

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

आयकर अपीलीय अधीकरण, न्यायपीठ "C" कोलकाता,

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1365/Kol/2017
Assessment Year: 2010-11**

Deputy Commissioner of Income-tax, Circle-12(1), Kolkata.	Vs.	M/s. Cargo Partners Logistics India Pvt. Ltd., 122A, Southern Avenue, 5 th floor, Kolkata-700029. (PAN: AACCC9129K)
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Manish Kanojia, CIT, DR
Respondent by : Shri Rahul Shah & Shri Mukesh Agarwal, ARs

Date of Hearing : 16.08.2022
Date of Pronouncement : 18.10.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is against the order of Ld. CIT(A)-22, Kolkata vide Appeal No. 216/CIT(A)-22/10-11/14-15/Kol dated 03.03.2017 passed against the assessment order by the DCIT, Circle-12, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 13.03.2014.

2. Grounds taken by the revenue are reproduced as under:

"1. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs.26,55,106/- made on account of excess claim of depreciation.

2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the assessee company had not acquired the software but only granted license and permission to use the software for a limited period of time.

3. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the software is still owned by SAP AG which is a German multinational software corporation who developed the software & selling only license to use it.

4(i). That on the facts and in the circumstances of the instant case, the Ld. CIT(A) has erred not appreciating that he services are in the nature of share holder service.

ii) Without prejudice to the above, that on the facts and in the circumstances of the Instant case, the Ld. CIT(A) has erred in determining the transaction of payment for management support services to be at Arm's Length without any analysis of uncontrolled price.

iii) That on the facts and in the circumstances of the instant case, the Ld. CIT(A) has erred in not determining the Arm's Length Price of the transaction.

iv) That on the facts and in the circumstances of the instant case, the Ld. CIT(A) has erred In rejecting comparable companies without appreciating the fact that these companies are also into rendering of freight forwarding services which is very nature of the assessee's operations."

3. From the above, we note that ground no. 1, 2 and 3, they all relate to disallowance made on account of excess claim of depreciation in respect of SAP software implemented by the assessee. Ground no. 4(i), (ii) and (iii) all relate to transfer pricing adjustment made in respect of receipt of management support services from the Associated Enterprises (AE) and last ground no. 4(iv) relates to rejecting comparable companies in respect of transfer pricing adjustment made for freight forwarding services.

3.1 Brief facts of the case from the records are that assessee is a Private Limited Company and a subsidiary of Multi Transport And Logistic Holding (AG) which is engaged in the business of providing freight and other cargo forwarding service managed organizationally as a single unit headquartered in Vienna, Austria. It contracts with asset based carriers who move cargo from the port of loading to the port of destination, proposes documentation

and performance related activities pertaining to international shipment. Assessee vide its return of income reported total income of Rs.2,34,06,681/- on 26.09.2010. The case was selected for scrutiny for which statutory notices were issued and complied with. In the assessment completed by the Ld. AO, disallowance of Rs.26,55,106/- has made towards excess depreciation on SAP software implemented by the assessee. Further, assessee had entered into international transactions with its AE for which transfer pricing adjustment of Rs.3,30,21,840/- were determined by the Ld. TPO-III, Kolkata, which were added to the total income of the assessee by the Ld. AO.

3.2. In respect of disallowance of excess depreciation, assessee had purchased SAP software and also incurred cost of its implementation and training the employees to use the said software, totaling to Rs.75,80,016/-. On this amount, assessee claimed depreciation @ 60% as per section 32(1)(ii) of the Act read with Rule 5 of Appendix-I to the said Rules wherein a rate of 60% of depreciation on “computers including computer software” has been prescribed. However, Ld. AO allowed only 25% depreciation as against claim of 60% made by the assessee since according to the Ld. AO, SAP is a software which the assessee had taken on license basis to use it. Ld. AO noted that assessee has not acquired the software but has only been granted license to use the software for a limited period of time and, therefore, excess depreciation i.e. 35% (60% minus 25%) amounting to Rs.26,55,106/- was disallowed and added back to the total income of the assessee.

3.3. In respect of the international transactions entered into by the assessee with its AE, the details are tabulated as under:

Nature of services	Amount (Rs.)
Receipt of Services from A.E	7,53,70,791/-
Rendering of Services to A.E	7,80,50,324/-
Intra-Group Management Services	1,38,76,419/-

3.4. In respect of these international transactions, the transfer pricing adjustment determined by the Ld. TPO and added by the Ld. AO in the assessment is tabulated as under:

International Transactions of the respondent with its associated enterprises	Amount (Rs.)	Value of TP adjustment
Receipt of management support Services	1,38,76,419/-	1,38,76,419/-
Rendering of Services to A.E	15,34,21,115/-	1,91,45,421/-

3.5. These disallowances and transfer pricing adjustment were protested in appeal before the Ld. CIT(A) who found merit in the submissions and contentions of the assessee and gave relief by allowing the appeal.

3.6. Before us, Shri Rahul Shah and Shri Mukesh Agarwal, AR represented the assessee and Shri Manish Kanojia, CIT, DR represented the department.

3.7. Before us, Ld. CIT, DR laid his contentions by supporting the orders of the authorities below. He referred to para 27 and 28 of the order of Ld. CIT(A) and also the conclusion drawn by Ld. TPO from the order of Ld. TPO placed in the paper book at page 354. In respect of comparables, Ld. CIT, DR submitted that Ld. TPO had included a new comparable which has been wrongly excluded by the Ld. CIT(A).

3.8. Per contra, Ld. Counsel for the assessee made his contentions by referring to the written submissions placed on record along with five volumes of paper book. On the first issue relating to disallowance of excess depreciation, Ld. CIT(A) found favour with the submissions made by the assessee which were as under:

- (i) that SAP software satisfies all parameters of a computer program and the definition of computer software as provided in Appendix-I to the Income-tax Rules;
- (ii) that purchase under any licensed agreement does not materially affect the purchase of software otherwise the depreciation as provided in the Rules for computer software would be rendered otiose;
- (iii) that legal principles namely, "*Generalie Specialibus Non-derogant*" or the Rule of implied exception would lead to a conclusion that the SAP software acquired by the assessee would be eligible for 60% depreciation instead the general rule of 25% applicable for intangible assets.

3.9. Based on the above submission, ld. CIT(A) held that in pure technical terms from the provisions of the Act and the various judgments relied on by the assessee and also by considering the application of legal maxim "*Generalie Specialibus Non-derogant*" and the meaning of the term computer and computer program, SAP software falls under the block of "computers including computer software" prescribed in the Income-tax Rules, 1962 and is eligible for depreciation @ 60%. Thus, he deleted the addition of Rs.26,55,106/- in respect of excess depreciation disallowed by the Ld. AO. Considering the facts of the case and meritorious finding given by the Ld. CIT(A), we do not find any reason to interfere with the relief granted by the ld. CIT(A). Accordingly, ground nos. 1, 2 and 3 are dismissed.

4. Now, we take up the issues relating to transfer pricing adjustment in respect of management support services and freight forwarding services.

4.1. Ground nos. 4 (i), (ii) and (iii) are in respect of Transfer pricing adjustment of Rs.1,38,76,419/- towards receipt of management support services by the assessee from its AEs. Before going into the merits of the case on the issue, Ld. Counsel for the assessee at the outset submitted that this issue is squarely covered by the coordinate bench of ITAT, Kolkata in a recent decision dated 27.07.2022 in assessee's own case for AY 2012-13 in ITA No. 658/Kol/2017 wherein contentions of the assessee have been upheld and TP adjustment made on this issue has been deleted. The relevant extracts from the said order is reproduced as under:

"14. Now, first we need to examine that what type of services have been provided by the AE to the assessee. Learned Counsel for the assessee has claimed that the assessee company in order to avail an effective network development and high productivity service standards the assessee is in continuous need of management services in the nature of marketing as well as information technology, personnel etc. The AE-CPA is a dynamically growing, mid-sized specialist for transportation and integrated logistics, with special expertise in overseas solutions. The assessee company avails various types of services from AE-CPA vide different agreements which stands submitted before the lower authorities and also filed in the paper book placed before us and according to the same, the description of the alleged management services can be enumerated in the following categories:

"(i)Marketing

The following description only refers to the marketing services performed by the CPA for the group entities. The performed services of the marketing department of the CPA comprise the following:

- Corporate Design: final check of compliance with design guideline and relaunches*
- Corporate Public Relations: press information, contacts with journalists, maintenance of the photo database for the journalists, partly press journeys*
- Direct Marketing: print campaigns in Europe twice a year, creation of all mailings for all countries, creation of invoice enclosures*
- Emailing: creation and wording of agent newsletters, request of databases, allocation of electronic newsletters with own Mail-client*

- *Website: maintenance and improvements of the websites, 3 updates a week, main content is developed by the CPA marketing department.*
- *Development of sales supporting booklets: country specific image booklets, product booklets, partly internal hand-out booklets. In average, 100 new product booklets per year*
- *Intranet Newsletter: 70% of the articles are created and layout modified by the CPA*

Without the services of the central marketing department, the assessee would have been less popular in India. The central purchase of advertising materials also benefits the assessee in marketing of its services. Moreover, the assessee does not have its own marketing department. If CP did not perform the activities, the assessee would have to perform the activities by itself or buy them in addition.

The services performed by CPA aims at gaining new customers as well as to keep the relationship with the existing ones. The benefits of the service "corporate design" e.g. are that the assessee does not have to develop any kind of new design. They receive any kind of templates they need to improve their customer relationship from CPA. Additionally, the assessee benefits from the pooling of know-how due to the centralization of the department in Austria. Thus, resulting in quality improvement and synergies.

(ii) Corporate Sales

The services performed under the given category are of the following types:

- *Development and implementation of corporate sales strategy*
- *Standardization and optimization of the sales process*
- *Sales analysis and performance measurement based on sales targets, sales reports and KPIs*
- *Implementation of sales tools (MyCRM, SQL) to support the sales team*
- *Coordinate global and corporate tender management*
- *Initiate sales trainings*

The services performed by the corporate sales department are aimed at gaining new customers as well as to keep the relationship with the existing ones. The assessee benefits from increased revenue coming from cross-selling opportunities specified by the corporate sales department. The cross-selling activities include selling among or between established clients, markets etc. or selling an additional service to an existing customer. Through the global and corporate tender management the assessee can address large accounts in several countries. Considering the size of the assessee it would not have been able to attract some of its existing clients. Moreover, the assessee also benefits from the centralized implementation and maintenance of the sales tools. If CPA did not perform this service, the assessee would have to perform it by themselves or buy them in addition.

(iii) Commercial management

The function Commercial Management can be divided into the 3 major services being Product Management, Global Network Development and Business Process Management. However, the following sub-items in this chapter after the description of the performed services refer to Commercial Management as a whole due to the fact that the cost allocation system of all Commercial services is the same.

Product management

- Create and implement global product strategy plan and targets
- Define, maintain and expand group-wide trade lanes and special vertical markets
- Provide trainings and up-to-date product knowledge to the National Product Managers and sales in the countries
- Centralized pricing and credit limit administration of partners/carriers
- Global Network Development:*
 - Select and expand the networks with external partners in the countries where cargo-partner has no own subsidiaries
 - Develop and expand the business with the ABC agent network
 - Define and implement sales campaigns in cooperation with the, local route management

Business Process Management:

- Harmonize and optimize the operational processes
- Develop and optimize the IT systems in cooperation with the IT department
- Training of standard procedures and group directives

The assessee benefits from the implementation and optimization of business processes and IT-tools which makes the processing of transport orders easier and faster. It also benefits from the larger access to vendors in different countries through CPA vendor management relationships.

(iv) Consulting

The Consulting department provides the following services:

- General legal consulting for the Group companies
- Drawing and checking of contracts and agreements
- Legal actions for the foundation and change in affiliated/related companies (entry in commercial register, appointment/dismissal of Managing Directors and authorized signatories ("Prokuristen"), registration of capital increase etc.)
- Consulting in court claims concerning civil and criminal law e.g. Iran-Embargo, aviation cartel reclaiming
- Protect intellectual property for cargo-partner Group
- Insurance for cargo-partner Group (property, liability and damage insurance)
- Centralized purchasing of office material for cargo-partner Group (e.g. standardized forms like airway bill, bill of lading)

The assessee benefits from the consulting services that include legal, insurance, purchasing and quality management as it needs them for its day to day business.

(v) ASP

The function ASP can be divided into the services SAP and IT. In the following, the description of the performed services of the ASP department distinguishes between SAP services and IT services.

SAP services:

- SAP Roll Out projects (FI/ CO Tool) by countries
- Help Desk Support activities in any kind of SAP related questions

- SAP project activities for local finance and controlling departments
- Customizing and Application activities for finance and controlling department regarding the following SAP Tools: FI, CO, MM, SD, BW and SEM/BCS. These activities are performed in case of necessary adaptations of the SAP system.

IT services:

- Service Desk

(1st& 2nd level end-user support, end-user desktop management, end-user ICT environment setup, telephone & mobile phone management)

- Technical Management

(network management, operate and optimize data centers& system infrastructure, hardware maintenance)

- Application management

(2nd& 3rd level application support, supplier relations, application design and changes, application manuals, data maintenance)

- Application Development

(develop, maintain and enhance applications, BI solutions/reports, SW-/system architecture, IT project management, customer & partner integration projects)

The assessee benefits from the provided ASP services as it needs them for its daily work business. Without these services the assessee could not exist as the services directly have an impact on the operational activities. The assessee is still moderate in size to have qualified personnel that implement and ensure an efficient IT SAP system. Each of the ASP services cannot be seen separately as all ASP services as a whole are necessary for CP's business model.

(vi)Controlling

The function Controlling can be divided into the services Controlling and Revision. In the following, the description of the performed services of the Controlling department distinguishes between Controlling services and Revision services.

Controlling services:

- Review of finance/controlling processes and monthly results
- Provide know-how and support in the area of accounting, controlling and cash management to the local finance departments
- Provide proposals and trainings to the local finance and controlling departments to improve efficiency and quality
- Support in the daily use of SAP (FI, CO, BW, SEMZBCS) and AS400 for accounting and controlling purposes in cooperation with the ASP team
- Support in SAP implementation projects in cooperation with the ASP team

Revision services:

- Review of operational, sales and personnel processes
- Provide proposals to improve efficiency and profitability
- Detect illegal and criminal acts

The assessee benefits from the Controlling services as they support the local, finance departments in the efficient and effective accounting operation and to provide reliable financial information.

(vii)Finance

The Finance department is responsible for the overall financial management of the CP Group. This responsibility includes:

- *Advisory on liquidity management*
- *Advisory on tax compliances and management*
- *Advisory on forex management*
- *Define and implement the Group-wide risk management strategy.*

The assessee benefits from the assistance of the CPA finance departments in the efficient and effective accounting operation and to provide reliable financial information. The provision of liquidity planning tools shall help the subsidiaries to monitor their local liquidity situation. The risk management processes and tools support the assessee in evaluating and monitoring the creditworthiness and payment behaviour of the customers thereby helping to reduce the losses from bad debts.

(viii) Personnel

The operational fields of the personnel department have to support the planned growth of the company and have to ensure that the quality of the management bears up to the increasing demands. The performed services are:

Recruiting: Qualitatively fitting and fast filling of open positions

- *Exact definition of job specifications,*
- *qualification of the peripheral units (branch manager, HR-responsible in operative units) in performing recruiting interviews and recruiting activities*

- *Hiring of young talents (specialists and junior executives)*

- *Utilization of the internally existing development potential before external search*

- *On-boarding: professional integration of new employees*

- *Definition of standardized adjustment plans and responsibilities*

- *Definition of mentors / buddies at least for key positions*

Potential- and performance analysis: identification of the potentials and performers (non-performers) in the company

- *Establishing of yearly appraisal interviews as an important management tool*

- *Review of the existing management qualities and definition of the need for action*

- *Realization of a personnel-portfolio of the employees*

Development- and succession planning: development and retention of the high performers and potentials to the company

- *Preparation of development plans for potentials, based on the analysis mentioned above*

- *Development of potentials by specific job-rotations and job enrichment (possibly matrix function)*

The assessee benefits from the services resulting in new responsible qualified personnel without having to develop new processes on their own in this regard. Furthermore, the assessee benefits from the personnel department's activities because those are meant to enable the local entities to work more qualified and efficiently on a high level. The local entities themselves are too small to have the capacity to work on personnel policy. The personnel policy is a key factor to make growth possible and therefore necessary for the assessee.

Further, the agreement states that the services costs for the aforesaid services shall be allocated towards the group companies based on the number of weighted total costs per country."

15. We observe that the above described type of management services which the assessee is availing is not only from the AE-CPA but from other companies also and the payment to such other companies are not disputed by the Revenue. On one hand, Revenue has accepted the claim of management services paid to other companies but has doubted only with regard to payment made to AEs. We find that the alleged management services are merely 2% of the total revenue of the company which is even less than 2% of the revenue of the company and the said sum paid by the assessee has also been offered to tax by AE-CPA. Also the nature of services rendered by AE-CPA to the assessee are not specific but provided on day to day basis whenever needed. The AE-CPA has expertise in the overseas freight and forwarding business and there are various types of issues and problems attached in such services and the AE being an expert in the international business – the assessee company is taking regular service through the personnel of AE-CPA to get guidelines on various fronts including the marketing, commercial management, corporate sales, invoicing, finance, other connected issues on various courses. In other words, for day to day smooth and effective working of business and for trying to keep an error free working environment, such management support services have been taken. In the past also, during the assessment year 2010-11 and 2011-12 such services have been taken and have been consistently charged in the books of account.

