

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.2001/Mum./2015

(Assessment Year : 2010-11)

OOCL Logistics (India) Pvt. Ltd.
ICC Chambers, 5th Floor, Saki Vihar Road
Powai, Mumbai 400 072
PAN – AAACO7690K

..... Appellant

v/s

Income Taxn Officer
Ward-7(3)(1), Mumbai

.....Respondent

Assessee by : Shri Siddhesh Chaugule

Revenue by : Ms. Vatsalaa Jha

Date of Hearing – 30/05/2022

Date of Order – 24/08/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 04/02/2015, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (*'the Act'*), for the assessment year 2010-11.

2. In this appeal, assessee has raised following grounds:

"The following grounds of appeal are independent of and without prejudice to each other

Ground relating to Transfer Pricing

1. *On the sand in the circus of the case and in law, the learned Transfer Pricing Officer (TPO) the loaned Assessing Officer (AO) under directions issued by the Hon'ble Dispute Resolution Panel (DRP) in making an addition of Rs. 2,93,56,738/- to the Appellant's total income under the provisions of Chapter X of the Income-tax Act, 1961 ("the Act").*

2. *On the sand in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding confirming the action of the TPO of rejecting the companies selected by the Appellant as comparable for the purpose of benchmarking the international transaction entered into by the Appellant.*

3. *On the facts and in the circumstance of the case and in law, the learned TPO erred and the Hon'ble DRP farther erred in upholding the action of the TPO of selecting companies as comparables for the purpose of determining the arm's length price without considering the fact that their functions undertaken, assets employed and risks borne were not comparable to those of the Appellant.*

4. *Without prejudice to the above, on the facts and in circumstances of the case and in law, the learned AO TPO failed to consider the correct calculations of the operating margins of the comparable companies selected by the learned Transfer Pricing Officer.*

The Appellant prays that the transfer pricing adjustment of Rs. 293.56,738 be deleted.

Grounds relating to Corporate tax

5. *On the facts and the circumstances of the case and in law, the learned AO erred in not granting credit of tax deducted at source of Rs 10,910.*

The Appellant prays that the credit of tax deducted at source be granted.

6. *On the facts and circumstances of the case and in law, the learned AO erred in incorrectly computing the amount of interest under section 244A as Rs 1,95,888, without appreciating that Rs.32.64,829 has not been refunded till date.*

The Appellant prays that amount of interest under section 244A be computed correctly.

7. *On the facts and circumstances of the case and in law, the learned AO erred in levying interest amounting to Rs. 85,726 under section 234B of the Act.*

The Appellant prays that levy of interest under section 234B of the Act be deleted."

3. Ground no.1 is general in nature and therefore, need no separate adjudication.

4. The issues arising in grounds no. 2 to 4, raised in assessee's appeal, are pertaining to transfer pricing adjustment qua the comparables.

5. The brief facts of the case pertaining to these issues, as emanating from the record, are: For the year under consideration, assessee filed its return of income on 16/10/2010 declaring income of Rs. Nil. The assessee is an Indian subsidiary of M/s OOCL Logistics (Singapore) Pte. Ltd. The assessee is engaged in '*provision of logistics services*' to its associated enterprises and also to non-associated enterprises. During the year, assessee entered into following international transactions with OOCL group entities ('associated enterprises'):

| <i>Sl. No.</i> | <i>Nature of International Transaction</i> | <i>Amount (in INR)</i> |
|----------------|--|------------------------|
| <i>1.</i> | <i>Provision of logistics services</i> | <i>7,75,37,599</i> |
| <i>2.</i> | <i>Availing of logistics services</i> | <i>15,49,08,951</i> |
| <i>3.</i> | <i>Corporate allocation of expenses</i> | <i>71,01,979</i> |

6. The assessee is engaged in the provision of logistics services in relation to movement of goods within India. In relation to logistics services involving cross-border movement of goods, the assessee received the logistics services from the group entity in respective countries. In relation to corporate allocation of expenses, the assessee has received information technology and management support services. For benchmarking, the assessee used Transactional Net Margin Method ('*TNMM*') as most appropriate method with Profit Level Indicator ('*PLI*') of Operating Profit to Total Sales. By considering itself as the tested party, the assessee identified following 7 companies as comparable with three-year average weighted margin of 5.25%:

- (a) *Gati Ltd (seg);*
- (b) *Gordon Woodroff Logistics Limited;*
- (c) *PL Shipping and Logistics Limited ;*
- (d) *Patel Integrated Logistics Limited;*
- (e) *Savani Transport Private Limited;*
- (f) *Seaway Shipping And Logistics Limited (seg); and*
- (g) *Sical Logistics Limited (seg).*

7. As the assessee computed its own PLI at 2.14% from its logistics operations with associated enterprises, accordingly, it claimed that international transactions pertaining to logistics operations with associated enterprises are at arm's length price ('ALP'). As per the assessee's transfer pricing study report, assessee and its associated enterprises are in business of providing services with respect to sea/ocean and air freight forwarding. To supplement these activities assessee also provided certain ancillary services like cargo handling, logistics management etc. Depending on origin and destination of a freight package, assessee can be classified as an origin company or destination company. In its transfer pricing study, following functions have been stated to have been performed by the origin company and destination company in relation to provision of logistics services:

"Functions when OLIPL acts as Origin Company ('OC'):

- *Pre-Shipment packaging and other activities*

Many clients find it economical to outsource their pre-shipment activities to third party logistics, so that they can concentrate completely on their core area of competence like selling or manufacturing whichever the case may be. The OC may assist its clients in packing, sampling and making the products ready for shipment.

- *Transportation to the exportation point*

Upon instructions of the client, the OC hires the services of an asset provider and arranges the transportation of the shipment from the client's facilities to the point of the shipment, an airport or seaport whichever the case may. It is the responsibility of the OC to evaluate the performance and reliability of the third party service provider and ensure that the shipment is handled carefully and efficiently.

- *Custom clearance and documentation*

The OC assists the client in customs related formalities and documentation so that the shipment is cleared by the authorities without any complications and is ready for transport. The OC needs to have an in-depth understanding of origin country rules and procedures, in order to add value to the customer.

- *Cargo consolidation and shipment of cargo Finally, the OC co-ordinates the handling of the cargo with the international transport company and negotiates for availability of cargo space. The cargo is put on board the vessel.*

- *Dispatch of documentation*

Logistics is a document-intensive business and accuracy of documentation is necessary to transfer the goods from the consignor to the consignee, OC consigns the goods to the OOCL Group office in the destination country and passes on the responsibility of handling the goods to the destination country.

Functions when OLIPL acts as Destination Company ("DC"):

- *Tracking the shipment and processing the receipt of the same Once the shipment has been dispatched, the responsibility of managing the movement of goods thereon is passed on to the DC. The DC scrutinizes the documentation from the OC to ascertain whether they are complying with local regulations or not. It co-ordinates with the international transport service provider (shipping company) and tracks the goods in real time. For instance in the case of air shipment, there is a possibility, that the portions of the total consignment have been separated and have not arrived on the same flight. This is called short landing and could create problems for the consignee in clearing the goods. The DC is responsible for assessing the amount of short landing and communicating the same to the OC. Additionally; it is the DC, which liaises with the shipping company offices and customs.*

- *Arranging transshipment of goods as per the instructions*

Once the shipment arrives at the main destination port, it may be shipped inland by another service provider. For instance, a shipment landing at Mumbai port is transported to final destination of the shipment through local transporter. The DC is responsible for scheduling and hiring the inland transport service provider and evaluating its performance and efficiency.

- *Preparing necessary Shipment documentation and intimating the consignee*

Once the shipment is received and found to be in order, a document called the Cargo Arrival notice is generated, and is sent to the consignee as intimation that the shipment has arrived and awaits collection. DC prepares a document called the Delivery Order against which goods will be released to the consignee by the port authorities.

- *Customs clearance/ transportation*

DC also co-ordinates the transportation of goods post clearance to the premises of the customer using a third party service provider. DC is responsible for ensuring that the service provider is efficient and reliable and that the goods are not damaged during transit.

- *Inventory management and control*

The different offices offer inventory management and warehousing services to their customers under an integrated logistics management package to client."

8. The Assessing Officer ('AO') made reference Transfer Pricing Officer ('TPO') for determination of ALP of the aforesaid international transaction. During the transfer pricing assessment proceedings, assessee was asked to submit updated margins of the comparables. In reply, assessee could file updated margins only of following companies:

| <i>Sl. No.</i> | <i>Company Name</i> | <i>F.Y. 2009-10</i> |
|------------------------|---|---------------------|
| 1. | <i>Gati Ltd. (Seg.)</i> | <i>N.A.</i> |
| 2. | <i>Gordon Woodroff Logistics Ltd.</i> | <i>N.A.</i> |
| 3. | <i>P.L. Shipping & Logistics Ltd.</i> | <i>N.A.</i> |
| 4. | <i>Patel Integrated Logistics Ltd.</i> | <i>9.38%</i> |
| 5. | <i>Savani Transport Pvt. Ltd.</i> | <i>N.A.</i> |
| 6. | <i>Seaways Shipping & Logistics Ltd. (Seg.)</i> | <i>N.A.</i> |
| 7. | <i>Sical Logistics Ltd. (Seg.)</i> | <i>6.57%</i> |
| <i>Arithmetic Mean</i> | | <i>7.98%</i> |

9. The TPO rejected 3 out of 7 comparables selected by the assessee and proposed 3 more comparables for benchmarking the international transaction pertaining to 'provision of logistics services'. Accordingly, the TPO vide order

dated 27/01/2014 passed under section 92CA(3) of the Act arrived at a set of following 7 comparables:

| <i>Sl. No.</i> | <i>Company Name</i> | <i>F.Y. 2009-10</i> |
|------------------------|---|---------------------|
| 1. | <i>Gati Ltd. (Seg.)</i> | <i>13.79%</i> |
| 2. | <i>Patel Integrated Logistics Ltd.</i> | <i>2.35%</i> |
| 3. | <i>Sical Logistics Ltd. (Seg.)</i> | <i>7.38%</i> |
| 4. | <i>Seaways Shipping & Logistics Ltd. (Seg.)</i> | <i>17.28%</i> |
| 5. | <i>Om Logistics Ltd.</i> | <i>16.85%</i> |
| 6. | <i>South India Corporation Ltd. (Seg.)</i> | <i>26.82%</i> |
| 7. | <i>Balmer Lawrie & Co. Ltd. (Seg.)</i> | <i>17.17%</i> |
| <i>Arithmetic Mean</i> | | <i>14.52%</i> |

10. The average OP/TS of comparables selected by the TPO was computed at 14.52%. By applying the arm's length margin, the TPO proposed an upward adjustment of Rs.2,93,56,738, in respect of international transaction of 'provision of logistics services'. In conformity, the AO, passed order under section 143(3) read with section 144C of the Act. The assessee filed detailed objections before the learned Dispute Resolution Panel ('learned DRP') against the adjustment proposed by the TPO/AO. The learned DRP vide directions dated 26/12/2014, issued under section 144C(5) of the Act dismissed the objections filed by the assessee in respect of selection of comparables by following its approach adopted in assessee's own case for assessment year 2008-09. Learned DRP further directed the TPO to verify the margins of the comparables and adopt correct margin for computation of adjustment. The TPO vide letter dated 29/01/2015, communicating the effect of learned DRP's direction to the AO, submitted that the assessee has not

filed any computation of PLI in support of its claim regarding error in margins calculation. The TPO further submitted that the PLI of all the companies considered as comparable was recalculated and no mistake was found in same. Therefore, the TPO proposed no change in computation of benchmarking PLI as well as the adjustment. In conformity, the AO passed the impugned final assessment order under section 143(3) read with section 144C (13) of the Act. Being aggrieved, assessee is in appeal before us.

11. During the course of hearing, learned Authorised Representative (*'learned AR'*) filed a chart in respect of its submission regarding comparables and prayed for consideration of correct margins of Gati Ltd (seg), Sical Logistics Limited (seg) and Seaway Shipping And Logistics Limited (seg). Learned AR also sought exclusion of Balmer Lawrie and Company Ltd, South India Corporation Ltd, and Om Logistics Limited. Learned AR further sought inclusion of Gordon Woodroffe Logistics Limited for benchmarking the international transaction pertaining to *'provision of logistics services'*. Thus, in view of the above submissions, we have confined our findings only in respect of these comparables in present appeal.

12. As regards the consideration of correct margin of Gati Ltd (seg), Sical Logistics Limited (seg) and Seaway Shipping And Logistics Limited (seg), learned AR referred to the computation of margin of the aforesaid comparables, during the course of hearing. We find that though the learned DRP had directed the TPO to consider correct margin of companies considered as comparable, however, in absence of any details being submitted by the

assessee, TPO made no change in the transfer pricing adjustment in its order giving effect to the learned DRP's directions. Now in the present appeal, the learned AR has referred to the computation of margin of aforesaid companies considered as comparables. Therefore, we deem it fit to direct the TPO/AO to verify the computation of margin now submitted before us by the assessee in respect of Gati Ltd (seg), Sical Logistics Limited (seg) and Seaway Shipping And Logistics Limited (seg) and accordingly, arrive at the correct margin of these comparables. The assessee is also directed to file any other information or document, as may be required by the TPO/AO, for arriving at the correct margin of aforesaid comparables. We order accordingly. As a result, ground No. 4 raised in assessee's appeal is allowed for statistical purpose.

13. As stated above, exclusion of Balmer Lawrie and Company Ltd, South India Corporation Ltd, and Om Logistics Limited has been sought by the learned AR. During the course of hearing, learned representatives appearing for both the parties submitted that they rely on their arguments made in respect of these comparables in assessee's appeal, in ITA No. 7024 of 2012, as there is no change in functional profile of the assessee as well as these companies. We further find that even the learned DRP rejected the objections filed by the assessee in respect of these companies by following its approach adopted in assessee's own case for assessment year 2008-09. It is pertinent to note that in assessee's appeal for assessment year 2008-09 these companies were found to be, inter-alia, functionally not comparable to the assessee. In the present appeal, nothing has been brought on record to show any change in functional profile of these comparables in the year under

consideration vis-à-vis assessment year 2008–09. From the perusal of annual reports of these companies, forming part of the paper book, we find that there is no change in functional profile in the year under consideration and the functional dissimilarity with the assessee in the year under consideration still exists. Thus, in view of the above, our findings rendered in assessee's appeal, in ITA No. 7024 of 2012 for assessment year 2008 – 09, in respect of these companies shall apply *mutatis mutandis* to the present appeal. The relevant findings rendered in assessee's appeal, in OOCL Logistics (India) Pvt. Ltd. v/s DCIT, in ITA No. 7024 of 2012, for assessment year 2008–09, vide order dated 23/08/2022 in respect of Balmer Lawrie and Company Ltd, South India Corporation Ltd, and Om Logistics Limited, are as under:

(i) Balmer Lawrie and Company Ltd.

