IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'D' BENCH

BEFORE SHRI D.MANMOHAN, VICE PRESIDENT &
SHRI T.R.SOOD, ACCOUNTANT MEMBER

I.T.A.NO.7360/Mum/2010 – A.Y 2006-07

M/s DHL Express (India) Private Limited, 8th Floor, Dheeraj Arma, A.K.Marg, Bandra (East), Mumbai 400 051. **PAN:AABCD 3611 Q**	Vs.	Asst. Commissioner of I.T. 10 (1), Mumbai.
(Appellant)		(Respondent)
Appellant by	:	S/Shri Kanchan Kaushal & Raju Vakharia.
Respondent by	:	Shri Sponthil Kumar.

O R D E R

Per T.R.SOOD, AM:

In this appeal various grounds have been raised but at the time of hearing Ld.counsel of the assessee submitted that the only dispute is regarding adjustment of Rs.14.82 crores on account of "Arm's Length Price" in accordance with the order passed by the Transfer Pricing Officer [for short 'TPO'] under sec.92CA(3).

2. The brief facts of the case are as under:

The assessee company is engaged in the business of couriers and picks up and delivers express shipments mainly as an international courier. The assessee company belongs to DHL Group which is engaged in the business of operating an international air express net work which provide courier services for door-to-door delivery of the documents and light parcels in more than 200 countries around the world. The group has 450 hubs, warehouses and terminals and approximately 230 gateways. DHL World Wide B.V. Netherlands (for short DHL) holds 100% of the total equity of the assessee company. The assessee company had entered into an agreement with DHL by which DHL had granted the assessee company access to the DHL net work for transportation and delivery of consignments in consideration of which the assessee company was required to pay a net work fees to DHL as per the terms of the agreement. The assessee company also rendered similar services to DHL as forwarders and couriers in India and was receiving fees accordingly. Since assessee company had certain international transactions by way of payment of net work fees, reimbursement expenses, purchase of marketing material etc. The same was referred to the Transfer Pricing Officer (for short TPO) to determine the Arm's Length Price. Initially, the assessee company adopted two comparables whose average arithmetic mean was 3.91% against assessee's margin of 7.70%. Subsequently a list of six comparables by updating the comparable search was submitted. The list of comparables furnished is as under:

i) DTDC Courier and Cargo Ltd: Total turnover ₹.106.42 Crores. It is into air courier services. Hence accepted as comparable.
ii) First Flight Couriers Ltd: Total turnover is ₹.241.75 Crores. It is also into air courier services. Hence accepted.
iii) On-dot Couriers & Cargo Ltd. Total turnover is ₹.27.29 crores which is hardly 5% of this turnover of the assessee. Hence cannot be treated as comparables. Hence rejected.
iv) Overtime Expenses Ltd. Total turnover is ₹.94.99 crores. The turnover is not even 20% of the turnover of the assessee. Hence rejected.

v) Skypak Services Specialists Ltd. Turnover is ₹.18.48 crores which below 5% of the assessee. Hence rejected.

vi) Transport Corporation India Ltd. It is functionally different. This company is into surface/road transport of goods. Hence rejected.

Initially TPO wanted to include M/s. Blue Dart Express Ltd. also as comparables, but after considering the objection of the assessee the same was dropped. Out of the other six comparables four were dropped because in the case of On-dot Couriers & Cargo Ltd. and Skypak Services Specialists Ltd. the turn over was Rs.27.19 crores and Rs.18.48 crores which was below 5% of assessee's turnover. In the case of Overnite Express Ltd. also the turnover was only Rs.94.99 crores which was less than 20% and, therefore, same was also rejected. In the case of Transport Corporation 0f India it was observed that it was functionally a different company and the main activity of this company was of surface/road transport of goods. Accordingly, only two comparables i.e. DTDC Courier & Cargo Ltd. and First Flight Couriers Ltd. were considered.

3. The assessee company had also objected to the inclusion of miscellaneous income in the operating profits in the case of DTDC Courtiers And Cargo Ltd. [for short DTDC] and First Flight Couriers Ltd. However, on examining the details, the TPO noted that in the case of DTDC non operating income was only 0.18 crores on account of interest and prior period and extra ordinary income of Rs.0.20 crores and, accordingly, he added a sum of Rs.1.84 crores of the other income in to the operating profits. In the case of First Flight Couriers

Ltd. he observed that only non operating income and interest was 0.39 crores and accordingly he added a sum of Rs.0.51 crores to the operating profits. Thus, the TPO considered only two comparables i.e. DTDC and First Flight Couriers Ltd. and finally worked out the adjustment as under:

Total turnover of the assessee during the year	₹.503.41 crores
Desired total costs based an arithmetic mean of 7.34% determined above	₹.466.46 crores
Less: Actual costs claimed by assessee, other than net work fee (481.28 – 269.52)	₹.211.76 crores
Desired cost of 'net work fee' paid to AE	₹.254.70 crores
Actual 'network' fee paid to AE during the year	₹.269.52 crores
Express 'network fee' paid to the AE during the year	₹. 14.82 crores

Applying safe habour limits:

Desired cost of 'network fee' to AE based on arithmetic mean	₹.254.70 crores

Safe harbour limits + 5% = ₹.267.44 crores
- 5% = ₹.241.97 crores

Actual total expenses of "network charges" claimed by the assessee:	₹.269.72 crores

Since, the assessee's transaction is beyond the safe turnover limits of + or 5% the ALP of the international transaction of 'network fee' paid to AEs is adopted at ₹.254.70 Crores, as against ₹.269.52 Crores claimed by the assessee, requiring a downward adjustment of ₹.14.82 Crores, as below:

ALP of 'network fee' to AE, as shown by assessee	₹.269.52 Crores
ALP of the transaction as determined above	₹.254.70 Crores
Adjustment (downward) to be made)	**₹. 14.82 Crores.**

4. The AO passed a draft assessment order and added the sum of Rs.14.82 crores to the income of the assessee on account of transfer pricing adjustment. The matter was taken up before the Ld. Dispute

Resolution Panel. Before the DRP similar submissions were made and the Ld. DRP decided the issue vide para-1 which is as under:

> "**Objection No.1:** This objection relates to transfer pricing adjustment amounting to ₹.14.82 crore. The nature of activities of the assessee are courier services within the country as well as to countries outside. The assessee paid network fees to the Associate Enterprise – M/s DHL Operations BV on account of the services provided to the assessee relating to air courier services outside India. The assessee conducted tis Tainwala Polycontainers Ltd. research and worked out its margin at 4.40% as against the average margin of 3 comparable companies selected by the assessee at 3.4k9% and no adjustment was made by the assessee. the TPO asked the assessee to conduct a fresh search, during which the assessee gave the list of 7 companies, out of which the TPO rejected 5 companies and selected only 2 companies which were also selected by the assessee and the TPO worked out the margin at 7.35% as against the marging of 4.40$ and made an adjustment of ₹.14.82 crores. The assessee has objected to the rejection of other companies like Patel On-Board Couriers Ltd. for which the TPO had given the reasons – "financial results are not available", which appears to be correct approach and the DRP agrees with the finding recorded by the TPO. The TPO rejected 3 other companies – Overnite Express Ltd., On-dot Couriers & Cargo Ltd & Skypak Services Specialists Ltd. on the ground that the turnover of these companies is less than 20% of the assessee's turnover. The assessee has objected to AO's rejection on the grounds that the AO should not have applied the filter of 20%. The DRP has perused the turnover of these 3 companies, which is 27.79 crores for On-dot Couriers & Cargo Ltd, 18.84 crore for Skypak Services Specialists Ltd. These turnovers are not even 5% of the assessee's turnover. The turnover of Overnite Express Ltd. is ₹.94 crores which is 18.8% of the assessee's turnover. Thus, the turnover of these companies is substantially lower and obviously due to lower turnover, their profitability would be lower and not properly comparable. The AO has compared the turnover of the companies which has reasonably high turnover and become more comparable, hence the DRP does not find any irregularity in applying the filter of 20% for rejecting 3 companies and the assessee's objection on this account is overruled. The assessee has objected to computation of profit margin by applying TNNM method on the ground that misc. income has been included in the turnover. The DRP called for the details of misc. income which included interest also. The assessee did not provide the nature of balance misc. income. Hence, the DRP is of the view that the AO should re-work the margin of profit by excluding the interest income included in the misc. income from the gross total turnover as well as the interest expenditure from the expenses side. The AO shall work out the margins afresh and consequential adjustment.

> The assessee's objection for rejecting Transport Corporation of India as comparable is also devoid of any merits, because when proper comparable companies are available, there is no requirement for making comparison with segmental results which does not give a true picture.
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> The assessee's next objection relates to not applying plus minus 5% factor for finding out the adjustment, whether it is covered within the plus minus 5% or not. Perusal of the draft assessment shows that the AO had applied the plus minus 5% factor for finding out whether the assessee falls within the permitted limited. Hence, the assessee's objection is rejected. However, in view of re-computation of net margin as directed above, the AO shall re-work out the plus minus limit and apply the same accordingly."

5. Before us, Ld.counsel of the assessee made three fold submissions. His first submission was that comparable in the case of On-Dot Couriers & Cargo Ltd. and Overnite Express Ltd. and Skypak Services Specialists Ltd. has been wrongly rejected by applying 20% filter. He emphasized that the comparable in the case of On-Dot Couriers & Cargo Ltd. and Over Night Express Ltd. were accepted as comparables in the earlier year i.e. A.Y 2005-06 and, therefore, the same should not have been rejected. His second objection is that comparable in the case of Transport Corporation of India could not have been rejected as segmental result which should not have rejected merely because direct comparables were available. It was argued that Transport Corporation of India Ltd. (TCI) was also engaged in the business of couriers and segmental data of courier business was easily available. He submitted that as per OECD guidelines if segmental data is available and if the same can provide better comparables, then same should be considered. His last submission on which he placed lot of

emphasis is that while making comparisons only operating profits should be considered and other income including miscellaneous receipts etc. could not be considered for the purpose of comparison. The TPO has wrongly rejected this argument by including some portion of the other receipts. Then he referred to various pages in the paper book and pointed out that data regarding other income in the case of DTDC and First Flight Couriers Ltd. was available. He accepted that in the case of DTDC e-mail facility, bad debt, discount receipts and handling charges could be considered as operating profits, but in any case items like interest income, rent receipts, dividend could be taken as operating income. Similarly, since details for other expenses amounting to Rs.88,86,724/- in the case of DTDC and Rs.47,24,722/- in the case of First Flight Couriers Ltd. are not available, therefore same should not have been included in the operating receipts. On a query by the Bench whether details of other receipts are available, he submitted that so far assessee has not been able to obtain such details and he would have no objection if the matter is remitted back to the file of the TPO/DRp and assessee would try to furnish these details.

6. On the other hand, Ld.DR submitted that there is no force in the submissions of the Ld.counsel of the assessee because the turnover in the case of On-Dot Couriers & Cargo Ltd. was Rs.27.29 crores and the turnover of Skypak Services Specialists Ltd. was Rs.18.48 crores which was below 5% of the turnover of the assessee and, therefore, the filtering has been applied at 5% which is totally justified. Only in the

case of Over Time Express Ltd. the turnover was of Rs.94.99 crores which was less than 20%. Even 20% filtering is justified. It is a known fact that only comparables can be compared because operations of small businesses are totally different from large businesses and when turnover of a comparable company is only less than 20%, then same cannot be called as a comparable. If the comparable in the case of On-Dot Couriers & Cargo Ltd. and Overnite Express Ltd. are available, then the segmental result of TCI has been correctly rejected. It is a known fact that segmental results may not be always be correct and precise because it is almost impossible to distribute certain common expenses. As far as the last submission regarding exclusion of other income is concerned, he submitted that the Ld.counsel of the assessee himself agreed to treat four items of income, namely, bad debt recovered, discount receipts, link charges and e-mail facility charges as operating income. Since the nature of other expenses is not clear, therefore, same has also to be treated as operating income. He also referred to page 233 of the paper book and pointed out that in the case of DTDC even small item like dividend receipts of Rs.11,839/- has been segregated separately, then obviously the largest item being Rs.88,82,624/- must be relating to the operational receipts because all other items like interest income, rent income, penalty collected, insurance charges etc., have already been listed separately.

7. We have considered the rival submissions carefully. We are unable to agree with the first submission of the assessee because in

the case of On-Dot Couriers & Cargo Ltd. and Skypak Services Specialists Ltd. the turnover is less than 5% and, therefore, these two comparables are totally non comparables. Even in the case of Over Night Express Ltd. the turnover is less than 20%. It is a universal fact that there are lot of differences between the large businesses and small businesses operating in the same field. In the case of small business economies of scale are not available and, therefore, generally less profitable. Therefore, merely because these two companies were considered as comparables in A.Y 2005-06 it is not necessary that this year also they should be considered particularly when we do not know the details as to why they were considered as comparables in the previous year. In any case, there is no res judicata in income tax proceedings. We further do not find any force in the submission that segmented result in the case of TCI should have been considered. Though segmented results are now required to be published in India, but still it is a common experience that in many such results certain expenditures, particularly expenditure on account of interest and head office, are generally not allocated and shown in the published results as separate expenditure. Therefore, the TPO was correct that when direct comparables were available, then there was no need to consider the segmented results of TCI. As far as the last submissions is concerned, we agree principally with the submissions of the Ld.counsel of the assessee that it is only the operating profit which can be considered. The details of other income in the case of DTDC and First

Flight Couriers Ltd. have been summarized at page 233 of the paper book which read as under:

Particulars	DTDC Courier & Cargo Ltd.	First Flight Courier Ltd	whether Non-operating in nature (Yes/No)
Other Income			
Interest income	18,18,341	39,43,360	Yes
Rent received	5,87,508	-	Yes
Dividend received	11,839	-	Yes
bad Debts recovered	7,01,046	-	No
Penalty collected	15,65,480	-	Yes
E-mail facility charges collection	59,915	-	No
Discount Received	43,42,262	-	No
Handling Charges	79,23,451		No
Rent Deposit written back	9,24,358		Yes
Other receipts/Miscellaneous income	-	47,24,772	Yes
Insurance charges	-	2,69,611	Yes
Foreign exchange Fluctuation	-	27,608	
Profit on sale of assets	-	32,435	Yes
			Yes
TOTAL	2,68,16,826	89,97,786	

From the above chart, it is clear that the assessee has itself accepted that the bad debts recovered, email facility charges, discount receipts and handling charges would be part of the operating income. There is no dispute on that. We agree with the submissions of the Ld.counsel of the assessee that interest income, rent receipts, dividend receipts, penalty collected, rent deposits returned back, foreign exchange fluctuations and profit on sale of assets do not form part of the operational income because these items have nothing to do with the main operations of the assessee. As far as insurance charges are concerned, it would depend on the nature of insurance charges, for example, if the insurance charges were on account of loss of some parcel or courier against which courier has made a payment of compensation, then such charges would constitute operational income. As far as the other receipts are concerned, which amounts to Rs.88,82,624/- in the case of DTDC and Rs.47,24,772/- in the case of First Flight Couriers Ltd., these are large amounts, but in the absence of details it is difficult to comment on the nature of these receipts though Ld.DR has made a good point that when small items have been segregated, chances are that these receipts may be related to operational income. Since the details are not available and the Ld.counsel of the assessee has agreed that he will try to find out further details and further perhaps both these comparable companies are being assessed in Mumbai even the department can find out the details. Therefore, in the interests of justice, we set aside the order of the ld. DRP and remit the matter to the file of the TPO for re-examination of the issue in the light of our above observations.

8. In the result, appeal is allowed for statistical purposes.

Order pronounced in the open Court on this day of 27/4/2011.

sd/-	sd/-
(D.MANMOHAN)	**(T.R.SOOD)**
Vice President	**Accountant Member**

Mumbai: 27/4/2011.
P/-*