IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

Before Shri C.N.Prasad, JM and Shri M.Balaganesh, AM

ITA No.4728/Mum/2017 : Asst.Year 2013-2014

M/s.Damco India Private Limited 13th Floor, Tower A, Urmi Estate 95 Ganpatrao Kadam Marg Lower Parel West Mumbai – 400 013. **PAN : AAHCA6078Q**	Vs.	The Dy.Commissioner of Income-tax Circle 6(2)(1) Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri Manish K.Kanth
Respondent by : Shri Rakesh Ranjan (DR)

Date of Hearing : 08.01.2019		**Date of Pronouncement : 08.01.2019.**

O R D E R

Per M.Balaganesh (AM) :

1. This appeal is directed against the final order passed by the Learned Deputy Commissioner of Income Tax 6(2)(1), Mumbai [in short the ld AO] under section [u/s] 143(3) read with section 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') pursuant to the Directions issued by the Honourable Dispute Resolution Panel [in short the ld DRP] vide directions dated 30.3.2017 for the Assessment Year [in short the Asst Year] 2013-14.

2. At the outset, the ld AR argued that once the Ground Nos. 8 & 9 raised by the assessee is adjudicated and if it goes in favour of the assessee, then the other grounds raised by the assessee on computation of income would become academic as the assessee would be through with its margins and that no further transfer pricing adjustment would be warranted. The ld DR before us fairly agreed for adjudication of Ground Nos. 8 & 9 first. For the sake of convenience, the Ground Nos. 8 & 9 raised by the assessee are reproduced below:-

> *8. On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in making th entire transfer pricing adjustment of INR 19,64,81,346 at entity level. In other words, the*

learned TPO should have restricted the adjustment only in respect of international transactions with the AE entered into by the Appellant.

9. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in disregarding the binding precedent laid down by the Hon'ble Bombay High Court without assigning any reasons for the same.

3. The brief facts of this issue are that Damco is one of the world's leading third party logistics providers which is engaged in the business of providing logistics solutions, encompassing supply chain management, freight forwarding, warehousing and distribution services to global customers of Maersk Group. Freight forwarding services ensure that cargo will arrive at the proper destination by an agreed upon date, in good condition using transport of various sorts from air freight and trucking companies to rail freight and ocean carriers. The business of Damco comprises many service lines, often bundled together to provide particular solutions to the clients and it broadly includes advising on best possible freight routes based on cost; determining optimal strategy and form of transport; risk management, monitoring and control; loading and unloading, warehousing, packaging, labeling of cargo, order planning, consolidation, insurance, customs, distribution and handling; documentation including bills of lading; supply chain management; and other advisory services. The Assessee is primarily a freight forwarder providing logistics solutions to global customers of Maersk group and is engaged in an intermediary role between the customers and various transport related service providers on behalf of customers on a contract basis. It was explained to the TPO that in freight forwarding activity, generally two Darnco entities are involved in any transaction, the originating entity (i.e. entity originating the shipment) and the destination entity (i.e. entity receiving the shipment). The Assessee operates at either leg - i.e., as the originating entity as well as the destination entity. The services performed by the Assessee in respect of export consignments and import consignments are: -

- Origination services: These are the services in relation to pick-up and delivery of cargo from Indian consignor to the Indian port; and
- Destination services: These are the services in relation to pick-up and delivery of cargo from Indian port to Indian consignee.

During the course of performing the above activities, the assessee pays / receives freight, terminal handling and other charges to / from Associated Enterprises (`AEs'). Depending on the International commercial terms (Inco terms) agreed between the consignor and consignee of each transaction, the origination and destination services performed by the assessee could be billed to an Indian consignor / consignee or billed to Damco overseas affiliates.

4. The international transactions as mentioned in Form 3CEB of the assessee for the year under consideration and in the immediately preceding assessment year are as under:-

Sr. No.	Nature of International Transaction	Value of transaction (Rs.) A.Y. 2013-14	Value of Transaction (Rs.) A.Y. 2012-13
1.	Receipt of freight and other charges	70,09,36,006	52,08,78,792
2.	Payment of freight, terminal handling and other charges	384,93,56,385	347,35,18,458
3.	Payment of support service charges	33,44,32,856	27,89,59,233
4.	Payment for miscellaneous services	55,54,160	79,95,179
5.	Recovery of expenses	52,18,335	29,66,791
6.	Payment of network fee	8,46,91,990	--

5. The ld TPO observed that for the purpose of benchmarking, the assessee had selected itself as tested party. The assessee submitted that the above international transactions are inextricably li9nked and are wholly necessary for logistics business and accordingly had aggregated the same and carried out a common benchmarking analysis under Transactional Net Margin Method (in short TNMM). The ld TPO accepted the TNMM as the Most Appropriate Method (MAM in short) but adopted the Profit Level Indicator (in short PLI) of the assessee at Net Profit Margin by rejecting the PLI adopted by the assessee as Operating Profit (OP) / Value Added Expenses (VAE) . The ld TPO finally by adopting various filters did a comparative study by accepting certain comparables of the assessee and by rejecting certain comparables of the assessee. The final comparables adopted by the ld TPO are as under:-

Sr. No.	Company Name	OP/OR (%) F.Y. 2012-13
1.	Hindustan Cargo Limited	0.92
2.	Yusen Logistics (India) Limited	1.59
3.	Sical Logistics Limited	8.05
4.	Patel Integrated Logistics Limited	2.30
5.	Transport Corporation of India Limited	4.04
	Average	3.38
	Assessee's margin	1.41

6. The ld TPO determined the ALP of the transactions as under:-

Particulars		Amount in rupees
Adjustment on an entity level basis		
Operating Revenue of the assessee	A	998,19,61,648
NPM of comparables	B	3.38%
Assessee's NPM margin	C	1.41%
ALP Profit	D=A*B	33,73,90,303
ALP Total Cost	E= A-D	964,45,71,344
Actual Total cost of the assessee	F	984,10,52,690
Difference in Actual cost and ALP cost	G = F – E	19,64,81,346
+/- 3 percent computation		
Total transactions with AEs (expenses)	H	426,84,81,231
3% of the International Transactions	I = H*3%	12,80,54,437
Adjustment		19,64,81,346

Accordingly, she made an adjustment to ALP at Rs.19,64,81,346/- in the order passed u/s 92CA(3) of the Act dated 28.10.2016.

7. The ld DRP among other observations categorically observed in page 15 of its order in para 3.2.11 as under:-

"3.2.11 So far as assessee's contention that adjustment may be restricted to the international transactions with AE only is concerned, the issue of entity level adjustment versus transaction level adjustment is pending before Hon'ble Supreme Court which has admitted SLP filed by the Department in the case of CIT v. Firestone International Pvt. Ltd. [ITA No.1354 of 2013] – TS-401-HC-2015 (BOM)-TP against the decision of the Hon'ble High Court holding that transfer pricing adjustment should be made with reference to the international transaction and not with reference to the entity level turnover. Since, there is a chance in the provisions of the

Act and the decisions of DRP are no longer appealable by the Department, if the issue is decided in favour of the assessee, it will amount to pre-judging the issue and bringing finality to an issue which is pending before a higher judicial authority. Therefore, in order to keep the issue alive and protect the interest of the Department, the action of the TPO in making a transfer pricing adjustment by considering the entire turnover is upheld."

8. Aggrieved, the assessee is in appeal before us.

9. We have heard the rival submissions. The main contention of the ld AR is that the adjustment to ALP should be computed only by taking the international transactions carried out with the AE and not at entity level which admittedly includes non AE transactions also. We hold that the objective of computing the ALP is to determine the income arising from an international transaction and accordingly, the adjustment that is required to be made is to be limited to the international transactions with the AEs only and not to the entity / segmental level transactions. This proposition if not accepted would also result in absurdity wherein the total value of international transactions would be much less than the adjustment made to ALP. We find that the issue under consideration is squarely answered by the *Hon'ble Bombay High Court in the case of CIT vs Tara Jewels Exports Private Limited in ITA No. 1814 of 2013 dated 5.10.2015*, wherein the question raised before the Hon'ble High Court is as under:-

"Whether in law and on the facts of the instant case, was the Tribunal justified in holding that while computing the ALP of international transactions the AO/TPO is precluded from taking into consideration transactions with Non Associate Enterprises, while arriving at the ALP using the Net Transactional Margin Method (TNMM) ; whereas Rule 10B(1)(e) mandates the consideration of profit margins with unrelated enterprises? "

It was observed in the said order by the Hon'ble High Court as under:-

"6. The question as proposed by the revenue does not seems to arise from the impugned order of the Tribunal nor is the method of determination of ALP on application of TNMM arriving at the margin of 4.79% is disputed before Tribunal or before us. We are unable to understand the grievance of the revenue as formulated in the proposed question. The respondent-assessee has not challenged the application of TNMM and arriving at the margin of 4.79% arrived at by the TPO to determine ALP. The grievance of the respondent-assessee before the Tribunal is only with the margin of 4.79% being applied in respect of all it's sales and not restricted to the international transactions entered into

by the respondent-assessee with it's AEs. It is evident from the provisions of Chapter-X of the Act that the adjustment which has to be done to arrive at ALP is only in respect of the transaction with it's AEs. Thus no fault can be found with the order of the Tribunal.

7. Mr.Pinto is unable to point out how the aforesaid finding of the Tribunal is incorrect in law in the face of the clear provisions in Chapter X of the Act. The question as framed by the revenue to our mind do not arise from the impugned order of the Tribunal as the issue raised in the proposed question is not disputed. Accordingly, we see no reason to entertain the proposed reframed question of law as it does not give rise to any substantial question of law.

8. Accordingly, the appeal is dismissed. No order as to costs."

9.1. Similar view was taken by the *Hon'ble Jurisdictional High Court in the case of CIT vs Hindustan Unilever Ltd reported in (2016) 72 taxmann.com 325 (Bombay) dated 26.7.2016* .

9.2. We find that the ld DRP had also taken cognizance of the aforesaid principle and had merely stated that the revenue's Special Leave Petition on the said issue is pending before the Hon'ble Apex Court and that since the appeal power to tribunal had been withdrawn against the order of ld DRP for the revenue, this issue was decided against the assessee. We find that as on date, the issue is covered by the order of the Hon'ble Jurisdictional High Court in favour of the assessee which would be binding on this tribunal. Respectfully following the aforesaid judicial precedents on the impugned issue before us, we direct the ld TPO to recomputed the ALP of the international transactions of the assessee by considering only the transactions with AE.

9.3. In view of these directions, the adjudication of other grounds viz. Grounds 1 to 7 as mutually agreed by both the parties before us does not warrant at this stage and hence we refrain to give our opinion on the same. Accordingly, the grounds 8 & 9 raised by the assessee are allowed for statistical purposes subject to the directions given hereinabove.

10. The Ground No. 10 raised by the assessee is with regard to initiation of penalty proceedings u/s 271(1)(c) of the Act , the adjudication of which , at this stage would be prematured. Hence the same is allowed .

11. The Ground No. 11 raised by the assessee is with regard to levy of interest u/s 234B and 234C of the Act which would only be consequential in nature and does not require any specific adjudication.

12. The Ground No. 12 raised by the assessee is with regard to non-grant of credit for tax deducted at source. As this matter is a subject matter of verification by the ld AO, we direct the ld AO to verify this factual aspect and grant TDS credit accordingly. Hence Ground No. 12 is allowed for statistical purposes.

13. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced on this 08th day of January, 2019.

Sd/-	Sd/-
(C.N.Prasad)	**(M.Balaganesh)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated : 08th January, 2019.
Devdas*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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