

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH '1-2', NEW DELHI**

Before Sh. N. K. Saini, AM and Sh. Kuldip Singh, JM

ITA No. 5875/Del/2017 : Asstt. Year : 2013-14

WM India Technical and Consulting Services Pvt. Ltd., 1 st Floor, Orchid Center, Golf Course Road, Sector-53, Gurgaon, Haryana-122002	Vs	Asstt. Commissioner of Income Tax, Circle-27(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACW7112N		

SA No. 533/Del/2017 : Asstt. Year : 2013-14

WM India Technical and Consulting Services Pvt. Ltd., 1 st Floor, Orchid Center, Golf Course Road, Sector-53, Gurgaon, Haryana-122002	Vs	Asstt. Commissioner of Income Tax, Circle-27(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AAACW7112N		

**Assessee by : Sh. Kanchan Kaushal, Adv.
Revenue by : Sh. H. K. Chaudhary, Sr. DR**

Date of Hearing : 03.10.2017	Date of Pronouncement : 13.10.2017
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ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 25.07.2017 passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter referred to as the Act). The assessee also moved Stay Application for the stay of outstanding demand of Rs.3,24,15,780/-.

2. Following grounds have been raised in this appeal:

“1. That the Ld. Assessing Officer ("AO") and the Hon'ble Dispute Resolution Panel ("Hon'ble DRP") erred both on facts and in law in confirming the addition of INR 7,79,48,576 to the income of the Appellant by holding that its international transaction relating to reimbursement of expenses (hereinafter referred to as "expat support services") to its Associated Enterprise ("AE") does not satisfy the arm's length principle envisaged under the Income tax Act, 1961. While determining the Arm's Length Price ("ALP") of the said transaction to be NIL, the Learned Transfer Pricing Officer's ("Ld. TPO's") erred in:

2.1 questioning the commercial expediency / business wisdom of the Appellant for undertaking the said transaction;

2.2 disregarding sound TP principles and judicial pronouncements in India in undertaking the said adjustment;

2.3 disregarding the fact that the transaction pertains to reimbursement of expenses and not provision of services by the AE;

2.4 holding that the expat support services are incidental and duplicative in nature and have not resulted in any economic and commercial benefit to the Appellant; and

2.5 disregarding the documentary evidence submitted by the Appellant substantiating the functions performed by the expats and the benefits received by the business of the Appellant.

2. That the Ld. AO / Ld. TPO and Hon'ble DRP erred in holding that the services rendered by the expats provides

incidental benefit to the Appellant and thus are in the nature of shareholder services;

3. That the Ld. AO and Hon'ble DRP erred, on facts and circumstances of the case and in law, in agreeing with the Ld. TPO action of re-determining the ALP of transaction relating to expat support services, assuming that no benefit has been conferred upon the Appellant from such payment. In doing so,

3.1 erred in rejecting the transfer pricing method and analysis of the Appellant.]

3.2 erred in determining the ALP of the international transaction without following the manner of applying the CUP method prescribed under Rule 10B(1)(a) of the Income Tax Rules, 1962 (the 'Rules')

4. That on facts and law, the Ld. AO and the Hon'ble DRP failed to appreciate that the independent third parties operating in similar industry had availed similar expat support services.

5. Without prejudice to the above contentions, the Ld. AO and the Hon'ble DRP has erred on facts and in law by ignoring the fact that income earned by the expats has already been taxed in India and subsequent disbursal of post-tax salary does not lead to any tax base erosion in India;

6. That on facts and law, the Ld. AO/Ld. TPO and the Hon'ble DRP failed to appreciate the business model of the Appellant and ignored the fact that entire cost of expats which was reimbursed to the AE was included in the cost base and in turn charged to the domestic entities at cost plus 10 percent mark-up basis.

7. That the Hon'ble DRP erred in not considering the judicial precedents on the matter and the order issued by the Hon'ble Delhi ITAT for AY 2009-10 in the Appellant's own case.

Corporate Tax grounds of appeal

8. That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP has erred in making disallowance under Section 14A of the Act read with Rule 8D of the Rules.

8.1 The Ld. AO and the Hon'ble DRP erred on facts and in law in not appreciating that the Appellant has not incurred any incremental expense, whether directly or indirectly, towards earning the exempt income;

8.2 That the Hon'ble DRP/ Ld. AO erred on facts and in law in framing a disallowance in accordance with Rule 8D of the Rules without recording a satisfaction in relation thereto as is mandatorily required by Section 14A of the Act read with Rule 8D of the Rules; and

8.3 That the Ld. AO has grossly erred on the facts and in law by computing average investment for the purpose of Rule 8D(2)(iii) by including investments which do not yield any exempt income in nature of dividend, being growth oriented debt mutual funds.

9. The Assessment Order passed in pursuance of the directions issued by the Hon'ble DRP is a vitiated order as the Hon'ble DRP erred both on facts and in law in confirming the additions made by the Ld. AO to the Appellant's income by issuing an order without appreciation of facts and law;

10. That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in wrongly calculating interest to be charged under 234D of the Act.

11. That the Ld. AO and the Hon'ble DRP has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.

That the above grounds of appeal are independent and without prejudice to each other.

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”

3. Vide Ground Nos. 1 to 7, the grievance of the assessee relates to the addition of Rs.7,79,48,576/- made by the AO by holding that the international transaction entered into by the assessee with its AE relating to reimbursement of expenses did not satisfy the arm's length principle envisaged under the Income Tax Act, 1961.

4. The facts related to this issue in brief are that the assessee was incorporated on April 24, 2007 as an indirectly wholly owned subsidiary of Wal-Mart Stores Inc., USA. The assessee was engaged in providing several types of consultancy services and assistance to domestic Indian entities, namely, Wal-Mart India Pvt. Ltd. (formerly known as Bharti Wal-Mart Pvt. Ltd.) and an unrelated entity, Bharti Retail Ltd. The services rendered by the assessee were about development, operation & management of wholesale business, retail business and related

operations. The entire operating revenue earned by the assessee during the year under consideration was derived only from those two entities.

5. The assessee e-filed its return of income on 29.11.2013 declaring total income at Rs.12,89,76,160/-. Later on, the case was selected for scrutiny. The AO during the course of assessment proceedings noticed that the assessee had entered into international transaction with its associated enterprises during the year. He, therefore, made a reference u/s 92CE of the Act to the Transfer Pricing Officer (TPO) for determining the arm's length price of international transactions entered into by the assessee with its AE. The TPO passed the order u/s 92CA(3) of the Act on 18.10.2016 wherein a total TP adjustment of Rs.7,79,48,576/- had been determined. The AO accordingly, passed the draft assessment order on 08.12.2016 and made the addition of Rs.7,79,48,576/- to the returned income on account of arm's length price.

6. Against the said draft assessment order, the assessee filed the objections before the Id. DRP and submitted that the reimbursements were made on account of the payments to set off the salary of the expatriate employees and those reimbursements in relation to expatriate salary formed part of its own cost which the assessee was compensated at cost plus 10% by domestic entities for rendering the services. The Id. DRP however, did not find merit in the submission of the assessee by

observing in paras iv to vi at page nos. 10 & 11 of the order dated 02.06.2017 which read as under:

“iv. Plain perusal of the same indicates clearly that such services are routine and fundamentally duplicate in nature. Besides, the TPO has also reached the conclusion that the payments for such deputation of the employees was duly paid for as quoted above. The panel is not convinced that such services were uniquely beneficial to the assessee. Ld AR also contended about the services being received from its AE by using the seconded employees as not the shareholder services. The assessee has not been able to point out what was the specific or exclusive benefit received because of services rendered by such seconded employees. It is also clear that the assessee did not seek such services from any unrelated party. There is nothing on record to show that the AE has provided similar bouquet of services to any unrelated party. So, it may result in a reasonable inference that such services are carried out only to protect the corporate interests of the AE in the business of the assessee. Further, when the said services are covered per FTS paid to the AE and well documented in the contract. The submission pleading that there were some unique benefits to the assessee are not backed by any credible evidence to support the contentions.

v. The Ld AR took the plea that taxes were paid on such salary payments to the expats. The Ld AR is missing the point here that chapter X of the Income Tax Act 1961, is fundamentally anti evasion in nature and it must be seen if an independent third party would have made payments for such services/ deployment. The test is not met in the instant matter as the job description per the table above shows. The taxes paid dictum also does not help as the taxes were paid because individual liability and it has no correlation with the

tax obligations of the assessee as a body corporate or within the purview of chapter X of the Act which examines the income/profit shift to the detriment of the source country.

vi. Basis the discussions supra, the panel is not convinced of the contents and facts of the objections. The objections are accordingly dismissed as untenable.”

On the basis of the aforesaid directions of the Id. DRP, the AO made the impugned addition.

7. Now the assessee is in appeal. The Id. Counsel for the assessee at the very outset stated that an identical issue having similar facts has already been adjudicated by this Bench of the Tribunal in ITA No. 1090/Del/2014 for the assessment year 2009-10 vide order dated 12.08.2016 in assessee's own case (copy of the said order was furnished which is placed on record). It was further submitted that a similar issue having identical facts has also been decided by the ITAT Delhi Bench -I, New Delhi in ITA No. 1427/Del/2014 for the assessment year 2009-10 in the case of XL India Business Services Pvt. Ltd. Vs ITO, Ward-18(4), New Delhi vide order dated 02.12.2015 (copy of the said order was furnished which is placed on record).

8. In his rival submissions the Id. DR strongly supported the order passed by the AO and reiterated the observations made in the said order.

9. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that an identical issue having similar facts was a subject matter of the assessee's appeal for the assessment year 2009-10 in ITA No. 1090/Del/2014 wherein vide order dated 12.08.2016, the issue has been decided in favour of the assessee and the relevant observations are made in paras 9.4 to 13 which are reproduced verbatim as under:

“9.4 On the issue of need for expatriates, the Learned AR submitted that the organized retail/cash and carry trade is a naïve concept in India. In 1997, India allowed foreign direct investment (FDI) in cash and carry wholesale, under the Government Approved Route, which was later on relaxed in 2006, when the automatic permission was granted. Further in 2006, FDI up to 51% in single brand product trading under government approved route was also allowed. However, until 2012, Indian Government denied foreign direct investment (FDI) in multibrand retail, forbidding foreign group from any ownership in super markets, convenience stores or any retail outlets in 2012, FDI up to 51% allowed in multibrand retail trading and up to 100% in single branch product trading was allowed under the government approved route subject to certain conditions. He submitted that it should be appreciated that organized retail is a new phenomena in India. The share of organized retail in developed countries is much higher than developing country like India. In 2006, the share of organized retail in the US was around 85%, while in India, it was 6%. The Learned AR drew our attention to page No. 4 of the written synopsis, wherein some of the key differences between the organized and unorganized retailing are provided in a tabular form.

9.5 *The Learned AR submitted that one of the key challenges faced by the Indian retail industry is the skilled and experience manpower. Being a new phenomena, there are extremely few individuals available within India holding necessary specialization, skills, knowledge and experience in this field. In the unorganized sector, a man power is not equipped with even on basic level of retail specific and customers service skills which adds to their incompetency vis-à-vis the organized sector. He submitted further that the complex Indian market is difficult to understand due to the lack of proper market research. Moreover, the Indian market has huge regional differences which make it important for the manager to understand the consumers.*

9.6 *In the light of the fact that the organized retailing is a new phenomena in India with immense opportunities and challenges, and there was lack of professional expertise to manage the peculiarity of cash and carry model and retail industry, the assessee hired employees of its A.E. who had significant expertise in commencement and implementation of operations in retail and cash and carry stores. The technical services receives from the expatriates are the strategic experience and guidance which the employees of Walmart Group have gained from years of operations in retail business. Therefore, owing to paucity of talent in terms of expertise, the assessee had taken a well informed business decision to hire/employees of these expatriates who hold the necessary qualifications, skill and desired level of experience.*

9.7 *The Learned AR submitted further that the assessee wishes to highlight that the employees transferred from WMSI performed management functions in the Indian A.E. for opening up of cash and carry and retail stores in India. These are more in nature of providing a strategy for*

operating a successful retail and cash and carry wholesale business in India. The Learned AR also referred page No. 4 of its written synopsis, wherein major functions performed by such employees have been provided. He submitted that the guidance, advice and support obtained from the experience and knowledgeable team of expatriates have held in the management of operational and corporate activities reducing the level of management required locally and provided a higher degree of co-ordination of the activities among the assessee and its affiliates. He submitted that the expatriates, who have been employed with the A.E. have tremendous experience in the retail industry and have brought in the retailing concepts which could not have been brought by the persons hired locally. Some of the concepts used by the A.E. and have been brought by the expatriates have been provided in Annexure-1 to the submissions. The Learned AR submitted that the alternative for these services may not have been available locally and only option would have been to invest locally till the time the person gains such experience and use the services to the A.Es. remotely. However, the costs and expertise required would have been far too prohibitive for the scale of operation in India, also, the assessee did not have appropriate competency with sufficient experience or knowledge to combat challenges, constraints and did not have adequate senior/technical resources to supervise the work performed in house.

9.8 Further contention of the Ld. AR remained that during the course of transfer pricing assessment proceedings, the Ld. TPO made an adjustment in respect of the subject international transaction of reimbursement of salary cost of the expats primarily based on the contention that the assessee had not derived any benefit from their services and hence such services are in the nature of "shareholder activities". The Ld. TPO proposed an addition of INR 130, 720, 653 by

determining the ALP of transaction relating to expat support services to be NIL. Ld. TPO has not properly understood the business of the assessee and approach of the Ld. TPO is based on surmises and conjecture. He has not been able to appreciate correlation between input and output services i.e. the link between expat support services available by the assessee (input) and consultancy services rendered by the assessee (output). The Ld. AR then prior to show the flaw in the approach adopted by the Ld. TPO i.e. regarding correct TP methodology of the assessee; commercial/business wisdom lying with assessee; difference in the services; expat support services not a shareholder service and the Ld. TPO also failed to appreciate that the income earned by the expats has already been taxed in India and it does not lead to any tax based erosion in India. In such a situation there would have no change in the circumstances i.e. the assessee would have earned cost plus 10% on their services and income earned by the local employees would have been subject to tax in India. This situation is also comparable to the current situation. Hence, the amount of salary reimbursed by the assessee to its AE should be considered to be at arm's length.

9.9 From the above discussion, we, thus, come to the conclusion that there is no scope of any debate that it is always the discretion of an assessee as to how and in which manner he is to run his business and no interference therein is required by the Revenue. In the present case, it was wisdom of the assessee to hire employees of its AE having significant expertise in commencement and implementation of operation in retail and cash and credit stores. There was no reason to doubt on the submission/explanation of the assessee furnished in this regard that the technical services received from the expatriates were the strategic experience and guidance, which they as employees of wal-mart group

had gained from years of operation in retail business. Thus, owing to paucity of talent in terms of expertise, the assessee had taken a well informed business decision to hire employees of this expertise who hold the necessary qualification, skills and desired level of experience. They performed management functions in the India AE for opening of cash and carry and retail stores in India.

10. We, thus, find that the major functions performed by such employees were for providing leadership and support for the operations being carried out by the customer, coordinating the training for the required operation functions insuring that the desired standards for operations are implemented in the companies, development and implementation of the operations manual, providing guidance to the management of the company in relation to the retail industries that will lead to success in retail operations in India, providing assistance in sales planning pricing and merchandise assortment, monitoring competition and acting quickly and collaboratively to meet the involving merchandising needs of the customer. The claim of the assessee that employees had basically performed these major functions have not been rebutted by the Revenue. The main objection of the Ld. TPO was that the services received by the assessee from expat employees were nothing but a duplication of services for the reason that the similar services have been provided by the parent entity for which technical service fee amounting to Rs.8,04,97,423/- was paid and further that the services rendered by the expats provide incidental benefit and are thus in the nature of shareholder services. The other objection was that there was no business/commercial need for availing such services. We have already discussed in the preceding paragraph that it is always prerogative of the assessee as to how run its business beneficially and what is best to be done in the interest of its

business. The authorities below were not justified to interfere in the business discretion of the assessee so far as services obtained from the hired employees of its AE having expertise in the field of implementation of operation in retail and cash and carry stores. The AR however in its written synopsis has narrated the reasons with justification for hiring such employees and as to how it was beneficial to the business of the assessee. The Ld. AR has also explained that if the assessee had not availed these services for expats under consideration then it could have led to several situations affecting the interest of business of the assessee.

11. We also find substance in the submission of the assessee meeting out the objection of the Ld. TPO that services were duplicative in nature. The contention of the Ld.AR in this regard remained that the assessee had earned income from its customer at cost plus 10% markup basis for such services and had the services being duplicative, then absolutely independent customer of WMIT like BRL would not have obliged to pay for them. The fact that the customers had paid for them and that too along with markup clearly suggest services were not duplicative but were valuable in nature. We also find substance in the contention of the Ld.AR that had the assessee not availed the said services from its expats then it would have hired other similarly experienced personal to render similar services to its customer. Hence, the amount paid as salary reimbursement of the expats cannot be considered to be either shareholder services or duplicative by any stretch of imagination, rather it is pure necessity of operating a business successfully. The services provided by these employees are directly linked to the business of wall mart group in India only i.e. the cash and credit, and retail business. We concur with the submission of the assessee that as per OECD guidelines para no. 7.9 and 7.13 and the facts given of the present case, the expat support

service does not constitute a shareholder service. Intra group service is construed as a shareholder service only when the recipient does not require the service. The services utilized were for assessee business purpose only and the assessee was the sole and absolute beneficiary of same.

12. *Besides above it is also worth noting that expats have offered this income to tax in India. Thus, the income earned by the expats does not lead to any tax based erosion in India. Post tax, whether the salary is paid to these employees directly in India by the assessee or the same is paid to them in their home country US (for administrative convenience routed through its AE which is compensated only to the extent of actual cost incurred), the Indian Revenue authorities are not bound to lose their share of taxes. Accordingly, we find substance in the submission of the Ld. AR that there is no loss in the Indian Revenue and the amount reimbursed by the assessee to its AE in relation to the salary paid to the expat employees/expats should not be disputed. Under these facts, if the proposed adjustment is made, it would lead to double taxation i.e. once in the hands of the expat employees earning the salary and additionally in the hands of the assessee bearing the cost of such salary merely owing to the fact that instead of discharging the salary payments directly, it has used its AE as a disbursal agent.*

13. *Our above findings are based upon the submission of the Ld. AR to which we are prima facie convinced specially in view of a settled position of law that how an assessee conducts his business is entirely his prerogative and it is not for the Revenue authorities to decide what is necessary for an assessee and what is not and that when evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not, the real question which is*

to be determining in such cases is, as to whether price of the services in question is what an independent enterprise would have paid for the same. It is not necessary for the Assessing Officer to see that any legitimate expenditure incurred by an assessee was also incurred out of necessity. The decision relied upon by the Ld. AR also support these views. Since the authorities below have not considered these established questions of law in right prospective while deciding the issue and have made and sustain an addition by determining the ALP of transaction relating to expat support services to be NIL, we set aside the matter to the file of the Ld. TPO to decide the issue afresh analyzing the submission of the assessee discussed above after affording adequate opportunity of being heard to the assessee and if he finds that the transaction is taxed neutral then it will not lead to erosion of tax based in India. We are also of the view that unless the TPO can identify a comparable uncontrolled case in which such services howsoever token or irrelevant services as he may consider these services to be are rendered and find out consideration for the same, the CUP method cannot have any application. The ground nos. 1 to 4 are thus, allowed for statistical purposes.”

10. So respectfully following the aforesaid referred to order, this issue is set aside to the file of the AO/TPO to be adjudicated as per the directions given vide aforesaid referred to order dated 12.08.2016 in assessee's own case for the assessment year 2009-10.

11. The next issue vide Ground Nos. 8 & 9 relates to the disallowance u/s 14A of the Act amounting to Rs.36,002/-.

12. The Id. Counsel for the assessee did not press these grounds by considering the smallness of the amount. Accordingly, no findings are given and these grounds are dismissed as not pressed.

13. As regards to the Stay Application i.e. SA No. 533/Del/2017, we are of the view that it becomes infructuous, since we have disposed off the appeal of the assessee in the former part of this order.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes and Stay Application is dismissed as infructuous.

(Order Pronounced in the Court on 13/10/2017)

Sd/-
(Kuldip Singh)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 13/10/2017

Subodh

Copy forwarded to:

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4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR