

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

IT(TP)A No.2525/Bang/2017
Assessment year : 2013-14

M/s. Wipro GE Healthcare Pvt. Ltd., Plot No.3, 3A & 4, Kadugodi Industrial Area, Bangalore – 560 067. PAN: AAACW 1685J	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Pradeep, CA
Respondent by	:	Shri Sanjay Kumar, CIT

Date of hearing	:	11.01.2018
Date of Pronouncement	:	23.03.2018

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the AO passed consequent to the directions of the DRP *inter alia* on the following grounds:-

“1. That the order of the Assessing Officer (AO), Transfer Pricing Officer (TPO), the directions of the Dispute Resolution Panel (DRP) and the order of the transfer pricing officer in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.

2. That the total income computed and the total tax computed is hereby disputed.

3. That the order of the Transfer Pricing Officer is without jurisdiction, against the law, facts, circumstances, natural justice, equity and all other known principles of law.
4. That the findings, reasons, conclusions and directions of Dispute Resolution Panel (DRP) u/s 144C are unsustainable in law requires to be set aside. Consequently the additions based on such directions also requires to be set aside.
5. The DRP erred in not considering the relevant materials, evidences, data and relevant law. The directions issued are without application of mind.
6. That the Order/Directions of the DRP violates the principles of judicial discipline as the binding nature of the orders of the higher appellate authorities have been totally ignored.
7. That the order of the DRP and the directions given therein are bad in law and not as per law requires to be cancelled.
8. That the AO/TPO/DRP erred in not providing adequate and sufficient opportunity as required under law thus violating the principle of natural justice, hence on this ground alone the orders requires to be annulled.

ISSUE OF TRANSFER PRICING

9. That the order of the Transfer Pricing Officer is without jurisdiction, against the law, facts, circumstances, natural justice, equity and all other known principles of law.
10. The learned DRP erred in overlooking the fact that the entire objections filed by the appellant have not been considered by the TPO before passing order u/s 92CA.
11. The appellant denies the tax liability on the surplus arising on the computation of arms length price for the impugned assessment year.
12. The Learned AO erred in bringing to tax a sum of Rs. 467,84,14,615/- as outlined below in the table under section 92CA of the Act as per the communication/order of the Transfer Pricing Officer and the directions of DRP.

Sl.No	Description	Amount
1	Arm's Length Price difference in the royalty paid	Rs. 10,82,48,490/-
2	Arm's Length Price difference in distribution segment	Rs. 419,24,94,988/-
3	Arm's Length Price difference in the Software services segment	Rs. 27,69,08,318/-
4	Arm's Length Price difference in the Support Services	Rs. 10,07,62,819/-
	Total adjustment U/S 92CA	Rs.467,84,14,615/-

13.i) The Learned AO / TPO / DRP erred in making adjustment towards the royalty for use of technology amounting Rs.10,82,48,490/- without determining the comparable transaction in the public domain as prescribed under the Act and Rules.

ii) The AO/TPO/DRP erred in making adjustment towards the trade mark / trade name royalty amounting Rs.1,15,34,426/- without determining the comparable transaction in the public domain as prescribed under the Act and Rules.

iii) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 10B(3).

iv) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in assessee's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for other assessment years.

14. i) The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the distribution segment amounting 419,24,94,988/-.

ii) The Learned AO / TPO / DRP erred in making adjustment on transactions beyond AE transactions, thus, the adjustment proposed includes non AE transactions.

iii) The Learned AO / TPO / DRP erred in wrongly adopting the financial results of the assessee.

iv) The Learned AO / TPO / DRP erred in comparing the appellant's distribution margin with comparables which are not in the business of trading/distribution.

v) The Learned AO / TPO / DRP erred in not following their own orders passed for the earlier asst. years on this issue.

vi) The selection of the method by the Learned AO / TPO / DRP is not as per law.

vii) The Learned AO / TPO / DRP erred in not granting the variances deduction of 5% envisaged in the Act and Circular.

viii) The Learned AO / TPO / DRP erred in not carrying out the adjustments as required under law as well as the facts.

ix) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 10B(3).

x) The Learned AO / TPO / DRP erred in failing to rely on decision of the ITAT in assessee's own case for the years 2002 - 03 to 2004 - 05 and subsequent orders of the ITAT for other assessment years.

xi) The Learned AO / TPO / DRP erred in adopting TNMM as the MAM ignoring the findings of ITAT in the appellant's own case for earlier years and accepted by department on the same issue.

15.i) The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the Software Services amounting Rs.27,69,08,318/-.

ii) The Learned AO / TPO / DRP erred in selecting the comparables. The selection of comparables does not confirm to the I.T. Rules. Further it also does not comply with the case laws on this point.

iii) The Learned AO / TPO / DRP erred in not carrying out the adjustments as required under law as well as the facts.

iv) The Learned AO / TPO / DRP erred in wrongly adopting the financial results of the assessee.

v) The Learned AO/TPO/DRP have failed to identify a comparable in terms of Rule 10B(3).

vi) The Learned AO / TPO / DRP erred in not granting the variances deduction of 5% envisaged in the Act and Circular.

16.i) The Learned AO / TPO / DRP erred in making adjustment towards the Arm's Length Price difference in the Support Services amounting Rs.10,07,62,819/- without determining the comparable transaction.

ii) The Learned AO / TPO / DRP erred in making adjustment on specified domestic transactions when no such reference could have been made for transactions entered into before 01.04.2013.

iii) The Learned AO / TPO / DRP erred in not identifying a comparable as required under law.

iv) The Learned AO / TPO / DRP erred in not considering the details, information and evidences furnished by the assessee.

OTHER ISSUES/ADDITIONS/DISALLOWANCES

17. The Learned AO / DRP erred in disallowing provision for obsolescence of Inventory amounting to Rs. 18,04,89,926/-.

18. The Learned AO / DRP erred in disallowing foreign exchange fluctuation loss amounting to Rs. 43,59,719/-.

19. The Learned AO / DRP erred in disallowing the sum of Rs. 15,99,635/- as provision for contingent liability.

20. The Learned AO / DRP erred in adding back to book profit the sum of Rs. 15,99,635/- in accordance with clause (c) of Explanation (1) to section 115JB of the Act.

21. The Learned AO / DRP erred in disallowing provision for foreseeable losses amounting to Rs. 1,28,33,674/-

22. The Learned AO / DRP erred in adding back to book profits the provision for foreseeable losses of Rs. 1,28,33,674/- in accordance with clause (c) of Explanation (1) to section 115JB of the Act.

23. The Learned AO / DRP erred in making disallowance of interest amounting to Rs. 78,15,500/- on the Investment made in the Share Capital of M/s. GE Healthcare Bangladesh Ltd.
24. The Learned AO / DRP erred in adding back to book profits the disallowance of interest amounting to Rs. 78,15,500/- on the Investment made in the Share Capital of M/s. GE Healthcare Bangladesh Ltd in accordance with clause (c) of Explanation (1) to section 115JB of the Act.
25. The Learned AO / DRP erred in disallowing dealer commission amounting to Rs. 5,55,31,974/- for non deduction of tax at source.
26. The Learned AO / DRP erred in disallowing advertisement expenses amounting to Rs. 31,01,165/- for non deduction of tax at source.
27. The Learned AO / DRP erred in disallowing Legal and Professional expenses amounting to Rs. 7,04,10,749/- for non deduction of tax at source.
28. The Learned AO / DRP erred in disallowing miscellaneous expenses amounting to Rs. 84,23,540/- for non deduction of tax at source.
29. The Learned AO / DRP erred in disallowing Repairs and Maintenance - Plant and Machinery amounting to Rs. 70,68,325/- for non deduction of tax at source.
30. The Learned AO / DRP erred in disallowing Repairs and Maintenance - Building amounting to Rs. 26,01,163/- for non deduction of tax at source.
31. The Learned AO / DRP erred in disallowing the reversal of provision of Rs. 2,80,45,369/- under Repairs and Maintenance - Others for non deduction of tax at source.
32. The AO/DRP failed to appreciate and consider that if payees /receivers / deductees have paid the tax then no disallowance can be made u/s 40(a) (ia) of the Act.

33. The Learned AO / DRP erred in treating the sum of Rs. 57,36,149/- as capital expenditure. Further erred in amortizing it over a period of 5 years.

34. The above disallowances have been made without providing sufficient and adequate opportunity as required under law and the Act. On this ground alone the above disallowances requires to be deleted.

35. The Learned AO / DRP officer erred in not giving credit for full TDS.

36. The Learned AO/DRP erred in not providing adequate and sufficient opportunity to the appellant thus violating the principles of natural justice and on this ground alone the above disallowances requires to be deleted.

ISSUE OF INTEREST U/S 234B

37. The appellant denies the liabilities for interest u/s 234B of the Act. Further prays that the interest if any should be levied only on returned Income.

38. No opportunity has been given before the levy of interest u/s 234B of the Act.

39. Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant begs for consequential relief in the levy of interest u/s 234B.

40. The appellant denies liability for interest u/s 234B on the adjustment made u/s 92CA of the Act and relies on the decision of the Supreme Court in the case of CIT v Kwality 8iscuits Ltd reported in 284 ITR 434.

41. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered.”

2. During the course of hearing, the Id. Counsel for the assessee has invited our attention that before the TPO certain evidence could not be filed due to paucity of time, but before the DRP the assessee has filed all the

relevant evidence to justify his claim raised before the DRP. But the DRP did not admit the additional evidence filed before them and they confirmed the order of the TPO. In the earlier years also, the DRP did the same by not admitting the additional evidence filed before them and when the matter reached the Tribunal, the Tribunal has set aside the order of the DRP on all the issues to the TPO to readjudicate the issues in the light of additional evidence filed before the DRP, after affording proper opportunity of being heard to the assessee. Copies of the orders of the Tribunal for the AYs 2010-11 to 2012-13 are placed on record. The Id. Counsel for the assessee further contended that since the nature of the activities of the assessee remain the same, the matter may be sent back to the AO/TPO to re-examine the issue afresh, otherwise there would not be independent adjudication by the AO in the earlier years if the Tribunal expresses its views.

3. The Id. DR did not dispute this factual aspect.

4. Having carefully examined the orders of the lower authorities and the orders of the Tribunal for the AYs 2010-11 to 2012-13, we find that in the earlier years also, the DRP did not admit the additional evidence filed before him and the Tribunal for that reason set aside the order of the DRP and restored the matter to the TPO/AO to readjudicate the issues raised before them after affording opportunity of being heard to the assessee. Copies of the orders of the Tribunal are placed on record. From a careful perusal of the orders of the TPO, we find that he started the proceedings from 28.07.2016 and concluded it on 25.10.2016 within a period of less than 3 months; whereas the DRP started its proceedings on 30.01.2017 and concluded it on 22.09.2017 after taking almost 8 months. Before the DRP the assessee has filed additional evidence on 29.08.2017 but it was not admitted by the DRP having observed that these evidence should have been filed before the TPO. Without looking to the additional evidence, the

DRP has adjudicated the issues and confirmed the order of the TPO. In the earlier years also, the DRP did not admit the additional evidence and confirmed the order of the AO and the Tribunal in all these years set aside the order of the DRP and restored the matter to the AO/TPO to readjudicate the issues raised before the Tribunal afresh, after affording opportunity of being heard to the assessee. In all these years, the issues are almost common, therefore, we are of the view that if we express our views on any of the issues, the proceedings pending in earlier years before the TPO/AO would get affected and there would be no independent application of the mind of the AO/TPO. Under these circumstances, we are of the view that let this matter also go back to the AO/TPO to readjudicate the issues raised before us afresh, after affording opportunity of being heard to the assessee. Accordingly, we set aside the order of the DRP and restore the matter to the AO/TPO to readjudicate the issues raised before us after affording opportunity of being heard to the assessee in the light of additional evidence filed before the DRP.

5. In the result, the appeal of the assessee stands allowed for statistical purposes.

Pronounced in the open court on this 23rd day of March, 2018.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 23rd March, 2018.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Senior Private Secretary
ITAT, Bangalore.