16. The observation of the Revenue authorities is not specific but general in nature that the assessee has failed on the benefit test but nowhere any specific instances have been given to show that the so-called services taken by the assessee company from its AE under various agreements are not related to the nature of business carried on by the assessee. It is not the case that the assessee which is carrying on forwarding chain business has paid the management services for some other unrelated business activity. The nature of business of the assessee company is directly linked to the nature of services and business carried on by its AE-CPA. In simple way, we find that the AE-CPA is an associated enterprise and the headquarter of the group company is based in Austria and they have to maintain their brand and uniformity in services to be provided to its clients which are attached to its various subsidiaries and other enterprises located in various part of the world.

17. Hon'ble Delhi High Court in the case of *EKL Appliances (supra)* has held as under:

“Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the

assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously.”

18. Recently, the coordinate Bench of Kolkata Tribunal has also adjudicated the issue in question in the case of *NLC Nalco India Private Limited, TS-36-ITAT-2016(Kol)* and *M/s. Bata India Ltd. [TS-I49-ITAT-2016(kol)]*. In the judgement rulings, the coordinate Bench of the Tribunal has held as under:

“Revenue cannot judge the reasonableness of the expenditure from its own view point and compute the ALP of the transaction as NIL based on the allegation that the assessee has not received any benefits out of the services received from the AE. It is that the quantum of expenditure can be examined by the TPO as per law and so long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Ld. TPO to disallow the same on any extraneous reasoning. In light of the same, the undersigned is of the view that the services received by the appellant from its AE were required for the purpose of its operations and cannot be regarded as duplicative in nature. The services provided direct and proximate benefit to the appellant and could not be regarded as shareholder services/stewardship in nature.”

19. We, therefore, under the given facts and circumstances of the case and respectfully following the ratio laid down by the decisions and in view of the discussions made hereinabove, are of the considered view that the alleged management charges at Rs. 2,47,69,939/- paid towards management support services to the AE-CPA are allowable as business expenditure incurred for the purpose of business of carrying out freight and other cargo forwarding services and by paying the alleged charges the assessee has been able to run the business smoothly and effectively. We, therefore, delete the transfer pricing adjustment made at Rs. 2,47,69,939/-and allow ground nos. 5 & 6 raised by the assessee.”

4.2. Further, Ld. Counsel submitted that Ld. CIT(A) had duly examined the documents in detail and explicitly held that the services had rendered benefits to the assessee and would not be regarded as shareholder services. The relevant extract from the order of Ld. CIT(A) is reproduced as under:

“28. Based on the above submission, the arm's length approach adopted by the appellant and the contentions placed by the Ld. TPO, I hold that:

a. I find merit in the appellant's argument that, being in the freight forwarding business, appellant, its customers and AEs are linked with each other all the time for exchange of information on urgent basis and also for recording of important financial information. It could be observed that the IT services were Imperative for the appellant for smooth functioning of its operations.

b. The appellant has submitted all the necessary information/ documents in the nature of service agreement, details of nature of IT service received, evidence substantiating receipt of services, basis of determining service charge, certified statement of cost allocation, benchmarking study to determine the arm's length price.

c. Further, the IT services received by the appellant are specialized in its nature and there is a logical need for a standardised operating system requirement. Accordingly, in light of the aforesaid, the undersigned is of the view that the services have resulted insignificant economic or commercial value to the appellant to enhance its commercial position.

d. With respect" to other category of services being in the nature of Consulting, Commercial, marketing, HR, administrative etc., the appellant had amply demonstrated the receipt of services and consequent benefits therefrom. On perusal of the evidences submitted by the appellant, it is observed that the appellant had received services from its AE and the same has resulted in direct and proximate benefit to the appellant. Hence, the services were not duplicative in nature so as to be termed as stewardship / shareholder services.

e. In addition, recently the Hon'ble Kolkata Tribunal has also adjudicated the aforesaid matter in case of N L C Nalco India Private Limited, TS-36-ITAT-2016(Kol) and M/s. Bata India Ltd. [TS-149-ITAT-2016(kol)]. In the aforesaid rulings, the Hon'ble Tribunal has held that Revenue cannot judge the reasonableness of the expenditure from its own view point and compute the ALP of the transaction as NIL based on the allegation that the assessee has not received, any benefits out of the services received from the AE. It is that the quantum of expenditure can be examined by the TPO as per law and so long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Ld. TPO to disallow the same on any extraneous reasoning. In light of the same, the undersigned is of the view that the services received by the appellant from its AE were required for the purpose of its operations and cannot be regarded as duplicative in nature. The services provided direct and proximate benefit to the appellant and could not be regarded as shareholder services/stewardship in nature.

f. In light of the aforesaid findings, the Ld. TPO's ALP determination as Nil for the intra-group services cannot be considered as well. The undersigned is of the view that charge for the said services should be determined to be arm's length with no adjustment warranted in this regard.

29. Thus, it has been held that the transaction of the appellant with its AE is at arm's length and no adjustment is warranted in this case. Hence, the adjustment made by the TPO of Rs. 13,876,419/- stands deleted."

4.3. Ld. Counsel further submitted that Ld. DRP had also adjudicated on this issue for AY 2012-13 and has explicitly held that the services

are not stewardship in nature and that there should have been a charge. The relevant extract from the order of Ld. DRP in respect of AY 2012-13 is reproduced as under:

“...basis above, the panel holds that the services are not of the nature of standardized in nature, but also not meeting the benefit test so as to limit allowance of the same..... However, the service charts put on account of I T related functions are to be allowed by the TPO as at Arms Length in view of the specialised nature of such expenses and eligible nature for a standardized operating system requirement.....”

4.4. On these submissions Ld. CIT, DR fairly accepted that the issue is covered by the decision of the Coordinate Bench of ITAT, Kolkata in assessee's own case (supra). Considering the factual matrix which are similar in the present case with that of AY 2012-13 as dealt in by the coordinate bench of ITAT, Kolkata in assessee's own case (supra) so also the meritorious finding given by Ld. CIT(A) and the explicit finding of the DRP for AY 2012-13, we direct to delete the transfer pricing adjustment of Rs.1,38,76,419/-, made in the present case. Accordingly, ground nos. 4 (i), (ii) and (iii) are dismissed.

5. Now, we take up ground no. 4(iv) in respect of T. P. adjustment made towards freight forwarding services amounting to Rs.1,91,45,421/-. From the ground taken by the revenue, we note that it is in respect of rejecting comparable companies. As already noted above, assessee is engaged in the business of providing freight and cargo forwarding services. During the year, assessee rendered freight forwarding services to its AE amounting to Rs.7,80,50,324/- and received freight forwarding services from its AE amounting to Rs.7,53,70,791/-. Assessee bench-marked these transactions based on external bench marking analysis which was also adopted by the Ld. TPO. Margins earned by the assessee were compared with the margins earned by similar companies engaged in similar operations to determine

arms length price. Ld. Counsel for the assessee submitted that Ld. TPO had selected certain functionally incomparable companies in a final set of comparable companies for determining the arms length margin in respect of which Ld. CIT(A) rejected only two companies from the list of comparable companies being, Aqua Logistics Ltd. (in short "Aqua") and Team Global Logistics Ltd. (in short "Team Global").

5.1. Further, Ld. Counsel submitted that Ld. CIT(A) had directed for considering the data of DHL Logistics Ltd. (in short "DHL") at segmental level i.e. freight forwarding services as against entity level as it also included data for supply chain segment which was considered by the Ld. TPO. He thus, submitted that there is no rejection of DHL as a comparable. Ld. Counsel pointed that the ground taken by the revenue in the Appeal Memo states that Ld. CIT(A) has erroneously rejected companies which are engaged into freight forwarding services i.e. functionally comparable companies and thus laid emphasis that revenue's ground pertains only to rejection of Aqua as being the only company rejected on account of functional incomparability. In respect of Team Global, he submitted that it has been rejected for non-availability of annual report and not on the ground of functional incomparability. In order to clarify the functional aspect of the assessee, Ld. Counsel elaborated the main functions performed by the assessee as freight forwarding activity, details of which are enumerated as under:

- "i) The Company provides preliminary advices to an exporter/shipper regarding the exporter's responsibility under the terms of sale, optimal and most effective shipping alternatives, packing/marking, port functions in connection with export, review of import licence and other related matters.*
- ii) Booking the freight / shipping operation: The freight forwarder takes custody and control of goods/material in transit, arranges for transit Insurance coverage, coordinates positioning of empty containers to be delivered/returned where stuffing takes place, chooses the line of shipment (airline/shipping line) as required, makes the requisite booking either with shipping company or airline company and finally, facilitates shipping. The Company also handles freight or other money advanced by the shipper.*

- iii) *Documentation for shipping: The Company completes customs paper work (i.e. customs clearance) on behalf of the shipper. It certifies and notarizes invoices and prepares dock receipt, bill of lading; warehouse receipt, insurance certificate, certificate of origin, special customs invoices, inspection certificate and other related documents.*
- iv) *The Company makes notification of shipment to exporter/shipper, consignee and consignee's broker. Notification is also made for insurance, L/C, contract, payment, and advice purposes.*
- v) *The company forwards negotiable documents for collection to Bank, exporter's foreign sales representative, consignee or consignee's broker."*

5.2. Based on the above description of the activities performed by the assessee, Ld. Counsel stated that assessee is engaged only in undertaking facilitation of component services in relation to movement of cargo from one place to another. It does not own any vehicles/vessels/aircraft etc. and is not engaged in provision of the same for logistic purposes. He also stated that assessee does not own any warehouse etc. and is not engaged any provision of warehousing services and, therefore, companies which are functionally comparable to the assessee, should only be accepted.

5.3. Ld. Counsel submitted his contention in relation to Aqua to demonstrate that selection made by the Ld. TPO of this company as a comparable fails to satisfy the functional comparability criteria and has been rightly rejected by the ld. CIT(A). He thus, pointed that Aqua is not functionally comparable on the following two grounds:

- (i) This company is, apart from undertaking freight forwarding activities also derives revenue from activities like warehousing and customs clearing house agency, hence, functionally not comparable.
- ii) This company owns significant amount of revenue generating assets i.e. vehicles, plant and machinery.

5.4. He submitted that this company is functionally not comparable to the assessee as the business activity of assessee is restricted to provision of freight forwarding activities only. Further, in the case of assessee, the revenue generating assets (vehicles, plant and machinery etc.) constitutes less than 30% of the total assets whereas in the case of Aqua, it is a largely asset intensive company and the revenue generating assets constitutes more than 70% of the total assets. Ld. Counsel further submitted that Ld. DRP also directed in the proceedings of AY 2012-13, to exclude Aqua due to it being functionally incomparable and owing significant revenue generating assets. The direction given by the Ld. DRP against the comments of Ld.TPO and the submission of assessee is tabulated as under:

Comparable	TPO comments after remand	Assessee	DRP
Aqua Logistics Ltd.	<p><i>We have verified from the audited financial statement (Page 3.554 of the paper book) and found that company's revenue generating assets namely, vehicles and plant & machinery constitutes more than 75% of its total assets.</i></p> <p><i>We have verified from the audited financial statement (Page 3.548 of the paper book) and found that company is engaged in Custom House Agency Works and Warehousing business.'</i></p>	<p>The TPO has confirmed the assessee's contentions that Aqua Logistics Ltd. is engaged in CHA and warehousing business and has revenue generating assets exceeding 75% of total fixed assets. (as evident from page 62 of submission dated 21st September 2016 filed before the Ld. Panel).</p>	<p>The functions assets and risks of this entity are not comparable with those of the assessee. This is not a good comparable. It should be excluded.</p>

5.5. In respect of comparable of Team Global which has been rejected owing to non-availability of annual report in the public domain, it was submitted by the Ld. Counsel that annual report is imperative for taking appropriate quantitative and qualitative analysis and Ld. TPO has erred in accepting the aforesaid company whose annual report is

not available in the public domain. Ld. CIT(A) appreciated the said fact and explicitly held that Team Global should not be considered as its annual report is not available in the public domain.

5.6. In respect of DHL as a comparable, Ld. Counsel submitted that this company operates under two business segments viz., “freight forwarding” and “supply chain”. Under the ‘supply chain’ segment, this company records revenue from warehousing activities and global service centre which is evident from its annual report placed on record, reflected in the segmental statement. Ld. Counsel thus, submitted that this company maintains separate segment for the freight forwarding activities undertaken by it which is comparable with the nature of service in which the assessee is also engaged in. Accordingly, considering the entity level margins of DHL would not be justified and margin for only freight forwarding segment should be considered for the purpose of comparability analysis, submitted the Ld. Counsel.

6. Per contra, Ld. CIT, DR placed reliance on the order of Ld. TPO according to which only one new comparable was included which was in turn excluded by the ld. CIT(A).

7. We have perused the material available on record and considered the submissions made before us. It is undisputed that transfer pricing regulation requires that the comparability is based on functional comparability criteria. From the factual matrix presented by the Ld. Counsel in respect of the comparable Aqua, we note that there are functional differences both on account of activities/functions performed by Aqua vis-à-vis those performed by the assessee and also on account of the revenue generating assets forming part of the total assets as narrated in the above paragraph. Further, we note that Ld. DRP in the proceedings for assessment year 2012-13 in assessee’s own case has

directed to exclude this comparable by holding that “*functions, assets and risks of this entity are not comparable with those of the assessee. This is not a good comparable. It should be excluded.*” The findings given by the Ld. CIT(A) after considering the contentions of the assessee on this aspect is extracted as under:

“g. DECISION : Based on the above submission, it is evident that the company is into activities of warehousing and customs house agency business and also owns a significant revenue generating asset (vehicles, plant and machinery) unlike the appellant not owning significant revenue generating assets as it is into freight forwarding business. Thus, as held by the Ld. DRP as well, the said company is to be rejected from the list of final companies.”

7.1 In respect of the comparable Team Global, we note that it has been rejected from the list of final comparable companies since the audited financial statement for the relevant year was not available in the public domain till the current date as noted by the Ld. CIT(A) for which screen shot was also placed on record.

7.2. In respect of DHL, wherein from its audited annual report it has been demonstrated that this company maintains separate segment for the freight forwarding activities which are comparable to the nature of services in which the assessee is engaged in. The assessee has considered segmental data for its comparative analysis against which Ld. TPO resorted to the entity level data. We note that Ld. CIT(A) appreciated the said fact and stated that the segmental data, if available, should always be considered over entity level data for the purpose of arms length analysis. To summarize the contentions of the Ld. Counsel on the issue in hand, the same is tabulated as under:

Name	Reasons for rejection	Verdict of the CIT
Aqua Logistics Limited	Engaged in warehousing and CHA business as against assessee engaged in freight forwarding activities Owns revenue generating assets (vehicles, Plant, machinery) accounting for more than 75% of its total assets which is less than 30% in case of assessee	The respondent's contention is accepted. Accordingly, Aqua has been excluded from the list of accepted companies.
Team Global Logistics Limited	Annual report is not available in public domain due to which required parameters for functional comparability could not be checked	The respondent's contention is accepted. Accordingly, Team Global has been excluded from the list of accepted companies.
DHL Logistics Limited	Engaged in both freight forwarding and supply chain activities. Hence, it should not be accepted at company level as results for 'freight forwarding segment' is available. Without prejudice, even otherwise, entity level margin should be considered at 4.87% as against 12.27% taken by TPO.	The respondent's contention is accepted. The margins have thus, been recomputed considering only the 'freight forwarding' segmental data.

8. From the discussion above, we find that from the list of final comparables, it is evident that Aqua and Team Global need to be removed and DHL needs to be considered only for the freight forwarding segment. On doing so, the arms length margin is imputed at OP/TC of 5.44% and OP/Sales of 5.13% as noted by Ld. CIT(A) at page 106 in para 10 of his order. The same is reproduced as under:

Sl. No.	Name of the companies	Operating profit/Total Cost	Operating profit/Sales
1.	DHL Logistics Limited (freight forwarding segment)	5.44%	5.16%
2.	Continental Carriers Pvt. Ltd.	5.47%	5.19%
3.	Sindhu Cargo Carriers ltd.	8.50%	7.83%
4.	TKM Global Logistics Ltd.	1.92%	1.89%
5.	Transpole Logistics Pvt. Ltd.	5.85%	5.56%
	Average	5.44%	5.13%

9. The margin of assessee is imputed at OP/TC of 2.06% and OP/Sales of 2.01%. Since the margin earned by the assessee is within the (+)/(-) 5% range allowed as per the proviso to section 92C(2) of the Act, the transaction is determined to be at arms' length as also held by the Ld. CIT(A). Considering the factual matrix and detailed functional comparable criteria analysis presented before us in respect of the

comparable companies rejected by the Ld. CIT(A), we find no reason to interfere with the fact based meritorious findings given by the Ld. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

10. In the result, the appeal of the Revenue is dismissed.

Order is pronounced in the open court on 18th October, 2022.

Sd/-

Sd/-

(RAJPAL YADAV)
VICE PRESIDENT

(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 18.10.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:.
3. The CIT(A)-22, Kolkata
4. The CIT , Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata