**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH, NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SMT BEENA A. PILLAI, JUDICIAL MEMBER**

**ITA No. 5451/DEL/2012**
[A.Y 2008-09]

| | | |
|---|---|---|
| Lufthansa Technik Services India Pvt Ltd<br>1005, Aakash Deep Building,<br>Barakhamba Road, Connaught Place<br>New Delhi | Vs. | The Dy. C.I.T<br>Circle – 4(1)<br>New Delhi |
| PAN : AAACO 7766 N<br>[Appellant] | | [Respondent] |

**Date of Hearing : 09.10.2018**
**Date of Pronouncement : 15.10.2018**

Assessee by : Shri Vishal Kalra, Adv
Shri Ankit Sahni, Adv
Shri S.S. Tomar, Adv

Revenue by : Shri Sanjay I. Bara, CIT-DR

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the order framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act]' dated 09.12.2012 pertaining to A.Y 2008-09.

2. The substantive grievance of the assessee is two fold :

(i) The assessee is aggrieved by the adjustment made in the transaction of purchase of home base segment.

(ii) The assessee is aggrieved by the adjustment made in the transaction of provision of Market Support Services [MSS]

In addition to these substantive grounds, the assessee has also raised some other issues, which will be duly considered.

3. We have heard the rival contentions and have given thoughtful consideration to the orders of the authorities below.

4. Briefly stated, the facts of the case are that the appellant-company was formerly known as One Stop Airline MRO Support Private Limited. It was incorporated under the Companies Act, 1956 on 27.07.2005. It is a subsidiary of Lufthansa Technik Immobilien - und Verwaltungsgesellschaft mBh, Germany which, in turn, is a subsidiary of Lufthansa Technik Aktiengesellschaft (LHT).

2. During the year under consideration, the appellant company was primarily engaged in the provision of services as well as provision of aircraft components in India. In relation to these activities, the

appellant entered into a number of international transactions with its Associated Enterprise (AE) which are as under:

| S. No. | Nature of transaction | Method used by Appellant | Value of transaction (INR) |
|---|---|---|---|
| 1. | Provision of marketing support services | Transactional Net Margin Method | 3,70,49,263 |
| 2. | Provision of logistics support services | TNMM | 1,73,38,799 |
| 3. | Interest on external commercial borrowings | Comparable Uncontrolled Price | 4,71,65,339 |
| 4. | Purchase of home base (for lease to third parties) | TNMM | 98,35,34,236 |
| 5. | Reimbursement of salary costs | NA | 6,36,29,220 |
| 6. | Receipt of payroll administration services | NA | 3,15,256 |
| 7. | Reimbursement of freight charges | NA | 74,56,695 |
| 8. | Reimbursement of expenses | NA | 2,69,28,768 |
| 9. | Purchase of fixed assets | NA | 42,21,939 |
| 10. | Sale of assets | NA | 5,794 |

3. It would be pertinent to mention here that there is no change in the functional profile of the appellant vis-a-vis the preceding year i.e. A.Y 2007-08. The international transactions entered into by the appellant with its AE during the previous year were primarily the same and no adverse inference was drawn by the Transfer Pricing Officer (TPO) for international transactions undertaken by the appellant in A.Y. 2007-08.

4. The return of income for the year under consideration was filed on 29.09.2008 declaring a loss of Rs. 13,74,73,287/-. The return was selected for scrutiny assessment and, accordingly, statutory notices were issued and served upon the assessee. A reference u/s 92CA(1) of the Act was made to the TPO by the AO, and the TPO, vide order dated 14.10.2011, proposed a reduction in the price of the fixed assets purchased from LHT (Homebase) by a value of Rs.78,23,82,084/- and an adjustment of Rs. 29,45,820/- on account of provision of MSS to LHT.

5. Pursuant to the order of the TPO, the AO framed a draft assessment order dated 28.11.2011 in conformity with the order of the TPO. An appeal was preferred before the Dispute Resolution Panel (DRP), which, vide order dated 15.06.2012, upheld the disallowance made by the TPO on account of purchase in the Homebase segment, but gave marginal relief to the appellant on account of provision of MSS to its AE. Final assessment order was framed on 24.08.2012 and the appellant is before us.

6. We will first address to the issue relating to adjustment made in the homebase segment.

7. Facts on record show that during year under consideration, the appellant purchased fixed assets of Rs. 98,35,24,236/- which were in the nature of spare parts, air craft components, etc., from its AE. Assets so purchased were further leased to independent parties and on such lease, the assessee earned lease rental income. Since the PLI of the assessee was 49%, whereas the weighted average PLI of the comparables was 24.30%, transactions were claimed to be at arms length.

8. The TPO found from the home base segmental account that the assessee had not allocated expenses properly to this segment. The TPO was of the opinion that most of the expenses had been allocated to the other domestic operation segment. The TPO observed that it is against the common business expediency that the revenue of Rs. 12.27 crores in the other segment is consuming Rs. 15.23 crores of expenses while home base segment is consuming only Rs. 9.23 crores of expenses. The TPO further observed that no salary, communication, telephone, travelling, conveyance and other administrative expenses have been incurred for the leasing business. The TPO formed a belief that homebase segment was artificially showing higher operating margin of 49%, while the domestic operation was showing loss of

24.13%. The TPO proceeded by pooling together homebase and domestic operation and the same read as under:

| | Homebase | Domestic | Total |
|---|---|---|---|
| **Operating** Income | **18,09,81,838** | **12,27,21,421** | **30,37,03,259** |
| Operating Expenses | 9,23,06,510 | 15,23,39,180 | 24,46,45,690 |
| Operating Expenses(re- allocated in revenue proportion) | **14,57,88,448** | **9,88,57,242** | **24,46,45,690** |
| Operating Profit | 3,51,93,390 | 2,38,64,179 | 5,90,57,569 |
| OP/OC | 24.14% | | |
| OP/OI | 19.45% | | |

9. After pooling the accounts as mentioned above, the TPO found that the current year's margin of the comparable companies chosen by the assessee was as under:

| Name of the Company | March 2008 |
|---|---|
| India Infrastructure Developers Limited | 11.25 |
| Mukunda Industrial Finance Limited | 41.81 |
| Trishakti Electronics and Industries Limited | 57.60 |
| Savitri Leasing and Finance Limited | 49.23 |
| | |
| Arithmetical Mean (%) | 39.98 |

10. The assessee was show caused to explain as to why results of the re-drawn homebase segment be not bench marked against the current year margins of comparables companies. The assessee was further asked to submit the following :

a) Whether the assets purchased were old or new? The details of cost of assets [in the home base segment] in the books of AE;

b) Whether any markup was charged by the AE on the sale of assets to the assessee; and

c) Details of valuation of assets, purchased from the AE, by the Custom Authorities.

11. The assessee filed a detailed reply explaining that the expenses debited in the domestic segment are the expenses directly related to the operations of the assessee in the domestic segment and, therefore, cannot be allocated to the homebase segment. It was further explained that in the homebase segment, the aircraft components are leased to airline customers in India which were directly shifted by AE to the customers and the assessee does not maintain any warehouse. It was further explained that the expenses incurred are primarily deprecation and professional fees as no dedicated employees were kept for this segment.

12. Not convinced with the reply of the assessee, the TPO proceeded by reallocating expenses between homebase segment and other segments and concluded by holding that the assessee has failed to allocate some of the necessary expenses associated with leasing of assets and finally rejected the transfer pricing documentation of the assessee.

13. The final adjustment on this segment was computed as under:

*"Arm's length mean margin39.98%*

| | ***Homebase (As drawn above)*** | ***Homebase (ALP)*** |
|---|---|---|
| ***Operating*** | *18,09,81,83* | *18,09,81,838* |
| ***Operating*** | *14,57,88,44* | ***10,86,25,29*** |
| ***Operating*** | *3,51,93,390* | *7,23,56,539* |
| | | |
| ***OP/OI*** | *19.45%* | *39.98%* |

*Shortfall = 145788448-108625299 =* ***3,71,63,149***

*14. The above shortfall of Rs. 3,71,63,149/- is computed as an adjustment to the depreciation claimed by the taxpayer in its Homebase segment. It is further noted that the assessee is claiming depreciation on leased assets @4.75 % (as per Companies Act). Therefore, the reduction in depreciation of Rs. 3,71,63,149/-*

*corresponds to a reduction in the price of asset amounting to Rs. 78,23,82,084 (Rs. 3,71,63,149/.0475). Therefore, the ALP of value of assets is calculated as below:*

| | | |
|---|---|---|
| *Book Value of the asset as per Form 3CEB* | *A* | ***98,35,34,236*** |
| *Reduction in price as calculated above* | *B* | *78,23,82,084* |
| *Arm's length Price of Assets* | *A-B* | ***20,11,52,152*** |

*15. Therefore, the arm's length price of the assets imported by the assessee comes to Rs. 20,11,52,152/-. The Assessing Officer shall reduce the value of block of fixed assets containing the leased assets of the assessee by an amount of Rs. 78,23,82,084/- while allowing the depreciation [as per Income Tax Act) on this block of fixed assets.*

*16. To sum up, the following adjustments were made:*

| | | |
|---|---|---|
| *a.* | *On account of MSS* | *Rs. 29,45,820/-* |
| *b.* | *On account of purchase of assets from the AE."* | *Rs. 78,23,82,084/-* |

14. We are of the considered view that if the Revenue authorities proceeded on a false premise, then the conclusion so arrived would not only be erroneous but also against the facts of the case. In our considered view, this is what has happened in the present case. The TPO proceeded on the false premise that the assessee has not allocated any expenditure on the homebase segment. Exhibit 6, which is Annexure 1 of segmental account clearly shows that under the segment homebase, the assessee has charged Rs. 1,53,69,969/- as allocable expenses. The list of allocable expenses charged to this segment is exhibited at pages 1307 and 1308 of Volume 5 of the paper book and the same reads as under:

| Particulars | Amount |
|---|---|
| Employees remuneration and benefits | 79,19,972 |
| Courier/postal Expense | 23,165 |
| Conferencing | 514 |
| Internet Charges | 28,669 |
| Telephone Expenses | 1,32,938 |
| Travelling Expenses | 3,22,491 |
| Car Petrol & Maintenance Charges | 4,574 |
| Conveyance | 33,385 |
| Car Hire Charges | 16,806 |
| Entertainment | 40,718 |
| Printing & Stationery | 1,40,560 |
| IT Expenses | 4,014 |
| Audit Fees | 8,06,360 |

| | |
|---|---|
| Professional Fee Paid | 26,21,530 |
| Rates & Taxes | 1,10,488 |
| Rent | 25,24,541 |
| Repair & Maintenance- Others | 2,77,764 |
| Bank charges | 19,552 |
| Miscellaneous expenses including office supply and maintenance | 341929 |
| Total expense allocated | 15369969 |

15. Considering the above factual data on record, the false/wrong premise of the TPO becomes apparent and thus makes his findings erroneous.

16. At this stage, the ld. DR submitted that the matter be restored to the file of the Assessing Officer/TPO for reconsideration of this issue. We are of the considered view that no second innings should be given to the Revenue if sufficient material is on record and the revenue authorities have ignored to consider such material as held by the Hon'ble High Court of Gujarat in the case of Rajesh Babubhai Damania 251 ITR 541, the finding of which, reads as under:

> *"The assessee was carrying on business on a small-scale in stainless steel utensils. He had filed a return of income for the said assessment year declaring a total income of Rs. 15,423. The*

*assessee had received deposits from six parties on April 14, 25, 1984, and had repaid all of them in the years 1984 and 1985. The Assessing Officer, disregarding the evidence produced by the assessee in respect of the identity and genuineness of the parties and their financial capacity, made an addition of the amount of the said six deposits totalling Rs. 2,80,000. An appeal was preferred by the assessee before the Commissioner of Income-tax (Appeals) who accepted the assessee's contentions regarding the genuineness of these transactions and deleted the addition of the said amount of six deposits.*

*In the appeal preferred by the Revenue, the Tribunal held that in the case of cash credit entries, the assessee has to prove the identity of the capacity of the creditor to advance the loan and genuineness of the transaction. The Tribunal held that the Assessing Officer, for reasons best known to him, did not care to examine the five creditors and did not take note of the voluminous evidence which was adduced by the assessee. It was found that the Assessing Officer had adopted a short-cut method and placed reliance on the statements of three creditors which were recorded during the search. The Assessing Officer did not supply the copies of those statements to the assessee against whom they were used by him and, thus, violated the principles of natural justice. The Tribunal observed that the Assessing Officer was "a bit negligent" in not examining the creditors who were produced by the assessee* *before him and that the ends of justice would be met if "fresh innings" be given to the Assessing Officer.*

*It was the duty of the Tribunal to ascertain the reasons which were given by the Commissioner of Income-tax (Appeals) in whose order the order of the Assessing Officer had merged. The Tribunal committed an error of law in restoring the matter to the Assessing Officer"*

17. Respectfully following the findings of the Hon'ble High Court of Gujarat [supra], we decline the request of the ld. DR.

18. Further, Exhibits 1139 to 1154 show the purchase price of the fixed assets which were leased to various parties and it can be seen that the lease price of the asset is the same as purchase price of the asset and the lease agreements are exhibited at pages 1232 to 1292 of the paper book.

19. We are of the opinion that when the accounts are regularly maintained in the course of business, duly audited under the provisions of the Act, free from any qualification by the auditors, they should be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. As mentioned elsewhere, the TPO

proceeded on a false premise that the appellant has not allocated any expenses to the homebase segment, whereas, as demonstrated elsewhere, not only the appellant has allocated routine expenses, the details were also furnished before the lower authorities.

20. Considering the facts in totality, we do not find any merits in the additions made in this segment. We, accordingly, set aside the findings of the DRP and direct the Assessing Officer to delete the additions made under home base segment. This substantive grievance of the assessee is allowed.

21. The second substantive grievance of the assessee relates to the transaction of provision of MSS.

22. Facts on record show that the appellant entered into a Consultancy Agreement with its AE, and in lieu of the agreement, it provided during the year the following MSS to its AE:

a) Assistance in market research and analysis of potential customers;

b) Advise on current market pricing (benchmark) and developments in the market;

c) Performance of customer liaison in general and communication of customer complaints;

d) Performance of networking / promotion activities with key contacts for better relationships between LHT and customers;

e) Monitoring of prices, supply and demand on a country basis;

f) Channelling sales enquiries to LHT, and

g) Dissemination of information about LHT's products / services.

23. As per the consultancy agreement, for running the above mentioned services, the appellant charged its AE the costs incurred in rendering such services plus, a mark-up of 9 percent on such costs. A perusal of the aforementioned services shows that these services are in the nature of routine support services and the appellant does not employ highly qualified or technical staff for the same, and uses routine assets like furniture, office equipment etc. for rendering the MSS.

24. The segment of MSS has been benchmarked by the appellant using TNMM as the most appropriate method and Operating Profit / Total cost as the Profit Level Indicator, earning a margin of 10.51% in the MSS segment. The appellant used 9 comparables, which had an arithmetic mean of 6.14%.

25. The TPO rejected the comparables selected by the Appellant and undertook a new search and arrived at 10 comparables. The TPO used the following filters:

a) Exclusion of companies whose data was not available for FY 2007-08;

b) Companies whose income from business support services constitutes at least 75 percent of total operating income was included;

c) Companies whose sales were less than Rs. 1 crore were excluded; and

d) Companies having related party transactions of more than 25% were to be excluded.

26. On the basis of the new comparables, the TPO held that the appellant should have earned a NPM of 19.30% and, accordingly, made an upward adjustment of Rs. 29,45,820/-.

27. The appellant filed its objections before the DRP, but the DRP removed Vapi Waste & Effluent Management Co. Ltd as a comparable and brought down the mean of margins of comparables to 18.18% and the adjustment proposed on account on MSS was brought down to Rs. 25,70,348/-.

28. Following is the final list of comparables adopted by the TPO:

| S. | Name | Database | Tota Incom e (Rs. | Service Income (%) | RPT (%) | PBIT / Cost (%) |
|---|---|---|---|---|---|---|
| 1 | Tamil Nadu Ex-Servicemen'S Corpn. Ltd. | Prowess | 63.46 | 99.68 | 0 | 9.29 |
| 2 | Apitco Ltd. | Prowess | 10.67 | 98.5 | 0 | 49.35 |
| 3 | Best Mulyankayan Consultants Ltd | Prowess | 1.11 | 92.79 | 11 | 12.84 |
| 4 | Choksi Laboratories Ltd | Capitaline | 9.45 | 98.7 | 0 | 29.18 |
| 5 | GeninsIndiaTPALtd. | Prowess | 5.34 | 96.69 | 0 | 9.11 |
| 6 | 1 C R A Management Consulting Services Ltd. | Prowess | 18.77 | 96.16 | 13.4 1 | 4.18 |
| 7 | 1 D C (India) Ltd. | Prowess | 15.77 | 99.43 | 0.95 | 15.31 |
| 8 | India Cements Capital ltd | Prowess | 7.95 | 97.48 | 0.72 | 42.46 |
| 9 | Tndus Technical & Financial Consultants Ltd. | Prowess | 1.15 | 98.26 | 0 | 14.05 |
| 10 | Mecon Ltd | Capitaline | 504.15 | 92.47 | 0 | 11.8 |
| 11 | NIS Sparta Ltd. | Capitaline | 11.4 | 94.6 | 0 | 1.84 |
| 12 | 0 R G Informatics Ltd.(Seg.) | Prowess | 163.91 | 77.02 | 1 | 6.54 |
| 13 | Rites Ltd. | Prowess | 709.54 | 84.43 | 3.49 | 31.52 |
| 14 | Sanco Trans Ltd. | Capitaline | 43.02 | 99.85 | 0 | 20.62 |
| 15 | Technicom-Chemie (India) Ltd. | Prowess | 1.97 | 94.42 | 0 | 13.43 |
| 16 | Vapi Waste & Effluent Mgmt. Co Ltd | Prowess | 19.9 | 79.85 | 0 | 47.53 |
| 17 | WAPCOS Ltd. (Seg) | Capitaline | 160.05 | .97.56 | 0 | 58.98 |

29. Before us, the inclusion of the following companies was challenged and only these companies will be considered by us:

a. APITCO Limited

b. Best Mulyankan Consultants Ltd

c. Choksi Laboratories

d. RITES Limited

e. WAPCOS Limited

APITCO Limited

30. A perusal of the annual report of this company shows that it carried out functions related to MSS, for which it prepares project feasibility reports, carries out market / other surveys, arranges for seminars and trainings, provides "escort services", energy related services, skill development etc. In our considered opinion, looking to the business profile of the assessee under MSS segment, as mentioned elsewhere, this company is functionally different from the appellant company and, therefore, cannot be accepted in the final list of comparables. We, accordingly, direct the Assessing Officer /TPO to exclude this company.

Best Mulyankan Consultants Ltd

31. In our considered opinion, this company fails the RPT filter as it appears that this company has RPT of 27.30% of the total revenue. We, therefore, restore the inclusion/exclusion of this company to the Assessing Officer/TPO with a direction to verify the RPT of this company and whether it passes the filter adopted by the TPO.

Choksi Laboratories Ltd

32. The website extract of this company shows that this company has expertise in setting up in-house labs for large number of clients and also provides consultancy, training and independent auditing for quality management systems. Its quality assurance solutions address almost every aspect of regulatory norms set by FDA, BIS, NABL i.e. National Accreditation Board for testing and calibration Laboratories, department of health and other regulatory bodies. Thus, the company is engaged in clinical research, assaying and hall marking and instrument calibration and validation, etc. As mentioned elsewhere, the appellant company is A routine service provider, which nowhere matches with the service provided by this laboratory company. Moreover, Choksi Laboratories Ltd has assets of high value which are

required for testing chemicals etc. In our considered view, this company is not comparable to routine service provider and deserves to be excluded. We order accordingly.

RITES

33. The profit and loss account of this company for the year ending 31.03.2008 shows income under the head 'Income' as under:

| | |
|---|---|
| Consultancy fee | Rs. 29833 |
| Export sales | Rs. 20830 |
| Inspection fee | Rs. 5479 |
| Lease services | Rs. 1908 |
| Other income | Rs. 80177 |

34. It can be seen from the above that the ratio of consultancy fee to the total income comes to 45.15% and, therefore, fails the filter of more than 75% adopted by the TPO. For this reason, we direct for the exclusion of this company.

WAPCOS LIMITED

35. This company is a techno-commercial organization under the aegis of Ministry of Water Resources, River Development and Ganga Rejuvenation utilises the talent and expertise developed in the various organizations of Government of India and State Government. Main fields of specialization of the company cover Irrigation and Drainage, Flood Control and Land Reclamation, River Management Dams, Reservoir Engineering and Barrages, Integrated Agriculture Development, Watershed Management, Hydropower and Thermal Power Generation, Power Transmission and Distribution, Rural Electrification, Ground Water Exploration, Minor Irrigation, Water Supply and Sanitation (Rural and Urban), Environmental Engineering, etc.

36. This company's spectrum of services covers a wide range of activities like pre-feasibility studies, feasibility studies, simulation studies, diagnostics studies, socio economic studies, master plans and regional development plans, field investigations, details engineering including design, detailed specifications, tendering process, contract and construction management, commissioning and testing, operation

and maintenance, quality assurance and management, software development and human resource development.

38. Such wide spectrum of services should not be compared with a routine service provider like the appellant. In our considered opinion, this company is functionally different not only in respect of the spectrum of services which it is providing but also in respect of gross assets to sales ratio which cannot be compared to a routine service provider. Hence we direct the Assessing Officer/TPO to exclude this company from the list of comparables. Second grievance is allowed in part for statistical purposes.

39. Third grievance relates to loss incurred during the year taken as income of the assessee.

40. It appears that the Assessing Officer, while passing final assessment order, has considered the returned income of the assessee as loss. We, accordingly, direct the Assessing Officer to verify and treat the income as such.

41. The other issue relates to charging of interest u/ss 234A, 234B and 234C of the Act.

42. Levy of interest will be consequential. We, accordingly, direct the AO/TPO do charge interest as per the provisions of law.

43. In the result, the appeal of the assessee in ITA No. 5451/DEL/2012 is allowed.

**The order is pronounced in the open court on 15.10.2018.**

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **[**BEENA PILLAI**]** | **[N.K. BILLAIYA]** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 15th October, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

| | |
|---|---|
| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr.PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr.PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
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| 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 | |