of the assessee. Ground number 1 of the appeal was not pressed, therefore, it is dismissed.
020. Ground number 2 – 5 are with respect to the transfer pricing adjustment upheld by the learned CIT – A of ₹ 28,052,580 in respect of the international transaction of procurement of ship chartering services from its associated enterprises. Ld AR submits that LD TPO has accepted as transactional net margin method as the most appropriate method, however, he rejected internal comparable available and adopted external transactional margin method. He further applied PLI on the total sales of ship chartering business instead of only ship chartering businesses arising from international transactions with associated enterprises. It is also aggrieved that the learned CIT – A has upheld the addition in the hands of the assessee which has exceeded the actual combined profit earned by the AE and the assessee taken together.
021. On the benchmarking of the international transactions of the ship charter services, the learned authorised representative, Mr. Madhur Agarwal, advocate, submitted that there is no dispute on most appropriate method for benchmarking of these international transaction. He submitted that
- a. Assessee is saying that internal transactional net margin method is the most appropriate method whereas the learned transfer-pricing officer says that external transactional net margin method at entity level is the most appropriate method for benchmarking of this transaction.



- b. Assessee has compared the gross profit of international transaction with associated enterprises with the gross profit of transaction with other parties.
- c. Internal transactional net margin method shall be preferred over external transactional net margin method.
- d. Internal segment cannot be rejected merely because no segmental information is available in the audited financial statement or it is not audited. Learned transfer pricing officer referring to the note on account has rejected the internal segment for these reasons.
- e. LD transfer pricing adjustment should have restricted adjustment to the extent of transactions with the associated enterprise is only.
- f. Coming to the comparable selected by the learned transfer pricing officer he submitted that Messer's Balmer Lawrie & Co Ltd is a company where GOI holds 61% and same has been accepted as a comparable company by the learned transfer pricing officer. He submitted that the government company could not be considered as a comparable company.
- g. With respect to the Inclusion of Hindustan cargo Ltd by the learned transfer-pricing officer, he submitted that the learned transfer-pricing officer has included the same despite of the reason that it is following the different Accounting year compared to the assessee. He submitted that because of this reasons the comparable company deserves to be excluded.
- h. For assessment year 2008 – 09 the learned transfer-pricing officer on the identical facts and circumstances has

accepted the benchmarking methodologies adopted by the assessee. He referred to page number 234 of paper book for this proposition showing that for assessment year 2008 – 09 the learned transfer-pricing officer has merely made an adjustment on account of the corporate guarantee charges. For this year, the assessee has also accepted the resale price method as the most appropriate method. He further referred to page number 249 of the paper book, which is international transaction for assessment year 2009 – 10, and the assessee has benchmarked above transaction adopting the resale price method as the most appropriate method for shipping services, which has been accepted by the learned transfer-pricing officer.

022. In view of this, he submitted that the benchmarking methodology adopted by the assessee deserves to be accepted.
023. Countering arguments of the learned authorised representative, the learned departmental representative stated that assessee has created the artificial segment and has compared the gross margin in adopting the transactional net margin method. It was stated that the transactional net margin method only considers the net profit and not the gross profit. Therefore, it was stated that method adopted by the assessee is flawed and the computation of the segments made by the assessee is also not backed by any reliable data and therefore the computation itself is flawed. In view of this it was stated that learned transfer pricing officer has correctly adopted external transactional net margin method for

benchmarking above International transaction which has also been upheld by the learned CIT – A.

024. We have carefully considered the rival contention and perused the orders of the lower authorities. The undisputed fact arising in these grounds is that both the parties have agreed that the transactional net margin method is the most appropriate method for benchmarking the international transaction of ship chartering services paid by the assessee of ₹ 389,690,370/-. The assessee has adopted the internal transactional net margin method by adopting the gross profit earned on transactions with the associated enterprises and comparing gross profit earned on transactions with non-associated enterprises. Therefore, assessee submits that this is the internal transactional net margin method should be adopted for the benchmarking of the transaction. The learned assessing officer has found fault with the above approach of the assessee stating that assessee is considering only the gross profit and therefore in ignoring the other expenditure incurred by the assessee. Therefore, TP approach of assessee of comparing only the gross profit and stating that it is an internal transactional net margin method is flawed. He further held that the segmental gross profit working of the assessee is also not backed by any reliable and accurate data available. Thereafter he applies the transactional net margin method in the case of the assessee at entity level, selects eight comparable companies, derives the arithmetic mean of their profit level indicator, and determines the arm's-length price of the transaction. On appeal before the learned CIT – A, he upheld the action of the learned transfer pricing officer; however, he applied that the profit ratio should be applied only to the transactions entered into with the associated enterprise. He corrects an error that the learned assessing

officer has applied the PLI of operating profit/operating income of 13.84% on the total sales of the assessee of Rs. 205,87,97,018 instead of applying on the international transactions only. The first test that arises is whether the computation of the margin of gross profit by the assessee supporting the internal transactional net margin method is the correct approach or not. We find that the rule 10 B of The Income Tax Rules defines the determination of arm's-length price u/s 92C of the act with respect to the several methods. In rule 10 B (1) (e), transactional net margin method is required to be computed with respect to the Net Profit Margin Only. We do not find that rules subscribe to the view taken by the assessee of computing Gross Profit margin while applying TNMM. Therefore as assessee has taken only the gross profit margin and stated that it has adopted internal transactional net margin method is an incorrect approach not supported by the income tax rules. In view of this, the benchmarking methodology adopted by the assessee taking the gross profit margin is correctly rejected by the revenue authorities.

025. As we have already held that transactional net margin method comparing the net profit is the correct methodology in accordance with the income tax rules, we reject the contentions of the assessee that there are no expenses incurred by the assessee or even if those are incurred they may be spread in the same ratio to arrive at the net profit.
026. Now coming to the aspect whether the learned transfer-pricing officer has taken the correct comparables or not. If the comparables are taken correctly then whether the arithmetic mean of the profit level indicator of those comparables have been correctly applied or not. In addition, whether such profit margin is to be applied on the total sales of the assessee or

only on the international transactions. We find that the learned transfer pricing officer has selected the following comparables

serial number	Name of the comparable company	PLI (OP/OI)	Activities of the comparable companies
1	Balmer Lawrie & Co Ltd (logistics segment)	24.90	The company is engaged in providing container freight station services, LCL and FCL services, as and ocean freight forwarding, NVOCCC operator et cetera. Logistics segment selected
2	Haytrans India Ltd	21.87	The company provides the following services cargo movement, shipping agency services, International frightful, logistics and supply chain management, a road transportation
3	Sical logistics Ltd (segment logistics)	8.44	The company is engaged in providing integrated solutions for offshore logistics and multimodal logistics for bulk and containerized cargo. It is also engaged important logistics, container freight station, and offshore supplies. Logistics segment selected
4	Sindhu cargo services Ltd	4.81	The company provides cargo logistic services like packing and documentation and freight forwarding

			services
5	TL sipping and logistics Ltd	4.44	The company is engaged in business of custom clearance, shipping agency and port -related agency services
6	Barwil forbes sipping services private limited	17.99	The company is engaged in sipping agency, freight forwarding, tramp tank activities
7	Hindustan cargo	23.85	the company provides airfreight, C freight, logistics services and related services
8	Aspinwall and Co Ltd (logistics segment)	4.42	The company is engaged in sipping and logistics and other services
	Arithmetic mean	13.84	

027. We do not find that assessee has made any serious challenge to the comparable selected by the learned transfer pricing officer either before the learned assessing officer or before the learned CIT - A. Before us, the assessee has submitted that Balmer Lawrie is a government-controlled company where 61% is owned by government of India and therefore it should not be considered as a comparable company. For this proposition assessee has relied upon the decision of the honourable Bombay High Court in case of CIT versus Thyssen Krupp industries Ltd 95 CCH 187 (Bom) and principal Commissioner of income tax versus International SOS services India private limited (ITA 454/2016 Del). We have carefully considered the contention raised by the assessee with the annual report furnished before us at page number 1 - 62 of paper book - 2. Coming to the decision of the honourable Bombay High Court (385 ITR 612) engineers India Ltd which was directed to be excluded by the coordinate bench was

upheld. The reasons for such exclusion were that engineers India Ltd was found to be a government company and its annual report indicated that the substantial part of its revenue in execution of turnkey project arose out of executed projects of public sector undertakings and further it did not pass the filter of 25% of related party transactions. The decision of the honourable Delhi High Court was also based on the decision of the Mumbai bench of ITAT in case of above case considered by the honourable Bombay High Court for exclusion of a government company. Before us, the assessee has produced the annual accounts of the above comparable company we find that the learned transfer-pricing officer has used only the logistics segment of that company. Further, it is not a government-owned company, which is evident at page number 20 of the annual report where 61.80% of the shareholding is held by holding company Balmer Lawrie investment Ltd. Further, the other 40% of shares of this company are held by various mutual funds banking, financial institutions, and foreign institutional investors. It is also a listed company at Bombay stock exchange and National stock exchange. The assessee has not shown that there are significant related party transactions in the logistics segment of this comparable company. Further, merely because a comparable company has a shareholding of government of India it does not become non-comparable only because of this factor that part of the shareholding is owned by government of India. If such logic were accepted then all the Navratna companies, who are leaders in their own business, would be excluded from the comparability analysis. Therefore, we reject the contention of the assessee for exclusion of Balmer Lawrie & Co Ltd (logistics segment).

028. The assessee has also challenged that Hindustan cargo Ltd is a company, which is following a different financial year i.e. January to December, which has been used by the learned transfer-pricing officer for computing the PLI. In fact Hindustan cargo Ltd is a company whose balance sheet is placed at page number 289/31 of the paper book we find that this company is following January to December i.e. calendar year for accounting purposes whereas the assessee is following financial year for its accounting purposes. Thus, there is a difference in the accounting period of the comparable company with the assessee company. It is also not shown before us that Hindustan cargo Ltd is a listed entity and it is publishing its quarterly results. Therefore, we find that the learned transfer-pricing officer has erred in including Hindustan cargo Ltd as a comparable company. Therefore, we direct the learned TPO to exclude the same.
029. The learned authorised representative further submitted that for assessment year 2008 – 09 and 2009 – 10 the assessee has adopted the resale price method as the most appropriate method for the same international transactions, which has been accepted by the learned transfer-pricing officer, and no adjustment is made. We find that in this year assessee has adopted TNMM as the MAM based on detailed transfer pricing study report prepared by assessee. Based on this study report all the other methods were eliminated. It is not the contention of assessee that FAR in the T P Study Report for this year is fallacious. The LD TPO has also consciously reached at the decision that TNMM is the most appropriate method for this year. Therefore subsequent years' benchmarking methodology does not have any impact for this year, unless, the TP study report for the year is found fallacious.

030. We find no infirmity in Ground no 4 raised by the assessee that the profit margin needs to be applied only on International transactions. It is stated that International Transaction is only Rs 42.32 crores where as the LD CIT (A) applied PLI on appellants total sales of Ship Chartering Business segment of RS 47.22 Crs. We direct accordingly.
031. Ground number 5 of the appeal, assessee has stated that the profit margin of 7.91% on by the appellant is higher than the profit margin of 6.76% on by associated enterprises in the subject international transaction and further the profits of ₹ 61,540,110/- a lack it to appellant after considering transfer pricing adjustment of ₹ 28,052,480 cannot exceed the actual combined profit on by the AE and the appellant together of ₹ 59,831,781/-. We do not find any force in the argument of the learned authorised representative as we are dealing with a transactional net margin method and not profit split method.
032. In the result ground number 2 – 5 of the appeal are allowed partly.
033. Coming to ground number 6, The learned authorised representative with respect to the disallowance sustained by the learned CIT – A u/s 14 A stated that rule 8D does not apply to these assessment year. The assessee has earned exempt income of ₹ 77 lakhs as a dividend and assessee has already offered the disallowance of ₹ 192,920. He submitted that in the earlier years the learned CIT – A has restricted disallowance to ₹ 75,000, however, for this year he has confirmed the higher disallowance adopting the rule 8D of the income tax rules. He submitted that when rule 8D does not apply for this year, there is no reason to sustain the disallowance confirmed by the learned CIT – A

034. Learned departmental representative supported the orders of the lower authorities.
035. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that learned assessing officer has applied the provisions of rule 8D of the income tax rules. He disallowed a sum of ₹ 16,57,476/-. The learned CIT - A restricted disallowance to ₹ 965,162/-. Assessee has earned exempt income of ₹ 7,778,110/- as dividend income exempt u/s 10 (34) of the act. For assessment year 2006 - 07 on an exempt, income earned by the assessee of ₹ 1,130,945/- the learned and CIT - A has restricted the disallowance only to ₹ 75,000. Therefore, the claim of the assessee is that it should be restricted to that some only. We find that during the year exempt income earned by the assessee is not 11, 30,945 but ₹ 7,778,110/-. The assessee itself has given a working where the disallowances required to be restricted at ₹ 192,920/-. Looking to the amount of exempt income earned during the year compared to the previous year the amount of disallowance deserves to be upheld to the extent of ₹ 192,920/-. Accordingly, the learned assessing officer is directed to retain the disallowance to that extent only. Accordingly, ground number 6 of the appeal is allowed.
036. Accordingly, ITA 2986/M/2012 filed by the assessee is partly allowed.
037. Now we come to the appeal of the learned assessing officer. Ground number 1 - 5 of the appeal are with respect to the transfer pricing adjustment on ship chartering income. These grounds have already been dealt with by us while deciding the appeal of the assessee. Therefore, as we have upheld largely

the order of the learned CIT – A, except to the extent of inclusion/exclusion of comparable and application of profit level indicator only on the international transactions, we dismiss ground number of the appeal of the AO.

038. Now we come to ground number 6 and 7 wherein the learned and CIT – A deleted the adjustment made to the guarantee fee is challenged by the learned assessing officer before us.
039. With respect to the corporate guarantee benchmarked by the learned transfer pricing officer and deletion made by the learned CIT – A, the learned departmental representative vehemently stated that the learned CIT – A has wrongly followed the decision of the learned CIT – A his predecessor in earlier years. He submitted that each assessment year is a separate and facts of the each assessment year should be looked into for benchmarking the international transactions. He further submitted that the learned transfer-pricing officer has correctly benchmarked the guarantee commission.
040. The learned authorised representative supported the order of the learned CIT – A. Assessee also placed before us the order of the Commissioner of income tax appeals for assessment year 2008 – 09 dated 3/9/2014 wherein identical adjustment because of corporate guarantee was deleted.
041. The fact shows that assessee has provided corporate guarantee of US\$ 0.3 million equivalent to ₹ 131 lakhs in favour of habib Bank zurich AG for working capital limits sanctioned to USL shipping Fze , UAE being 100% subsidiary of assessee. For this guarantee assessee has charged a commission at the rate of 0.5% being ₹ 62,670/-. The transfer pricing officer held that 4.75% is considered as appropriate to benchmark the about transaction accordingly he

made an adjustment of ₹ 578,580/- on and above the guarantee fee charged by the assessee. The learned CIT – A based on his order for assessment year 2005 – 06 and 2006 – 07 as well as for assessment year 2007 – 08 and 2008 – 09 wherein he upheld the guarantee commission of 0.5 percent adequate and deleted the addition. We find that the learned CIT – A correctly held that companies and cannot be made between guarantee issued by a commercial bank as against a corporate guarantee issued by holding company to its subsidiary company. Therefore, the rate adopted by the learned transfer pricing officer of state bank of India rates are not proper and further a markup of 200 basis point on the same is also not proper consequently. As it is a case of holding company and subsidiary company transaction, we do not think any reason to consider the placement of margin money for the purpose of bank guarantee. In view of this we do not find any infirmity in the order of the learned CIT – A in deleting the adjustment on account of guarantee commission. Accordingly, ground number 6 – 7 of the appeal of the AO is dismissed.

042. Ground number 8 is with respect to the disallowance restricted by the learned CIT – A u/s 14 A of the act. As we have already dealt with this issue in ground number 6 of the appeal of the assessee wherein we have upheld the disallowance to the extent of ₹ 192,920/-, this ground of appeal is dismissed.
043. Ground number 9 – 10 is with respect to the addition u/s 41 (1) of ₹ 1,816,155/- being provision for liability in respect of transfer charges for assessment year 2007 – 08. The fact shows that transshipment charges had the credit balance of ₹ 2,628,351/- in the account called liability provision 2006 – 07. During the course of assessment proceedings assessee explained that it is payable to various agents as and when

those are claimed by them and the outstanding amount has not been claimed till to date of the learned assessing officer noted that as these expenses have not been claimed by the agents from the assessee and he made the addition u/s 41 (1) of the act. Learned CIT – A noted that assessee follows a policy two) the outstanding transshipment charges if the agents have not claimed the same for more than three years. Therefore the amount that has been provided and outstanding for financial year 2006 – 07 the assessee needs to wait till 31st of March 2010 and thereafter) the same in the books in financial year 2010 – 11. The assessee has followed the same and in financial year 2010 – 11 the financial statement shows in the miscellaneous receipt the assessee has written back such an amount. Therefore, for assessment year 2011 – 12 the assessee has offered this sum for taxation. We do not find any infirmity in the order of the learned CIT – A in deleting the above addition looking at the consistent accounting policy adopted by the assessee and offering the same amount as income when three years have elapsed. Accordingly, ground numbers 9 – 10 of the appeal are dismissed.

044. Accordingly, appeal filed by the learned assessing officer in ITA number 3036/M/2012 is dismissed.
045. In the result, appeal filed by the assessee is partly allowed and appeal filed by the AO is dismissed.

Order pronounced in the open court on 26.04.2022.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 26. 04.2022



Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai