

आयकर अपीलीय अधिकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्ष श्री ए.टी. वर्की, न्यायिक सदस्य एवं डॉ ए.एल. सैनी, लेखा सदस्य)

[Before Shri A. T. Varkey, JM & Dr. A.L. Saini, AM]

I.T.A. No. 1385/Kol/2018
Assessment Year: 2012-13

TKM Global Logistics Ltd., (PAN: AABCT2426M)	Vs.	Assistant Commissioner of Income-tax, Circle-15(1), Kolkata
Appellant		Respondent

For the Appellant	Shri Soumen Saha & Ms. Rachna Agarwal, AR
For the Respondent	Shri Vijay Shankar, CIT, DR

Date of Hearing	03.02.2020
Date of Pronouncement	18.03.2020

ORDER

Per Shri A.T.Varkey, JM:

This is an appeal preferred by the assessee against the order of AO dated 27.12.2016 pursuant to the TPO passing the revised order u/s. 92CA(5) r.w.s. 92CA(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 16.06.2017 and the AO passing the revised order dated 14.07.2017.

2. At the outset, we note that there is a delay of 283 days in filing this appeal before this tribunal. According to assessee, though the final assessment order was passed by the AO dated 27.12.2016 after the DRP order, subsequently the TPO passed a revised order dated 16.06.2017 and accordingly, the AO gave effect to that vide order dated 14.07.2017 received by the assessee on 18.07.2017. As per the advice given to the assessee at that point of time, the assessee preferred an additional ground before the ITAT on 13.09.2017. However, the Tribunal while adjudicating the additional ground of the assessee in respect of the assessment order passed by the AO dated 27.12.2016 directed the assessee to file separate appeal before the Tribunal and observed that “*the delay in filing of the appeal shall be considered sympathetically as and when the appeal is filed before the appellate authority*” and the Tribunal refrained

from adjudicating the additional ground arising from the revised order u/s. 154 of the Act passed by the TPO/AO dated 14.07.2017. Therefore, the delay has been caused. We note that the Tribunal had adjudicated the appeal preferred by the assessee against the final assessment order passed u/s. 144C(5) r.w.s. 143(3) of the Act relating to AY 2012-13 on 18.04.2018. While passing the said order, the Tribunal observed that the assessee had filed following additional grounds of appeal and the Tribunal passed the following order:

“3. The assessee filed the following additional grounds :

“1. On the facts of the case and in law, the order of the Transfer Pricing Officer (hereinafter referred to as "TPO") passed u/s 92 CA(3) of the Income-tax Act, 1961, (hereinafter referred to as the 'Act'), subsequently confirmed in part by the Dispute Resolution Panel (hereinafter referred to as "Panel") and consequently incorporated by the Income Tax Officer (hereinafter referred to as "AO") in the assessment order U/S 143(3) r/w s. 144C(13)/IS4 of the Act, is erroneous on facts and bad in law.

2. On the facts of the case and in law the Panel erred in confirming the adjustment of Rs. 3,87,07,126/- to the international transactions of the Appellant with its Associated Enterprises" (hereinafter referred to as 'AEs').

3. On the facts and circumstances of the case, the Learned ("Ld.") TPOIAO and subsequently the Ld. Panel have erred in selection of companies which are functionally not comparable to the assessee.

4, That on the facts and circumstances of the case, the Ld. AO have erred in initiating penalty proceedings u/s. 271(1)(c) of the Act.

5. The Appellant craves leave to add to and/or amend, alter, modify or rescind the grounds hereinabove before or at the time of hearing of the appeal.”

4. The ld. Counsel for the assessee Shri R.N.Dutt, Advocate pleaded for admission of additional grounds. The ld. DR opposed the same on the ground that they arise out of an order passed u/s 154 of the Act.

5. After hearing the rival submissions, we find that the additional grounds arise out of a rectification order passed by the AO u/s 154 of the Income Tax Act, 1961 (Act). Though the assessee pleads that there is a merger, we are of the considered opinion that the proceedings made by the AO u/s 154/92CA(5) r.w.s. 92CA(3)/144C/143(3) of the Act dated 14.07.2017 is a separate proceedings and has to be separately challenged, as the assessee wishes to challenge as to whether the rectification in question carried out by the AO to the final assessment order are mistakes apparent on record or not. Such a challenge to the Sec.154 proceedings can be done only by filing separate appeal against the Sec.154 order.

6. Hence we do not admit these additional grounds of appeal. The assessee is free to file an appeal against the order passed by the AO u/s 154 of the Act. The delay in ITA No.280/Kol/2017 T.K.M.Global Logistics Ltd. A.Y.2012-13 3 filing shall be considered sympathetically as and when the appeal is filed before the Appellate Authority.”

3. For the reasons discussed supra we are of the opinion that delay caused to file the appeal is not deliberate and therefore we condone the delay and proceed to adjudicate the appeal. From a perusal of the grounds of appeal raised before us, we note that the assessee has raised the grounds of appeal assailing the adjustment of Rs.3,87,07,126/- to the international transaction of the assessee with its Associated Enterprises (AEs) as per the direction by the Ld. DRP to include M/s. Gateway Distriparks Ltd. (in short GDL).

4. Brief facts of the case are that the assessee company was established in 1991 as a wholly owned subsidiary of TM International Logistics Limited (in short "TMILL"). The assessee company was engaged in providing freight forwarding services to both AEs and non-AEs. According to assessee, it acts as an interface, which is based on manpower driven activity like coordinating between the end customer and the various category of service providers i.e. companies engaged in warehousing, transportation CHA, container freight handling services etc. whose business are based on their assets like CHA license, vehicles, plant and machinery, port handling equipment and warehouses. According to assessee, it has rendered/received services in the nature of local clearance, inland transportation etc. to/from both AEs and non AEs. Hence, for the purpose of benchmarking, the company has adopted Internal Transactional Net Margin Method (in short "TNMM") wherein the margin earned by the TKM India (assessee) was compared with margins earned by comparable companies. However, the TPO passed direction for certain adjustments and made addition based on which the AO proposed certain adjustments in the income of the assessee which action was challenged before the DRP by the assessee and vide order dated 25.10.2016 the Ld. DRP disposed of the appeal of the assessee by giving certain directions. The Ld. AR is only against the direction given by the Ld. DRP which is seen at page 478 of the paper book wherein the Ld. DRP gave direction as below:

Sl.	Comparable	TPO	Assessee	DRP
8	Gateway Distriparks Ltd.	Rejected by TPO	TPO has contradicted itself by selecting Arshiya as a comparable despite its being engaged in	The panel has directed inclusion of Arshiya & Om Logistics on similar functionality.

			warehousing business, while having himself rejected Gateway Distriparks Ltd. on account of its being engaged in warehousing business and therefore being functionally not comparable to the assessee.	In order to have uniformity and consistency, this entity should also be included.
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Thereafter, the TPO while giving effect to the Ld. DRP's direction did not make any adjustment by not including M/s. GDL as one of the comparable companies. Since the TPO did not include M/s. GDL while giving effect to the order of the DRP which resulted in AO passing the final assessment order and the assessee did not prefer any appeal against the final order of the AO dated 27.12.2016. Thereafter, the TPO issued notice u/s. 154 and revised the TP order by including M/s. GDL and computed the ALP (mean margin) and revised the adjustment under the head sale and purchase of services. Accordingly, the quantum of upward adjustment in respect of sale was computed at Rs.3,19,57,511/- and quantum of downward adjustment in respect of purchases was computed at Rs.67,49,615/- and revised total adjustment at Rs.3,87,07,126/- and AO gave effect to the order of TPO by revising the total income computed at Rs.3,89,29,466/- vide order dated 14.07.2017. Aggrieved, the assessee is before us.

5. At the outset itself, the Ld. AR confined his contention in respect of comparables and according to him, if M/s. GDL is not included in the list of comparables the assessee would be well within the range of arms length.

M/S. GATEWAY DISTRI PARKS LIMITED

6. According to Ld. AR, the DRP erred in directing this company to be included as a comparable. According to Ld. Counsel, the DRP has directed the inclusion of this company because the assessee had stated before it that it was into business of freight forwarding and since the DRP has already ordered the inclusion of M/s. Arshiya Ltd. and Om Logitic Ltd. were freight agents. According to DRP, to have uniformity in the selection of comparables it directed inclusion of M/s. GDL. According to Ld. AR,

the functions of this company are different and asset intensive. The following facts were pointed out by the Ld. AR to contend that M/s. GDL were functionally different and asset intensive:

- i) As per the financials, entire business of the company is from Container Freight Stations (“CFS”), no other segment details are available (Page 862 of paper book 2), (page 3 of handout).
- ii) The company owns significant amount of revenue generating assets i.e. vehicles, Plant & Machinery, which accounts for more than 80% of their total fixed assets vis-a-vis the assessee owning less than 5% of such assets (page 884 of PB 2) (page 60 of handout)
- iii) Out of the total assets of INR 139.86 crores, revenue generating assets such as land of INR 23 cr. building of INR 79 cr. vehicles of INR 16.8 cr. yard equipment of INR 7.9 cr. etc. amount to 97.62% of the total assets, as against 5% revenue generating assets of the Assessee.
- iv) The company has only segment CFS and no data is separately available for freight forwarding services. (page 862 of PB 2) (page 16 of handout)
- v) The TPO had erroneously included Gateway in TP order despite having rejected it on account of functional profile. However, the same was rectified by the TPO in rectified order. (Page 463-464 of PB 1)
- vi) The DRP directed the inclusion of Gateway for maintaining consistency and hence TPO subsequently included it again in the TP order (page 493 of PB 1).

7. It was also pointed out that in assessee’s own case the Ld. DRP for AY 2013-14 had directed the TPO to exclude this company on account of acquisition of Punjab State Warehousing Company in the year 2007 for fifteen years; (1)for having a rail subsidiary Gateway Rail Freight Ltd. (2) for having high asset base and (3) for having FAR different from assessee and drew our attention to page 8 of DRP direction for AY 2013-14. We note that for AY 2013-14, the Ld. DRP vide its order dated 25.08.2017 has directed exclusion of comparable M/s. GDL as under:

Sl.	Comparable	TPO	Assessee	DRP
4	Gateway Distriparks Ltd.	Rejected by TPO	More than 90% of its revenue is from transportation, rental of container freight station, and container handling. Company is operating container freight station/terminal for keeping containers TPO has contradicted itself by selecting Arshiya as a comparable despite its being engaged in warehousing business, while having himself rejected Gateway Distriparks Ltd. on account of its being engaged in warehousing business and therefore being functionally not comparable to the assessee. Fixed assets to turnover is 127.43% as against 7.12% of the assessee.	The company's entire business is container forwarding services. The company has taken over Punjab State Container & Warehousing Corp. Ltd.'s CFS at JNPT for 15 years from Feb. 2007. The company also has a rail subsidiary, Gateway Rail Freight Ltd. which has railway rakes/trailers beside other JVs. Out of total tangible assets of Rs.262.35 cr. the company has building and land (174.27 cr.) vehicles (38.42 cr.) yard equipments, electrical installations and P&M (37.70 cr.). FAR is different.

8. The Ld. AR contended that since the facts and law are similar as that of AY 2012-13 the decision of Ld. DRP itself passed in the relevant AY 2012-13 was erroneous and, therefore, this comparable M/s. GDL should be excluded. Per contra, the Ld. DR could not controvert that the Ld. DRP had rejected this company as a comparable for AY 2013-14 and has clearly held that the FAR is different from that of the assessee company. And the Ld. DR could not point out any difference in fact or law as of this year with AY 2013-14.

9. After hearing both the parties and after perusal of the records, we note that the assessee has taken consistent stand before the TPO as well as the Ld. DRP that M/s. GDL cannot be a comparable since it is functionally different, and asset intensive. However, the Ld. DRP has directed inclusion of the said company this year only on the reason that since it (DRP) had already included M/s. Arshiya Ltd. and M/s. Aqua Logistics Ltd. being freight agents as comparables, for the sake of consistency the Ld. DRP directed inclusion of M/s. GDL. While giving effect to the Ld. DRP's direction,

the TPO in the first round did not consider M/s. GDL as comparable, so the assessee was not aggrieved by the action of TPO and did not prefer the appeal against the direction of the Ld. DRP. However, subsequently when the TPO suo moto revised/rectified its order by including this company M/s. GDL as comparable and directed certain adjustments and pursuant to it, the AO giving effect to the same, the assessee is before us and has pointed out that M/s. GDL is functionally different and asset intensive and, therefore, cannot be a comparable with that of the assessee. We find considerable force in this contention of assessee, however, without getting into the details, as pointed out by the assessee as such, we note that the Ld. DRP itself in assessee's own case for AY 2013-14 has found that this company (M/s. GDL) is functionally different from that of the assessee and cannot be a comparable since the FAR is different (supra) the Ld. DRP's reasons given to exclude M/s. GDL is self explanatory, therefore, we agree with the contention of the assessee that M/s. GDL cannot be included as a comparable for computing the ALP, therefore, we direct M/s. GDL should not be included as a comparable while computing ALP. The appeal of the assessee is allowed.

10. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 18th March, 2020.

Sd/-(A.L. Saini)
Accountant Member

Sd/- (A. T. Varkey)
Judicial Member

Dated: 18th March, 2020

Jd. Sr. PS

Copy of the order forwarded to:

1. Appellant – M/s. TKM Global Logistics Ltd., Diamond Heritage, Room No. 710 & 711, 7th floor, 16, Strand Road, Kolkata-700 001.
2. Respondent – ACIT, Circle-15(1), Kolkata.
3. ACIT (Transfer pricing Officer)-II, Kolkata.
4. DR, Kolkata Benches, Kolkata. (sent through e-mail)

True Copy,

By order,

Assistant Registrar
ITAT, Kolkata Benches