10. *The first comparable under dispute is Balmer Lawrie and Company Ltd for the purpose of benchmarking of international transaction pertaining to 'provision of logistics services'. Balmer Lawrie and Company Ltd (logistics infrastructure and services segment) was selected as comparable by the TPO vide order passed under section 92CA(3) of the Act on the basis that under TNMM only broad compatibility of the comparable needs to be seen and therefore, this company is functionally comparable to the assessee. In proceedings before the learned DRP, assessee's objection against selection of this company was rejected vide directions issued under section 144C(5) of the Act. Being aggrieved, the assessee is in appeal before us.*

11. *During the course of hearing, learned AR submitted that Balmer Lawrie and Company Ltd is multifunctional, multiproduct and multi-location company engaged in both manufacturing and services and therefore, is functionally not comparable to the assessee, as it is into diversified business. The learned AR also submitted that segmental profitability has un-allocable expenses and income, which are not allocated to the logistics infrastructure and services segment. On the other hand, learned DR by vehemently relying upon the orders passed by the lower authorities submitted that the company is broadly similar to the assessee and under TNMM broad similarity is to be seen. The learned DR also placed reliance upon the decision of coordinate bench of Tribunal in ACIT vs United Shippers Ltd., In ITA No. 3036/Mum/2012 and 2986/Mum/2012, wherein this company was selected as a comparable.*

12. We have considered the rival submissions and perused the material available on record. From the perusal of annual report and Director's report of Balmer Lawrie and Company Ltd for the relevant year, forming part of the paper book, we find that the services offered by this company are industrial packaging, greases and lubricants manufacturing, logistics services, tours and travels, logistics infrastructure, performance chemicals, tea production and refinery and oil field services. For the purpose of comparability with assessee, the TPO considered logistic infrastructure and services as the relevant segment. We find that under the logistics services, Balmer Lawrie and Company Ltd offers services including import consolidation by air, air and sea freight forwarding, customs house agency, handling of project cargo, Multimodal transportation, chartering of aircraft and vessels and door-to-door services. Further, in respect of logistic infrastructure, the services offered by Balmer Lawrie and Company Ltd include aggregation of long distance cargo, in transit storage, warehousing, custom house clearance and transportation to and from ports. Further, the company has Container Freight Stations (CFS), which operates as an extension of the port, at Kolkata, Navi Mumbai, Chennai and the company is exploring possibilities of setting up new CFS at other locations within the country. Thus, in comparison to the functions performed by the assessee, as noted above, we find that under the relevant segment, i.e. logistic infrastructure and services, Balmer Lawrie and Company Ltd is rendering wide range of logistics solutions to its customers, which renders the company to be functionally not comparable to the assessee.

13. In addition to above, we also find from the perusal of information about relevant business segment of Balmer Lawrie and Company Ltd that apart from separate segment -wise revenues and costs available in the annual report, there is an item of 'un-allocable revenue' of Rs. 1812.76 lakhs and 'un-allocable expenditure' of Rs. 1320.35 lakhs. We find that for the very same reason, Balmer Lawrie and Company Ltd was considered to be not comparable by the coordinate bench of Tribunal in CEVA Freight India Private Limited vs DCIT, in ITA No. 4956/Del/2013, vide order dated 18/01/2018, as due to presence of 'un-allocable revenue' and 'un-allocable expenditure' the profit margin of relevant segment cannot be correctly computed. The relevant findings of the coordinate bench of the Tribunal, in aforesaid decision, are as under:-

"10. We have heard both the sides and perused the relevant material on record. Page 764 onwards of the paper book is a copy of the Annual report of Balmer Lawrie & Co. Ltd. Page 804 is a copy of its Profit & Loss Account, which shows revenue from sale of Manufactured goods, Trading goods, Turkey projects and Services. The Director's report divulges that this company has several units, such as, Industrial packaging. Grease and lubricants, Logistics services, Project and engineering consultancy. Travel and tours, Container freight station. It is axiomatic that this company, on entity level, cannot be considered as comparable with the assessee company. The TPO has considered 'Logistics services' segment of this company for comparing it with the assessee. In our considered opinion, even the segment of this company cannot be considered as comparable for the reason that apart from separate segment-wise revenues and costs available in the Annual report, there is an item of 'Unallocable expenditure of Rs.35.52 crore, which has been apportioned by the TPO amongst all the segments, including 'Logistics services, on the basis of their revenue. This approach of bifurcation of 'Unallocable expenditure' cannot be countenanced. Unallocated expenses obviously comprise several items of expenses of distinct

nature and hence there cannot be a uniform key of apportionment. For example, Rent paid by an assessee cannot be bifurcated on the basis of revenue from different segments, such as, Manufacturing, Trading and services. The extent of area used by each business segment varies as per the nature of transaction, which may have no relation with the gross revenue. For example, a manufacturing unit will need relatively more area than a trading unit. Similarly, a service unit will need still lesser area. In such circumstances, apportioning common Rent expenditure on the basis of gross revenue from such varied divisions, will give skewed results of segment profitability. Similarly, contribution of various segments to other items of expenses varies depending upon the nature of transaction, extent of capital and labour required etc. etc. So all common expenses cannot be apportioned in one stroke in the ratio of gross revenue from different segments, each having its own separate features and characteristics. One can logically make allocation depending upon the nature of expenditure and appropriate allocation key. Since in the case of Balmer Lawrie, neither the nature of common unallocated expenses is known, nor the information concerning the appropriate allocation keys is available, we cannot approve the allocation of common expenses in the ratio of gross revenue from each segment. That being the position, the computation of the profit margin of the relevant segment of Balmer Lawrie & Co. sheds credibility which renders its inclusion invalid. This company is directed to be excluded."

14. Thus, we are of the considered view that Balmer Lawrie and Company Ltd (logistic infrastructure and services segment) is not comparable to the assessee in the present case.

15. Further, as regards the reliance placed by learned DR on the decision of coordinate bench of Tribunal in United Shippers Ltd. (supra), it is pertinent to note that in the aforesaid decision, assessee's submission to exclude Balmer Lawrie and Company Ltd as a comparable on the basis that it has shareholding of government of India was rejected by the coordinate bench of the Tribunal. However, in the present case, Balmer Lawrie and Company Ltd has been found to be functionally non-comparable to the assessee in addition to presence of 'un-allocable revenue' and 'un-allocable expenditure' in the segmental profitability of the company. Therefore, in view of the above, the TPO/AO is directed to exclude Balmer Lawrie and Company Ltd as comparable for benchmarking the international transaction of 'provision of freight services'.

(ii) South India Corporation Ltd.

16. The next comparable under dispute is South India Corporation Ltd for the purpose of benchmarking of international transaction pertaining to 'provision of logistics services'. South India Corporation Ltd (clearing and forwarding segments) was selected as comparable by the TPO vide order passed under section 92CA (3) of the Act. In proceedings before the learned DRP, assessee's objection against selection of this company was rejected vide directions issued under section 144C (5) of the Act. Being aggrieved, the assessee is in appeal before us.

17. Having considered the rival submissions and perused the material available on record, we find that South India Corporation Ltd (clearing and forwarding segments) was selected as comparable by the TPO. In proceedings before the TPO, assessee objected to the selection of this comparable on the

basis that the data pertaining to this company is not available in public data base and therefore, the same cannot be selected as comparable. We find that vide order passed under 92CA (3) of the Act, the TPO though accepted that the data pertaining to this company is not available in public domain, however, rejected the contention of the assessee on the basis that PLI working of the company has been provided to the assessee, during transfer pricing assessment proceedings. The learned DRP also rejected the objections of the assessee against the selection of this comparable and upheld the findings of the TPO. We find that the TPO considered carrying and forwarding segment of South India Corporation Ltd as comparable to the assessee. As per the Director's report of South India Corporation Ltd, forming part of the paper book, we find that the company is performing stevedoring activities e.g, handling of coal, foodgrains, steel, lignite, limestone and transporting the goods. The relevant portion of the Director's report in respect of clearing and forwarding division of South India Corporation Ltd, is as under:

"Clearing and Forwarding Division

The performance of this division of the Company is satisfactory. The Company has bagged a new contract from Karnataka Power Corporation Limited for handling coal by all rail route besides the existing contract of handling coal by rail-sea route. The existing contracts with Tamilnadu Electricity Board for handling coal and the contract with Central Warehousing Corporation for handling food grains and the contract with SAIL for handling of steel and the contract with Chennai Container Terminal Limited for transporting goods from inside the harbour and the contract with Chettinad Lignite Transport Services Private Limited for ST-CMS Electric Company Private Limited for transport of lignite have been extended. During the year under review, the company has bagged a new contract for mining work from Indian Rare Earths Limited. The two year contract for transporting and unloading of food grains for Central Warehousing Corporation at Thanjavur is under progress. The contract from Neyveli Lignite Corporation Limited for transport of raw lignite has also been extended. Small contracts were awarded to the Company by SAIL. and Vizag Steel Plant for loading of Steel and unloading of limestone respectively at Vizag. Logistics operations have been modernised and the company hopes to achieve better results in the coming years. M/s.Bhatia Coal International Limited who is dealing with Stock and Sales of Steam Coal has given the Stevedoring work to our Company."

18. While, on the other hand, as noted above assessee is engaged in providing logistics services in the nature of pre-shipment packaging and other activities; transportation to the exportation port; custom clearance and documentation; cargo consolidation and shipment of cargo; tracking the shipment and processing the receipt of the same; arranging transshipment of goods as per the instructions; preparing necessary shipment documentation and intimating the consignee; custom clearance/transportation; and inventory management and control. Thus, from the above, it is evident that the functions performed by South India Corporation Ltd, in the segment of clearing and forwarding division, are not comparable to the assessee. Therefore, in view of the above, the TPO/AO is directed to exclude South India Corporation Ltd as comparable for benchmarking the international transaction of 'provision of freight services'.

(iii) Om Logistics Limited

19. The next comparable sought to be excluded by the assessee for the purpose of benchmarking of international transaction pertaining to 'provision of logistics services' is Om Logistics Limited. This company was selected as a comparable by the assessee on the basis of three-year financial data. The TPO also vide order passed under section 92CA (3) of the Act retained this company for the purpose of benchmarking. In proceedings before the learned DRP, the assessee raised no objections for exclusion of Om Logistics Limited as a comparable. It is only in the present appeal, assessee has sought exclusion of Om Logistics Limited for the benchmarking the aforesaid international transaction. The learned DR submitted that this company was selected by the assessee and since it had passed all the filters, therefore, was considered as a comparable to the assessee by the TPO. The learned DR further submitted that this company is primarily into providing logistics services. On the other hand, learned AR placed reliance upon the decision of the coordinate bench of the Tribunal, wherein this company was excluded for the reason that it has significant asset base.

20. We have considered the rival submissions and perused the material available on record. The relevant details of the fixed assets of the assessee, as per the schedule forming part of the financials, are as under:

SCHEDULE-2 – FIXED ASSETS (Refer Note 1(ii) on Schedule 12)

| Particulars | | | | | | | | | |
|------------------------|-----------|-----------|-----------|---------|---------|-----------|-----------|-----------|--|
| Furniture and Fixtures | 44,390 | - | 44,390 | 14,404 | 8,178 | 22,582 | 21,808 | 29,986 | |
| Office Equipments | 50,849 | 59,040 | 109,889 | 50,849 | 59,040 | 109,889 | - | - | |
| Computers | 1,296,526 | 1,766,238 | 3,062,764 | 256,790 | 666,886 | 923,676 | 2,139,088 | 1,039,736 | |
| Total | 1,391,765 | 1,825,278 | 3,217,043 | 322,043 | 734,104 | 1,056,147 | 2,160,896 | 1,069,722 | |
| Previous Year | 269,542 | 1,122,223 | 1,391,765 | 35,376 | 286,667 | 322,043 | 1,069,722 | | |

21. While on the other hand, in case of Om Logistics Ltd., relevant details of the fixed assets, as per the schedule forming part of the financials, are as under:

| | | | | | | | | | | | |
|------------------------|---------|---------|--------|----------|--------|----------|--------|-------|--------|----------|---------|
| Plant and machinery | 194.57 | 164.75 | - | 359.32 | 44.00 | - | 14.18 | - | 58.11 | 301.14 | 150.57 |
| Computer and equipment | 284.06 | 55.70 | 22.32 | 317.44 | 161.91 | - | 38.66 | 22.02 | 178.55 | 138.89 | 122.15 |
| Furniture and Fixtures | 117.42 | 123.64 | - | 241.06 | 18.80 | - | 10.52 | - | 29.32 | 211.74 | 96.62 |
| Vehicles | 1709.87 | 137.50 | 24.02 | 1823.15 | 203.13 | - | 264.51 | 14.20 | 453.44 | 1389.71 | 1506.54 |
| Land | 1399.69 | 2977.73 | - | 4377.42 | - | - | - | - | - | 4377.42 | 1399.69 |
| Buildings | 1801.57 | 1938.42 | - | 3739.99 | 44.56 | - | 45.35 | - | 89.91 | 3650.08 | 1757.02 |
| Leasehold Improvement | - | 96.21 | - | 96.21 | - | - | 5.31 | - | 5.31 | 90.90 | - |
| Total | 5506.98 | 5493.95 | 48.34 | 10954.59 | 472.40 | - | 378.53 | 38.22 | 814.71 | 10139.88 | 5034.59 |
| Previous Year | 3912.82 | 1906.01 | 311.85 | 5506.98 | 619.16 | (345.06) | 206.30 | 8.00 | 472.40 | 5034.58 | |

22. We find that the coordinate bench of the Tribunal in DHL Logistics Pvt. Ltd. v/s DCIT, in ITA No. 1030/Mum./2015, vide order dated 20/12/2019, for the assessment year 2010-11, while directing exclusion of Om Logistics Limited for the purpose of benchmarking with the company, which was engaged in providing logistics services i.e., international, domestic and specialised freight handling services, observed as under:

“(iii) Om Logistics Ltd:

(a) It was the claim of the assessee that as the aforesaid company owned transportation assets and had started warehousing business, therefore, it could not have been selected as a comparable to the assessee. However, the TPO had observed that the 'annual report' of the aforesaid company for financial year 2008-09 and financial year 2009-10 revealed that its composition of assets had remained the same. In fact, it was observed by the TPO that in financial year 2008-09 the assets of the aforesaid company were more than those during the year under consideration i.e financial year 2009-10. Also, it was observed by the TPO that the operations as well as the background of the aforesaid company had remained the same as in the last two preceding years. Accordingly, on the basis of his aforesaid observations the aforesaid claim of the assessee was rejected by the TPO. As regards the claim of the assessee that the aforesaid company was having super profit, it was observed by the TPO that merely for the said reason the same could not be rejected as a comparable. In fact, the TPO had observed that for rejecting a company as a comparable, for the reason, that it had shown super profit. It has to be shown by the assessee that there were exceptional events or situation leading to higher than the normal profits in the case of such comparable. Accordingly, it was observed by the TPO that as no such exceptional circumstances or events had been shown by the assessee, therefore, the plea of the assessee that the aforesaid company be rejected as a comparable did not merit acceptance. Apart therefrom, it was observed by the TPO that as the OP/TC margin of the company was ranging from 9.76% to 17.37%, and in fact the same had gone down to 14.46% in the next year, therefore, there was no pattern to suggest any abnormality in the profit of the assessee. On the basis of his aforesaid deliberations the TPO had declined to accept the claim of the assessee that the aforesaid company was to be excluded from the final list of comparables.

(b) Admittedly, the aforesaid company was selected by the assessee in its TP study report, but then as observed by us hereinabove, an assessee cannot be barred in law from withdrawing from its list of comparables a company, which had either been included on account of a mistake on facts or is not found to be comparable. Our aforesaid view is fortified by the judgment of the Hon'ble High Court of Bombay in the case of The Commissioner of Income-tax-7 Vs. M/s Tata Power Solar Systems Ltd. (2017) 245 Taxman 93 (Bom) and Pr. CIT Vs. J.P Morgan India Pvt. Ltd. (ITA No. 912 of 2016, dated 14.01.2019) (Bom). It is in the backdrop of our aforesaid conviction, that we shall deliberate upon the aspect as to how the aforesaid company could not have been feasibly selected as a comparable for determining the arm's length price of its international transactions for the year under consideration. On a perusal of the 'annual report' of the aforesaid company for the year under consideration viz. F. Y 2009-10, we find, that unlike the assessee company it has a significant asset base. For the sake of clarity, the Fixed asset schedule of the aforesaid company for the FY 2009-10 is reproduced as under:

**SCHEDULE-5
FIXED ASSETS**

| Particulars | | | | | | | | | | |
|------------------------|----------|----------|--------|-----------|--------|---------|--------|----------|-----------|-----------|
| Land | 4,377.42 | 231.16 | - | 4,808.58 | - | - | - | - | 4,608.58 | 4,377.42 |
| Building | 3,739.99 | 909.10 | - | 4,649.09 | 89.90 | 69.45 | - | 159.35 | 4,489.74 | 3,850.09 |
| Plant and Machinery | 359.32 | 95.34 | 14.14 | 440.52 | 58.18 | 20.50 | 7.11 | 71.57 | 368.95 | 301.14 |
| Computer and equipment | 317.44 | 39.29 | 76.79 | 279.94 | 178.55 | 41.35 | 76.78 | 143.12 | 136.82 | 138.89 |
| Furniture and Fixture | 241.06 | 12.80 | 7.53 | 246.33 | 29.32 | 15.54 | 4.05 | 40.81 | 205.52 | 211.74 |
| Leasehold Improvement | 96.21 | 114.48 | - | 210.69 | 5.31 | 24.77 | - | 30.08 | 180.81 | 90.90 |
| Vehicles | 1,823.15 | 121.89 | 53.47 | 1,891.57 | 453.45 | 283.69 | 19.56 | 717.59 | 1,713.98 | 1,389.70 |
| | 1,984.59 | 1,524.08 | 151.93 | 12,328.72 | 814.71 | 455.630 | 107.49 | 1,162.52 | 11,164.20 | 10,138.88 |
| Previous Year | 5,506.98 | 5,493.95 | 48.34 | 10,954.59 | 472.40 | 378.53 | 38.22 | 814.71 | 10,139.88 | |

**SCHEDULE-6
INTANGIBLE ASSETS**

| | | | | | | | | | | |
|-------------------|-------|------|---|-------|-------|------|---|-------|-------|-------|
| Computer Software | 29.01 | - | - | 29.01 | 12.97 | 9.67 | - | 22.64 | 6.37 | 18.04 |
| | 29.01 | - | - | 29.01 | 12.97 | 9.57 | - | 22.64 | 6.37 | 16.04 |
| Previous Year | 22.01 | 7.00 | - | 29.01 | 3.93 | 9.04 | - | 12.97 | 18.04 | |

Also, a perusal of the 'annual report' of the aforesaid company reveals that unlike the assessee it has various warehouses across the country and has increased the fleet of its vehicles. In order to fortify his aforesaid claim, the Id. A.R had drawn our attention to Page No. 7 of the "annual report' of the aforesaid company, which reads as under:

"Strengthening the Infrastructure

As envisaged in the last report, Your company has taken various steps during the year to strengthen its infrastructure base across the country. We have successfully launched the warehouses at Jamalpur (Delhi NCR region), Sanad near Ahmedabad and Sriperambadur near Chennai and plan to setup more warehouses in near future at strategic locations throughout the country.

Your company also set up about 20 more branches at strategic locations. Further the fleet strength owned by the company was also increased to smoothen the operational activities."

As observed by us hereinabove, as the assessee company is not an asset owning company, therefore, the aforesaid company viz. M/s Om Logistics Limited which has a significant asset base, thus being functionally different could not have been feasibly selected as a comparable for the purpose of determining the arm's length price of its international transactions for the year under consideration. Accordingly, we direct the A.O/TPO to exclude the aforesaid company from the final list of comparables for the purpose of benchmarking its international transactions for the year under consideration."

23. *As, the assessee is also not an asset owning company, while on the other hand, Om Logistics Limited is having significant asset base including having warehousing facility, therefore, same cannot be considered to be comparable to the assessee. Insofar as the submission of the learned DR that assessee is seeking exclusion of its own comparable, it is pertinent to note that Special Bench of the Tribunal in DCIT vs Quark Systems Private Limited, [2010] 38 SOT 307 (Chd.) (SB) held that there is no estoppel on the taxpayer from pointing out that a particular company has been wrongly taken as a comparable. We further find that the aforesaid decision rendered by Special Bench of the Tribunal has been affirmed by Hon'ble Punjab and Haryana High Court in CIT vs Quark Systems Private Limited, [2011] 244 CTR 542 (P&H). Accordingly, in view of the above, the TPO/AO is directed to exclude Om Logistics Limited as comparable for benchmarking the international transaction of 'provision of freight services'."*

14. Therefore, in view of the above, TPO/AO is directed to exclude Balmer Lawrie and Company Ltd, South India Corporation Ltd, and Om Logistics Limited as comparables for benchmarking the international transaction pertaining to 'provision of logistics services'.

15. The assessee has sought inclusion of Gordon Woodroffe Logistics Limited for benchmarking the international transaction pertaining to 'provision of logistics services'. This company was selected as a comparable by the assessee in its transfer pricing study. The TPO vide order passed under section 92CA (3) of the Act rejected this company on the basis of non-availability of data for the relevant financial year in public domain. We find that learned DRP rendered no findings in respect of this company. It is the plea of the assessee that data for relevant financial year was submitted before the TPO. However, the TPO did not consider the same. The annual report of this company is forming part of the paper book from page No. 216 – 237. In the present case, it is not in dispute that none of the lower authorities has examined the relevant data to determine the comparability of Gordon

Woodroffe Logistics Limited with the assessee. Therefore, in view of the above, we deem it appropriate to remand the issue of comparability of Gordon Woodroffe Logistics Limited to the file of TPO/AO for *de novo* adjudication in view of the data now referred by the assessee, during the course of hearing. The assessee as well as the TPO/AO shall be at liberty to furnish/seek any other information/document as may be required for determining the comparability of the aforesaid company with the assessee.

16. As a result, grounds no. 2 and 3 raised in assessee's appeal are allowed for statistical purpose.

17. As the issue arising in ground No. 5 raised in assessee's appeal is pertaining to grant of credit of TDS, therefore, we deem it appropriate to direct the AO to grant the credit of TDS as per law, after necessary verification/examination of details. Accordingly, ground no. 5 raised in assessee's appeal is allowed for statistical purpose.

18. Ground No. 6 raised in assessee's appeal is pertaining to levy of interest under section 244A of the Act. As per the assessee, Rs 32,64,829 has not been refunded to the assessee. Therefore, we deem it appropriate to direct the AO to *de novo* adjudicate upon the issue of levy of interest under section 244A of the Act after necessary verification/examination of details. As a result, ground no. 6 raised in assessee's appeal is allowed for statistical purpose.

19. Ground no. 7 raised in assessee's appeal is pertaining to levy of interest under section 234B of the Act, which is consequential in nature. Therefore, ground no. 7 is allowed for statistical purpose.

20. The assessee has also filed an application dated 04/02/2020 seeking admission of additional ground of appeal. However, during the course of hearing the said application was not pressed by the learned AR. Therefore, the aforesaid application is dismissed *in limine*.

21. In the result, appeal by the assessee is allowed for statistical purpose.

Order pronounced in the open Court on 24/08/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 24/08/2022

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai