INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 2484/Del/2014 (Assessment Year: 2009-10)
ITA No. 1687/Del/2016 (Assessment Year: 2011-12)

JAS Forwarding Worldwide Pvt. Ltd, 1st Floor, A-Wing, Commercial Complex, Radisson Hotel, New Delhi PAN: AABCJ5564A	Vs.	DCIT, Circle-4(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Salil Kapoor advocate Ms Ananya Kapoor advocate Shri Sumit Lal Chandani, Adv
Revenue by:	Shri M. Barnwal, Sr. DR
Date of Hearing	21/05/2021
Date of pronouncement	26/07/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the two appeals filed by the assessee Jas Forwarding worldwide private limited for assessment year 2009 – 10 and 2011 – 12. Certain common grounds are involved. Both the parties argued these two appeals together and therefore both these appeals are disposed of by this common order.

2. The appeal for assessment year 2009 – 10 is filed by assessee against the order of the deputy Commissioner of income tax, Circle – 4 (1) New Delhi dated 28th of February 2014 passed u/s 143 (3) read with Section 144C of the income tax act 1961 on 28 February 2014 determining the total income of the assessee at ₹ 332,007,303/– against the returned income of the assessee at ₹ 41,027,920/–.

3. The learned assessing officer has made total disallowance/addition to the extent of ₹ 290,979,383/– comprising of following three additions to the total income of the assessee :-

   a. addition on account of transfer pricing adjustment of Rs 4,41,43,790/–
   b. disallowance u/s 40 (a) (ia) of ₹ 245,582,264
   c. disallowance for non-deduction of tax at source of ₹ 12,53,329 /-

4. The assessee has raised the following grounds of appeal in ITA No. 2484/Del/2014 for the Assessment Year 2009-10.

> *"The addition amounting to Rs. 29,09,79,383 undertaken by the Learned Deputy Commissioner of Income-tax, Circle 4 (1), New Delhi ("the Ld. AO") [including additions by the Learned Additional Commissioner of Income-tax, Transfer Pricing Officer-1 (3) ("the Ld. TPO")] vide final assessment order dated February 28, 2014 passed under Section 143 (3) read with Section 144C of the Income Tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.*
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> *That the Hon'ble Dispute Resolution Panel, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order passed by the Ld. AO under Section 143(3) read with Section 144C(1) of the Act ("the draft assessment order").*
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> *The Hon'ble DRP while issuing directions under Section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the Ld. TPO in his order passed under Section 92CA(3) of the Act and by the Ld. AO in his draft assessment order.*
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> *On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and Hon'ble DRP has further erred in confirming the adjustment of Rs. 29,09,79,383 (including Rs 24,68,35,593 under Section 40(a)(i) and Tranfer Pricing adjustment of Rs. 4,41,43,790) without due application of mind and without affording a reasonable opportunity of being heard in the matter:*
>
> ***Transfer Pricing Adjustments - Rs. 4,41,43,790***
>
> *1. The Ld. TPO erred in the facts and circumstances of the case and in law by summarily rejecting/disregarding the comparability analysis without giving any cogent basis and without demonstrating the inadequacy or infirmity in the economic analysis so conducted by the Assessee.*
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> *In this regard, the Ld. TPO erred in demonstrating correctness of the presumption/hypothesis so framed to*

reject the comparability analysis of the Assessee and has accordingly misconstrued the provisions of Section 92C (3) (c) of the Act. The Ld. TPO also overlooked the fact that the results were falling within permissible limits in accordance with proviso to Section 92C(2) of the Act.

2. *The Ld. TPO erred in the facts and circumstances of the case and in law by substituting the comparability analysis conducted by the Assessee for its freight forwarding services with a fresh comparability analysis based on his own conjectures and surmises.*

Specifically, the Ld. TPO erred by using an approach that had an inherent upward bias and employed erroneous filters, that were designed to select only high margin comparable companies. Accordingly, the fresh search conducted by the Ld. TPO is liable to be quashed.

2.1 *The Ld. TPO misconstrued the functional profile of the assessee. In this connection, the Ld. TPO grossly erred, in following inconsistent approach while accepting/ rejecting companies comparable to the business profile of the assessee.*

The Ld. TPO also erred by not allowing appropriate comparability adjustment on account of risk of the comparable companies for the purpose of comparison with the results of the Assessee.

2.2 *The Dispute Resolution Panel ('DRP') has not adjudicated on the issue pertaining to erroneous approach followed by the Ld. TPO by considering the Shipping Companies as comparable to the assessee.*

As the Ld. TPO erred on facts by comparing shipping companies as comparable to the assessee, the relevant ground relating to this issue had been discussed before the DRP in our hearing on November 11, 2013 through DRP objection dated April 22, 2013 (Para 1.3.11.7) and submission dated November 7, 2013 and November 11, 2013.

An application under Rule 13 of the Income Tax (DRP) Rules, 2009 has been filed before the DRP.

2.3 *The Ld. TPO erred by relying upon data of the comparables for financial year 2008-09 only for determination of the arm's length price, disregarding the multiple year data approach followed by the Assessee.*

The Ld. TPO also erred by relying upon updated data of the Comparables which was not available to the Assessee at the time of maintenance of Transfer Pricing Documentation within the time-frame mentioned in Rule 10D(4) of the Rules.

3. *The Ld. TPO has erred in law and on facts by summarily disregarding the approach followed by the Assessee for benchmarking international transaction pertaining to receipt of ,! Management services without assigning any cogent reasons.*

   In this regard, the Ld. TPO has artificially created separate business segments on fallacious assumptions, contrary to the fact that management services are received in the course of routine business activity and are integral part /inextricably linked to the business model of the Assessee (viz. freight forwarding services).

4. *The Ld. TPO has erred in law and on facts by assigning NIL value to the value of international transaction in relation to receipt of management services. Further, the Ld. TPO has failed to provide the detailed methodology/ reasoning or CUP data for assigning NIL value to the underlying transaction.*

Disallowance under Section 40{a)(i) - Rs. 24,68,35,593

5. *The Ld. AO failed to appreciate that the payments made by the Assessee to non-resident Associated Enterprises were towards rendering freight and forwarding services, which was a business income in the hands of the respective AE's and not Fees for Technical Services (FTS) as defined under Section 9(l)(vii) of the Act. Therefore, the Assessee was not under any obligation to withhold any tax from the payment so made.*

6. *The Ld. AO failed to appreciate that the tax has not been deducted on the payments made by the Assessee to agents of non-resident shipping companies based on declaration received from such companies. Therefore, the Assessee was not under any obligation to withhold any tax from the payments so made."*

5. Brief facts of the case shows that the assessee is a freight forwarder as an intermediary and facilitator in cross-border transaction as an agent of the shippers. Assessee would take responsibility for the entire segment depending upon the terms of the contract and understanding with the shippers et cetera illustrative lead depending upon the terms of the contract or understanding, the freight forwarder shall arrange for loading and unloading, transportation, fixing air or shipping lines through which consignment cell be sent and four other ancillary or incidental matters. Assessee is an agent for imports export business and import business also. It commenced its operation in September 2005 and currently has offices in

four different cities. It has entered into 11 different international transactions. Mainly three transactions were entered into with respect to freight and forwarding services rendered to its associated enterprise amounting to ₹ 398,000 608,000, freight and forwarding services received from associated enterprise of ₹ 245,000 582,000 is and management fees of 14,000 132,000. The assessee has benchmark this transaction considering the most appropriate method is transactional net margin method aggregating all its international transaction relating to receipt and payment of freight charges as closely linked transaction. It has used profit level indicator of operating profit/operating cost. It has selected six comparable companies whose average author metric mean margin of 1.63% was arrived at taking three years data. The margin of the assessee was calculated at 2.89% on its cost and stated that it is higher than 1.63% on by the comparables and therefore the transactions are stated to be at arm's-length.

6. The assessee filed its return of income on 25/9/2009 declaring a total income of ₹ 41,027,920.

7. The learned assessing officer took the business profile and the functions of the assessee from the transfer pricing study report submitted by the assessee which shows as Under:-

"Jas India business involves provision of freight forwarding services for delivery of cargo outside India (export business) and into India (import business). In this regard the company has entered into an agreement with JAS worldwide group of companies, in relation to all the transactions of export and import, a part of the services is provided by assessee in the Indian Territory and part of the services is provided by JAS counterparts of the respective countries. For each transaction, there is a profit sharing of approximately 50% of the freight with the counterpart of JAs i.e. Jas India. For each of the above sharing, the bills are raised and/or received by JAS for sharing of the profit. If the counterpart of JAS is not in existence in any part of the country, then the billing is done with the outside agency. The bill will be raised based on the terms of sipping material.

Export Business:-

In case of the export business, the principal contractor with the shipper/consignor would be JAS India. JAS India would organize the

collection of the goods from the exporter's premises and load the same for transport (air or ship). It would also provide a copy of the airway/shipping bills and bill of leading to the exporters. The copy of the bill of leading/House airway bill after loading the material is given to the shipper. Thereafter it would communicate with its associated enterprise in the destination country, who would organize the material released in the recipient country, including custom clearance and delivery to the consignee. JAS will raise the bill to the exporter for the transportation charges, haulage charges,, custom clearance charge, Ocean/hair freight, a handling/clearing charges, documentation charges, terminal charges, advance cargo declaration charge (in case of USA) and fumigation charges for European countries. It may be noted the recovery of these costs would include profit margins charged to the exporter. In relation to the efforts provided by the associated enterprise, assessee would be required to share the profit margin of the freight income earned.

Import Business

In case of import business, the principal contractor with the shipper/consignor would be the associated enterprises and assessee would be responsible for clearing the goods at the Indian port and a port and coordination with the consignee in India. In addition to the profit share Under the agreement, assessee would recover the freight charges recovered from the consignee in relation to material transported on "to pay basis', customer clearance charges, delivery charges, transportation charges and any duties incurred on behalf of the consignee would be recovered from the consignee would be recovered from the consignee any incremental costs incurred by assessee towards irregularities in the statement would be covered from the associated enterprises."

8. The learned transfer pricing officer noted the above functions of the assessee and noted that the compensation model is based on the arrangement between assessee and its associated enterprises and a shared in the ratio of 50:50. Therefore it means that assessee has entered into some kind of profit split method. However he accepted the transactional net margin method as the most appropriate method as well as also accepted the profit level indicator of OP/OC. However he rejected the use of multiple year

data used by the assessee for computation of the comparable margins. The learned transfer pricing officer noted that assessee did not apply proper criteria for application of the filter as well as did not select the domain by applying proper criteria and multiple year data has been used for benchmarking. Therefore the learned assessing officer primarily selected seven comparables and computed the margin. Thereafter after giving the proper show cause notice to the assessee and applying the new filter and using the current year data the learned transfer pricing officer proposed an adjustment of ₹ 87,200,000 of adjustment on account of freight and forwarding segment by selecting following comparable sets.

Serial number	name of the comparable	margins of the comparable
1	Om logistics Ltd	10.34
2	Sical logistics Ltd	6.57
3	Arcadia shipping Ltd	7.68
4	Good Earth Maritime Ltd	37.89
5	Sun mar sipping Ltd	23.02
6	PL shipping and logistics private limited	3.17
7	Sindhu cargo services Ltd	8.13
	Arithmetic mean	13.83

The learned transfer pricing officer denied the working capital adjustment is no justification was given by the assessee. He recast

Margins of the assessee by disallowing management fees and computed the same at 5.32 percentage and compared it with the arm's-length margin of comparable companies is 13.83% as and proposed an adjustment of 8.72 crores.

9. He further noted that assessee has also entered into the transaction of payment of intragroup service charges to its associated enterprise stated to be the cost reimbursements amounting to ₹ 17,271,000 which also included management fees of 14,132,000. He asked the assessee to submit its treatment in the books of accounts as well as the cost benefit analysis of the

above services. He held that assessee has not been able to show that any service has actually passed to the assessee and no independent party would have made a payment in uncontrolled circumstances therefore by applying the CUP method he determined the arm's-length price of this transaction of payment of service fee at rupees nil against the international transaction shown by the assessee of Rs. 17271000/- . Thus proposing the above two adjustments in order was passed by the learned transfer pricing officer u/s 92CA (3) of the act on 28th of January 2013.

10. There was a corporate disallowance made by the learned assessing officer u/s 40 (a) (i) of the act of ₹ 2 46835593/– as the learned assessing officer noted that the assessee has made a payment to a non-resident associated enterprise towards rendering freight and forwarding services which were a business income in the hands of the respective associated enterprises but the learned assessing officer held the same to be a fees for technical services as defined Under the provisions of Section 9 (1) (Viia) of the act. Therefore the learned assessing officer was of the view that assessee has failed to deduct tax at source on the above payment and therefore the same was disallowable for non-deduction of tax at source as fees for technical services. With respect to the addition u/s 40 (a) (i) assessee was asked to furnish the details of payment made to nonresidents and tax deducted at source thereon. The company submitted its submission on 05/12/2012. On the basis of the submission of the assessee it was found that with respect to the 46 parties where the total payment made is of ₹ 245,582,264/– the assessee has not deducted any tax at source. The assessee submitted that the provisions of Section 195 of the act are not applicable on the above payments as those payments are made to the nonresidents are purely reimbursement of expenses and therefore the liability to withhold tax on the same does not arise. The learned assessing officer rejected the explanation of the assessee and noted that the sums were paid by way of expenses to non-resident third parties who had rendered services to the assessee and these payments fall within the purview of Section 9 (1) (Viia) and that therefore taxable in India as fees for technical services. He also rejected that the payments made is a reimbursement against actual expenses and therefore not chargeable to tax after considering the various judicial

precedents cited by the assessee the learned assessing officer held that the payments are not reimbursement. During the course of assessment proceedings it was found by the assessee that assessee has made a payment for import of goods to sipping lines in non-treaty countries jurisdiction amounting to ₹ 1,253,329 on which no tax at source has been deducted. The assessee submitted that TDS was not deducted because exemption certificates were provided by sipping line for non-deduction of tax at source on the said payment. Assessee also filed an exemption certificate received from such sipping lines with which there is no double taxation avoidance agreement. On perusal of the above certificates the residential status of the said sipping line the learned assessing officer noted that the amount charged shall be included by them in the return to be filed u/s 172 of the income tax act the learned assessing officer noted that the provisions of Section 172 of the act applies to the cases where the goods are received at the port in India and takes care of export from India only therefore he held that the payment made to the Indian agents and establishment of foreign shipping companies other than for export from India is subject to deduction of tax u/s 195 of the act if the said sipping company is a resident of a country which there is no double taxation avoidance agreement therefore he held that a sum of ₹ 1,253,329 is this allowable u/s 40 (a) (i) and added to the total income of the assessee. Consequently the draft assessment order was passed on 21st of March 2013.

11. Against the said order of the assessee preferred an objection before the learned dispute resolution panel that passed a direction to the learned transfer pricing officer on the transfer pricing adjustment. Consequent to that the order giving effect to the above direction was passed by the learned transfer pricing officer on 21st of February 2014. Consequently the following six comparable companies were retained for benchmarking the international transactions of freight forwarding business of the assessee.

Serial number	name of the comparable company	OP/OC (in percentage)
1	Arcadia shipping Ltd	6.83%
2	Good Earth Maritime Ltd	37.46%

3	Om Logistics Ltd	10.34%
4	Sanmar sipping Ltd	23.02%
5	Sical Logistics Ltd	9.37%
6	Sindhu cargo services Ltd	8.09%
	Average	15.85%

As the learned dispute resolution panel directed the learned transfer pricing officer to restrict the adjustment to the extent of international transaction he computed the margin of the assessee at the total operating cost of ₹ 1014347216/– against the total revenue of ₹ 1 053438776/– computing the profit of Rs 3,90,91,560/– and against the total cost excluding management services fee of ₹ 1 000215070, the operating profit/OC was computed at 5.32%. The margin of the comparable was 15.85% and therefore the arm's-length price was determined at ₹ 158,534,089/– and consequently the above profit was applied to the 25.52% of the total international transactions and proposed an adjustment of Rs 268,72,790 against the proposed addition of ₹ 87,200,000/– in the transfer pricing order dated 28/1/2018. The learned dispute resolution panel also upheld the finding of the learned assessing officer and therefore the addition of ₹ 24,55,82,264 was made. Consequently in assessment order was passed u/s 143 (3) read with Section 144C of the income tax act 1961 on 28th of February 2014 determining the total income of the assessee at ₹ 332,007,300 against the returned income of ₹ 4,10,27,920/– wherein the following three additions were made

i. addition on account of transfer pricing adjustment Rs 4 41,43,790/–
ii. disallowance u/s 40 (a) (i) ₹ 245,582,264/-
iii. disallowance for non-deduction of tax at source ₹ 1,253,329/-

Thus the assessee is aggrieved against the order of the learned assessing officer has preferred the above appeal.

12. Coming to the grounds of appeal of the assessee, as per ground number 1 and 2 assessee has challenged the transfer pricing adjustment of Rs 4,

41,43,790 on account of freight forwarding business. Mainly in the above arguments, the assessee is

a. Asking for exclusion of Om logistics Ltd stating that the above comparable company is a domestic road transport company which owns a fleet of vehicles for rendering the services. It was stated that in assessment year 2008 – 09 the DRP has rejected Agrawal industrial Corporation Ltd which is engaged in the road transportation business which is having the same business profile as this comparable company holding that the company is functionally not comparable to the business of the assessee. It was further argued that the learned transfer pricing officer in assessment year 2008 2009 has also rejected several road transport business companies. The assessee also relied upon the decision of the coordinate bench in 5648/del/2010 wherein the Tribunal has held that the companies owning trucks, aero planes and other assets useful for transportation cannot be compared to a freight forwarding companies which do not own such assets. Assessee further relied on the decision of the coordinate bench in ITA number 4956/del/2013 wherein the ITAT has held that the road transportation companies are functionally dissimilar to freight forwarding companies. Therefore the assessee has argued for exclusion of the above comparable company.
b. The next comparable challenged by the assessee is Arcadia shipping Ltd which is engaged in sipping operation and also own ships and barges relevant to sipping business. It was also stated that the above company is also claiming deduction u/s 33AC. The various points of the annual accounts were also stated.
c. With respect to the third comparable good Earth Maritime Ltd it was stated that this company is engaged in sipping operation and primarily own ships, Tugs and barges relevant to sipping business and has also opted for the tonnage tax scheme deduction under the income tax act. Therefore it was stated that it is not functionally comparable company.
d. The assessee has also challenged comparable Sanmar shipping Ltd stating that above comparable companies engaged in sipping

operation and owns fleet equipment and vessels relevant to sipping business and has also obtained the tonnage tax benefit.

Thus, the assessee is arguing for exclusion of the above four comparables.

13. The assessee is also asking for the inclusion of the comparable companies dated at Gordon Woodruff logistics Ltd wherein the learned transfer pricing officer has held that it is not a suitable comparable company stating that current year data (March 2009) not available. The assessee submitted that that the financial performance of the above company is available on the capital line database whereas the learned transfer pricing officer using prowess database has rejected the above company stating that current year data not available. The assessee further stated that company is functionally comparable. Therefore the assessee submitted that the above comparable company should be included for the comparability analysis.

14. With respect to the determination of the arm's-length price of the international transaction of payment of intragroup services at rupees nil he submitted that identical issue arose in the case of the assessee for assessment year 2008 – 09 wherein the coordinate bench in ITA number 5410/del/2015 dated 14/10/2019 at para number 38 onwards on identical facts and circumstances has dealt with this issue and in para number 41 following the decision of the honourable Delhi High Court the issue was restored to the file of the learned transfer pricing officer with a direction to examine the rendition of the services with supporting evidences and the assessee was directed to file the details for the same. He therefore submitted that this issue squarely covered by the above direction of the coordinate bench.

15. With respect to the disallowance u/s 40(a) (i) of the act he submitted that the issue is squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 2007 – 08 dated 23 is/10/2019 wherein he referred para number 15 onwards of that order and stated that in paragraph number 22 the coordinate bench has held that there is no business connections of the parties exist in India and therefore no tax is required to be deducted. He further referred to the order of the coordinate bench for assessment year 2008 – 09 at page number 43 of the paper book.

He submitted that there is no change in the facts and circumstances of the case and therefore the above decision requires to be deleted. He further submitted that assessee has an agent of non-resident shipping companies and therefore it is also covered by the circular of the CBDT.

16. The learned departmental representative filed the comments received from the transfer pricing officer dated 10/9/2018. He further supported the orders of the learned transfer pricing officer and the learned assessing officer on all these grounds.

17. We have carefully considered the rival contentions and perused the orders of the lower authorities. The first issue that arises relating to the transfer pricing adjustment as per ground number 1 and 2 of the appeal of the assessee relates to the adjustment of Rs 2,68,72,790/– in the freight and forwarding segment of the assessee. There is no dispute on the functional profile of the assessee, most appropriate method adopted by the assessee and the margins of the assessee. The learned transfer pricing officer has objected to the adoption of the multiple year data to which assessee does not have an objection now. The only objection is with respect to the selection of the comparables where assessee is seeking exclusion of Om logistics Ltd as the comparable companies and domestic road Transport Company which owns a fleet of vehicles for rendering of the services. Assessee has submitted the extract from the annual accounts of the comparable company which shows that the company provides logistic support and solution including transportation, warehousing and logistics support in India to Indian incorporates and multinational. The company is a multimodal logistics company with single window integrated logistic services for all the elements of the supply chain management in India. It owns a dedicated fleet of vehicles for local distribution in addition to the logistics mix of rail and road. It also provides transport of cargo by air. The fixed assets of this company show that it owns a vehicle having a written down value of 13.69 crores. Further in assessee's own case the learned transfer pricing officer has rejected various companies engaged in road transportation business and further the dispute resolution panel has also rejected one comparable company which is engaged in road transportation

business which has the same profile as of this comparable company holding that it is functionally not comparable to the operations of the assessee. Further it was not shown by the revenue that this assessee company is having also a fleet of trucks et cetera for transportation. Therefore we direct the learned transfer pricing officer/AO to exclude the above comparable company from the comparability analysis.

18. Next comparable company Arcadia shipping Ltd also owns ships and vessels for his sipping operation is the fixed assets of that company also shows that it own ships and vehicles of Rs. 115 crores. Therefore on the same logic this company also deserves to be excluded from the comparability analysis.

19. Similar is the case of good Earth Maritime Ltd which also ownership structure and barges for its operation having the written down value of ₹ 248 crores. Therefore on the same logic this company also deserves to be excluded from the comparability analysis.

20. With respect to exclusion of Sanmar shipping Ltd the assessee has also given similar explanation and also claimed that this company is also claiming deduction u/s 33AC of the act as it has tonnage tax reserve account in its reserves and surplus. We have carefully considered the argument of the assessee and find that this comparable company also owns fleet and fleet equipment as well as the vehicles as per is fixed assets listing. Therefore this comparable company is also deserved to be excluded for the limited reason that it has own fleet for its transportation business.

21. With respect to the inclusion of Gordon Woodruff Ltd we find that identical issue involved in this comparable was decided by the coordinate bench in the case of the assessee for assessment year 2008 – 09 by the coordinate bench wide its order dated 14/10/2019 as Under:-

GORDON WOODROFEE LOGISTICS LTD

34. The ld. counsel for the assessee pointed out that Gordon Woodrofee Logistics Ltd was excluded by the assessee when it applied a filter on comparables having 75% of turnover. It is the say of the ld. counsel for the assessee that when the TPO has applied filter on turnover of more than Rs. 1 crore, then this comparable should have been included in the final list of comparables.

35. We find force in the contention of the ld. counsel for the assessee. Earlier, when the assessee applied filter of 75% of Revenue, this comparable was excluded. But later on, the TPO applied the filter and included the companies having turnover of more than Rs. 1 crore. Since this

company now fits in the filter adopted by the TPO, we direct the TPO to include this company in the final list of comparables.

This clearly shows that the coordinate bench has tested the functional similarity of this comparable with the functions of the assessee. The assessee has also claimed that the relevant data for the financial year ending on 31st of March 2009 are available in capital line database. Therefore we direct the assessee to produce the relevant data before the learned transfer pricing officer and after examination the learned transfer pricing officer may include this comparable in the comparability analysis.

22. Accordingly ground number 1 – 2 of the appeal of the assessee is allowed with above directions.

23. With respect to the adjustment made by the learned transfer pricing officer with respect to the intragroup services we find that the issue squarely covered by the decision of the coordinate bench in assessee's own case for assessment year 2008 – 09 [ITA No 5410/DEL/2015 [AY 2008-09] dated 14/10/2019]wherein the coordinate bench dealt with this issue as Under:-

"37. Second grievance relates to the adjustment on account of IGS.

38. As mentioned elsewhere, the TPO has taken arm's length price of IGS at NIL and made an adjustment of 35.89 lakhs. The reimbursement received by the assessee has already been exhibited elsewhere. A perusal of the order of the TPO shows that the TPO has constantly hit upon the fact that the assessee has failed to demonstrate the need and benefits derived from such services.

39. The Hon'ble High Court of Delhi in the case of EKL Appliances Ltd in ITA No. 1068 & 1070/DEL/2011 after considering the decision of the Hon'ble Supreme Court in the case of Sassoon J, David Pvt Ltd, 118 ITR 261 referred to the legislative history and noted that:

"when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the

purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. 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. 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 TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised."

22. 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.

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 TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised."

40. Similar view has been taken by the Hon'ble High Court of Delhi in the case of Bausch & Lomb Eyecare [India] Pvt Ltd in ITA No. 643/2014 & Ors of 2014. Relevant finding of the Hon'ble High Court reads as under:

> "66. On the issue of the intra group services, the Assessee is justified in contending that the re-characterization of its transaction involving its AE for the two years which have been fully disclosed in the TP Study on the basis of it not being for commercial expediency of the Assessee is clearly beyond the powers of the TPO and contrary to the legal position explained in EKL Appliances (supra)."
>
> 41. In the light of the aforementioned decisions of the Hon'ble High Court of Delhi, we are of the considered view that the only thing that a TPO can examine is the rendition of services and supporting evidences. We, accordingly, restore this issue to the file of the TPO. The TPO is directed to examine the rendition of services with supporting evidences and the assessee is directed to file the details for the same. This ground is treated as allowed for statistical purposes."

Therefore respectfully following the decision of the coordinate bench in assessee's own case for earlier year we also set-aside the whole issue of determination of the arm's-length price of the intragroup services back to the file of the learned transfer pricing officer with similar direction to the assessee and the learned transfer pricing officer. Accordingly ground number 3 – 4 of the appeal of the assessee is allowed with above directions for statistical purposes.

24. With respect to the disallowance u/s 40 a(i) we find that the identical issue arose in the case of the assessee for assessment year 2007 – 08 in ITA number 3222/del/2011 dated 8 May 2019 and for assessment year 2008 – 09 in ITA number 5410/del/2015 dated 14/10/2019. The coordinate bench in case of the assessee for assessment year 2008 – 09 has followed the order of the coordinate bench in assessee's own case for assessment year 2007 – 08. In appeal of the revenue and assessee for assessment year 2007 – 08 the learned assessing officer made a disallowance on account of payment to non-resident of ₹ 210,507,858/– and coordinate bench dealt with this issue as under :-

> "15. We have heard the rival submissions, perused the relevant material referred to before us which includes the written submissions filed by both the parties and the paper book placed on record. During the course of hearing, the Bench had also asked for certain further documents, which have been placed on record by the Assessee and have been perused by us. From the facts and arguments discussed above, it can be clearly inferred that the Assessee and Associated Enterprises though being AEs, are operating on a principal to principal model and there is no 'Principal-Agent' relationship between JAS India and its AEs/Affiliates. From the documentary evidences depicting negotiations, quotations, contracts and exchange of e-mail correspondence between JAS India and end-customers in India along with underlying invoices which have been placed on record pursuant to our directions, it is seen that the terms of contracts with

clients distinctively specify the principal-to principal relationship between the parties. For instance, the particular clause of a customer contract entered with Gates India Private Limited is reproduced below ready reference:-

"MANNER OF PERFORMANCE Subject to any contract to contrary the contractor shall execute the job/work or contract independently without any interference from the company on day to day basis.

It is specifically agreed and understood between the parties that this contract shall create principal-to principal relationship between the company and the contractor and the contractor shall not be treated as supervisor or agent of the company.

That the contract would be creating relationship of the principal-to-principal between the company and the contractor wherever the context may so require to be ascertained..."

16. From the above clause, the intention of the parties is clear that there is no Principal and agency relationship. Further, the contracts and ancillary documents submitted, distinctively states that JAS India signs contracts in its own name and issues invoices on its own name. An illustration of JAS India invoicing the end customer and AEs subsequently raising an invoice on JAS India for services provided in their territory were placed before us, from which it is quite clear that the charges raised on Hindustan Lever Limited by JAS India is after accounting for the overseas charges. In this case, Overseas Entity namely JAS Indonesia raised an Invoice on JAS India for the services rendered by them in their territory. Accordingly, JAS India raised an Invoice on the Customer namely Hindustan Lever after adding Local expenses and its profit share. Also, from the e-mail correspondence submitted along with contracts, it is evident that JAS India has not been impelled by any instructions from AEs/Affiliates. The contracts are concluded based on objective business goals of JAS India and AEs have no role to play in the negotiations with clients.

16.1 Furthermore, the said agreement has been framed to specifically provide that the terms of contracts/transactions between AEs/Affiliates and JAS Forwarding Worldwide has independently negotiated and rates of remuneration are fixed so as to maintain a 50:50 share of profits. The relevant Paras from the Agreement are reproduced below:

> "...4.2 The Principal shall pay the remuneration to the agents at the rates so agreed, in accordance to this agreement (Clause 5.2)...
>
> ...5.1. Payment of collect freight less Profit share will be settled as agreed mutually by both the parties...
>
> ...5.2. Profit share between the Principal and Agent shall be on a 50/50 basis and it shall be calculated only on the sea freight or airfreight, irrespective of whether freight is prepaid or collect..."

17. Thus, it can be seen that mere use of the word 'agency' is not sufficient to conclude that the Assessee and the AEs do not operate on principal-to-principal basis and nomenclature is not the determinative factor. The above mentioned evidences filed clear show that JAS India has not been impelled by any instructions from AEs/Affiliates and the specific clause to this effect has been mentioned in the agreement. It has also been informed to us that above principle of 50:50 Profit Split are a widely accepted pricing formula prevalent across the global freight-forwarding industry at large. In support, the Ld. Counsel for the Assessee has placed reliance on recent ruling in case of Balmer Lawrie & co. Ltd. [2016] 68 taxmann.com 384 (Kolkata- Trib.), wherein 50:50 profit

split method has been upheld. In the said case this issue had come up for, wherein Tribunal vide para 32 has categorically stated that merely the use of the word agency in the agreement does not amount that there exists a relationship of agency. The Tribunal held that:

> "....With regard to the issue of agency relationship we find that both the parties are acting on principal to principal basis. In case of exports the Indian companies engage the assessee with the necessary information of the overseas importers for the delivery of the goods to outside India. This agreement is limited to Indian exporter and the assessee in relation to the logistic services and at no point of time the overseas entity or the Indian exporter has any dealing of whatsoever. The assessee for the services raises the bill to the Indian exporter. After completing the custom formalities, the assessee communicates with overseas entities who are independently engaged for rendering required logistic services and delivers the same to the overseas importer. For such services the assessee and overseas agent share the profit after the expenses incurred in India. Accordingly the assessee does not deduct the TDS as no service in India and no income accrued or arose in India. The assessee engages the airlines, shipping lines and local transport in India and not as overseas agent. Similar procedure is followed when some overseas agents require import of the goods from India.
>
> In our considered view we find from the facts that there is no agent and principal relationship between the assessee and overseas entities and vice versa. Merely the word used in the 'agency' in the agreement does not amount that there exist the relationship of agency..."

18. Further, it is noticed that this Agency only deals with payment of remuneration by the overseas Principal (viz. overseas AEs/Affiliates) to the so-called agent (viz. JAS India). Accordingly, Agency Agreement deals with cases where there is a non-resident customer who receives invoices from and who makes payment to the respective JAS AE/Affiliate in a foreign jurisdiction. In the second step, the overseas JAS AE/Affiliate compensates JAS India for services rendered in India. The transaction results in 'receipt of income' by JAS India (i.e. inward cash remittances), which is not the subject matter of current disallowance u/s 40(a)(i) of the Act, as the disallowance is mainly on account of non deduction of TDS which is applicable to outbound transactions when payment is being made outside India, attracting Section 195 of the Act. The subject matter of current disallowance u/s 40(a)(i) are the payments made 'outward cash remittances' by JAS India to its overseas AEs/Affiliates. These payments are not governed by the Agency Agreement as such, albeit the universal 50/50 revenue sharing model is common to both inbound/ outbound transactions and perhaps this universal 50/50 revenue sharing model which is common, has led the Ld. CIT (DR) to raise this argument. The Ld. CIT (DR) relied on a ruling of the AAR (AAR No. 542 of 2001) in the case of ABC. However, it can be seen that the facts of the case before us are different. In the present case, JAS India invoices customers in the capacity of a Principal, and correspondingly deals with overseas AEs/Affiliates on a Principal- to-Principal basis. Quite contrary to the terms of 'compensation' (clause 2.12) as defined under the 'transportation agreement' in case of ABC, it is JAS India who compensates the overseas AEs/Affiliate on an arm's length basis for services availed in the respective overseas jurisdictions. The service invoices raised on payments received from Indian customers entirely belong to JAS India as integral part of its own business. Further, unlike the facts in the case of ABC, JAS Worldwide is in no manner responsible for meeting/ reimbursing the salary and other establishment expenses incurred by JAS India in running its day-to-day operations. Thus, this judgment is distinguishable.

19. Even otherwise, we find that there is merit in the alternate plea of the Assessee is that since the above transactions are at arm's length for the aforesaid year, no further attribution can be made even if PE is established. TPO's order u/s 92CA (3) dated 26.10.2010, has been placed before us wherein no adverse inference was drawn in respect of the international transactions undertaken by the Assessee during the relevant year. It is now a settled principle that even if there is a business connection, no further income can be chargeable to tax in India on account of PE since the transaction between the Assessee and its AE has been found at arm's length. Hon'ble Supreme Court has held as under in case of Morgan Stanley (292 ITR 416 (SC)).

> "...As regards attribution of further profits to the PE of MSCo where the transaction between the two are held to be at arm's length, we hold that the ruling is correct in principle provided that an associated enterprise (that also constitutes a PE) is remunerated on arm's length basis taking into account all the risk-taking functions of the multinational enterprise. In such a case nothing further would be left to attribute to the PE..."

This principle of law has been recently again upheld and applied by SC in the case of Honda Motor Co. (301 CTR 601 (SC)) and E-funds Solutions (399 ITR 34 (SC)).

20. Further, we find that the Ld. CIT(A) has discussed the essential ingredients for attracting Section 9(1) of the Act and has held that the non-residents are liable to tax in India on account of 'business connection' and has thereafter has given a finding that there is no business connection in India. On perusal of the material placed on record reveals that:-

There was no business connection of AEs in India;¬

Assessee was not an agent of AEs in India;¬

AEs do not exercise any control over the activities performed by the Appellant Also, the expression 'any sum chargeable under this Act' under¬ Section 195 of the Act states that sums payable to non-resident is not liable to deduct tax if such sum is not chargeable to tax. This view has been upheld by the Hon'ble Delhi High Court in the case of Van Oord ACZ India (P) Ltd. vs CIT, 323 ITR 130; and by Hon'ble Supreme Court ruling in the case GE India Technology Cent. (P) Ltd (2010); 327 ITR 456. The Hon'ble Supreme Court has held that person paying interest or any other sum to non-resident is not liable to deduct tax if such sum is not chargeable to tax. Thus, in the absence of any 'business connection, there was no obligation on the Assessee to deduction tax u/s 195 of the Act and thus correspondingly no disallowance could be made u/s 40(a)(i) of the Act.

21. The payments made to non-resident are not on account of rendering any services in the nature of technical or professional services or fees for technical services or getting any income on account of royalty, albeit the nature of activities performed by the non-resident are purely business activities. The AEs are carrying on the business of freight forwarding services in their respective jurisdictions which are mirror reflection of the business activities carried on by the Assessee. This issue has also been discussed and adjudicated in favour of the Assessee in the case of Mumbai ITAT, UPS SCS (Asia) Limited, [2012] 18 taxmann.com 302 (Mum.), wherein the Tribunal has held that payments to non- residents for providing freight and logistics services outside India, is not within the purview of fees for technical services and in the absence of any permanent establishment or 'business connection in India', the same is not taxable.

> 22. Since as held above that there is no 'business connection in India', therefore, we hold that the Assessee was not under an obligation to deduct tax u/s 195 of the Act. Correspondingly, no disallowance could be made u/s 40(a)(i) of the Act. Thus, we uphold the order of the CIT (A) and the appeal filed by the Revenue accordingly is dismissed."

25. We have carefully examined the facts before us. Firstly the claim of the assessee that these are the reimbursement of the expenditure. If these are the reimbursement and it is the duty of the assessee to show that assessee had an authority to incur these expenditure on behalf of the other parties and same would be reimbursed to the assessee. Thereafter if this expenditure is incurred they need to be passed on to the principal and then only the assessee can claim that these are the reimbursement of the expenditure. There is no such evidence available before us. Further in that particular case for assessment year 2007 – 08 the claim of the assessing officer was that that there is a business connection in India of the recipient of the income and the assessee has an agency agreement with the associated enterprises. Further there was an argument by the assessee that the about transaction is at arm's-length is no further attribution were made even if the permanent establishment is established. However the case before us is that the learned assessing officer has taxed it as fees for technical services. Further the assessee has also relied upon the provisions of Section 172 of the income tax act and stated that it is a code itself . We find that the provisions of Section 172 of the income tax act do not apply to the nature of income on by the assessee for its associated enterprise. For applying the provisions of Section 172 of the income tax act there has to be a ship belonging to or chartered by a non-resident which is not the case before us. Similarly the reliance placed by the assessee on the circular of the CBDT also does not apply that in case of a non-resident charterers of the ship no tax is required to be deducted. Here neither the assessee nor the associated enterprise is of the assessee operate any ship. They are merely the service providers. Therefore the issue arises is whether the services provided to the assessee by the associated enterprises is management services, technical services or consultancy services. At the end of the argument of the learned authorised representative he submitted that the issue may be set-aside to the file of the learned assessing officer for

determination whether the above sum paid to the associated enterprises can be chargeable to tax as fees for technical services or not. He further submitted that he does not have any objection if the issue is set-aside to the file of the learned assessing officer with all issues left open to be decided afresh. The learned departmental representative did not have any objection to the above request. In view of this we set-aside ground number 5 of the appeal of the assessee back to the file of the learned assessing officer to decide about the chargeability of income in the hands of the associated enterprise and consequent tax deduction at source on such payments vis-a-vis applicability of the double taxation avoidance agreements of the respective countries of the residence of recipient of income. The assessee is also directed to place before the learned assessing officer the arguments on this issue. The learned assessing officer may examine the same and then decide the issue afresh. Accordingly ground number 5 of the appeal of the assessee is allowed with above direction for statistical purposes.

26. Accordingly appeal of the assessee is allowed for statistical purposes.

AY 2011-12

27. The assessee has raised the following grounds of appeal in ITA No. 1687/Del/2016 for the Assessment Year 2011-12:-

"The addition amounting to Rs. 60,36,77,192 undertaken by the Learned Deputy Commissioner of Income-Tax, Circle 13(1), New Delhi ("the Ld. AO") [confirming additions by the Learned Additional Commissioner of Income-tax, Transfer Pricing Officer - 2(2) ("the Ld. TPO")] vide final assessment order dated January 30, 2016 passed under Section 143(3) read with Section 144C of the Income Tax Act, 1961 ("the Act") is not in accordance with the law and therefore not sustainable.

That the Hon'ble Dispute Resolution Panel, New Delhi ("the DRP") has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order passed by the Ld. AO under Section 143(3) read with Section 144C(1) of the Act ("the draft assessment order").

The Hon'ble DRP while issuing directions under Section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the erstwhile Hon'ble DRP vide directions issued under Section 144C(5) of the Act for AY 2009-10, reasoning given by the Ld. TPO in his order passed under Section 92CA(3) of the Act.

On the facts and in the circumstances of the case, the Ld. TPO and the Ld. AO have erred in proposing and Hon'ble DRP has further erred in confirming the adjustment of Rs. 60,36,77,192 (including Rs. 58,49,10,210 under Section 40(a)(i) and Transfer Pricing adjustment of Rs. 1,87,66,982) without due

application of mind and without affording a reasonable opportunity of being heard in the matter.

Transfer Pricing Adjustments - Rs. 1,87,66,982

1. *The Ld. TPO has erred in law and on facts by summarily disregarding the approach followed by the Appellant for benchmarking international transaction pertaining to receipt of management services (excluding IT & Infrastructure related charge) without assigning any cogent reasons.*

   In this regard, the Ld. TPO has artificially created separate business segments on fallacious assumptions, contrary to the fact that management services are received in the course of routine business activity and are integral part / inextricably linked to the business model of the Appellant (viz. freight forwarding services).

2. *The Ld. TPO has erred in law and on facts by assigning NIL value to the value of international transaction in relation to receipt of management services (excluding IT & Infrastructure related charge). Further, the Ld. TPO has failed to provide the detailed methodology/ reasoning or CUP data for assigning NIL value to the underlying transaction.*

   Further the Ld. TPO/DRP, while rejecting management cross-charge for sales and marketing, based on its conjectures, erroneously stated that the appellant had regularly incurred expenditure on sales and marketing under the head 'Business Promotion'.

3. *The Ld. TPO has erred in law by summarily disregarding the Appellant's submission dated December 17, 2014 in response to the queries raised vide show-cause notice dated December 10, 2014 and submission dated December 22, 2014 filed in relation to intra group services.*

Disallowance under Section 40(a)(i) - Rs. 58,49,10,210

4. *The Ld. AO failed to appreciate that the payments made by the Appellant to non-resident Associated Enterprises were towards rendering freight and forwarding services, which was a business income in the hands of the respective AE's and not Fees for Technical Services ('FTS') as defined under Section 9(l)(vii) of the Act. Therefore, the Appellant was not under any obligation to withhold any tax from the payments so made.*

5. *The Ld. AO failed to appreciate that the tax has not been deducted on the payments made by the Appellant to agents of non-resident shipping companies based on declaration received from such companies. Therefore, the Appellant was not under any obligation to withhold any tax from the payments so made."*

28. Contesting the appeal for assessment year 2011 – 12 the learned authorised representative submitted that all these issues are similar to the issues in appeal of the assessee for assessment year 2009 – 10. He also submitted that his arguments also remain the same.

29. The learned DR also agreed with the above proposition stating that there is no change in the facts and circumstances of the case for assessment year 2011 – 12 as compared to the facts in assessment year 2009 – 10.

30. We have carefully considered the rival contentions and perused the orders of the lower authorities. Ground number 1, 2 and 3 are with respect to the transfer pricing adjustment where arm's-length price with respect to the intragroup services have been determined at rupees nil. This is identical to the ground number 3 – 4 of the appeal of the assessee for assessment year 2009 – 10. We have already set-aside this issue back to the file of the learned transfer pricing officer with direction to the assessee and the learned TPO. For similar direction we also set-aside this grounds of appeal back to the file of the learned TPO. Accordingly ground numbers 1 – 3 are allowed for statistical purposes.

31. Ground number 4 – 5 are with respect to the disallowance u/s 40 a (ia) which are similar to ground number 5 – 6 of the appeal of the assessee for assessment year 2009 – 10. As we have set-aside that ground of appeal with directions to both the parties for assessment year 2009 – 10, with similar direction we also set-aside this ground to the file of the learned assessing officer to decide afresh. Accordingly ground numbers 4 – 5 of the appeal of the assessee are allowed for statistical purposes.

32. In the result appeal of the assessee for assessment year 2011 – 12 is allowed for statistical purposes.

Order pronounced in the open court on 26/07/2021.

Sd/-	Sd/-
(AMIT SHUKLA)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 26/07/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	26.07.2021
Date on which the typed draft is placed before the dictating member	26.07.2021
Date on which the typed draft is placed before the other member	26.07.2021
Date on which the approved draft comes to the Sr. PS/ PS	26.07.2021
Date on which the fair order is placed before the dictating member for pronouncement	26.07.2021
Date on which the fair order comes back to the Sr. PS/ PS	26.07.2021
Date on which the final order is uploaded on the website of ITAT	26.07.2021
date on which the file goes to the Bench Clerk	26.07.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	