

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1700/Del./2015
(ASSESSMENT YEAR : 2010-11)**

M/s. Wolters Kluwer (India) Pvt. Ltd., vs. DCIT,
501 – A, Devika Tower – 6, Circle 27 (2),
Nehru Place, New Delhi.
New Delhi.

(PAN : AAACW6190J)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Mukesh Bhutani, Advocate
REVENUE BY : Shri Sanjay Kumar Yadav, Senior DR

Date of Hearing : 02.07.2018

Date of Order : 06.07.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Wolters Kluwer (India) Pvt. Ltd. (for short 'the taxpayer'), by filing the present appeal sought to set aside the impugned order dated 27.01.2015, passed by the AO under section 144C read with section 143 (3) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2010-11 in consonance with the orders passed by the Id. DRP/TPO on the grounds inter alia that :-

“1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant for the relevant AY at INR 4,51,05,620 as against the returned income of INR 4,02,78,624.

2. That on the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ("DRP") / AO / Transfer Pricing Officer ("TPO") erred in making a transfer pricing adjustment of INR 48,26,992 in respect of the international transaction relating to business support services alleging the same to be not at arm's length in terms of the provisions of section 92C of the Act read with Rule 100 of the Income Tax Rules, 1962 ("the Rules").

3. That on the facts and circumstances of the facts and in law, the DRP / AO / TPO while rejecting Appellant's determination of arm's length price for rendering business support services have erred in (a) not appreciating the business model, functional, asset and risk analysis, (b) not accepting the economic analysis done in accordance with the provisions of the Act read with the Rules and (c) making several observations / findings based on incorrect interpretation of law and contrary to facts of the case.

4. That on the facts and circumstances of the case and in law, the DRP / AO / TPO have erred, in arbitrarily rejecting certain functionally comparable companies identified by the Appellant on a subjective / arbitrary basis, inter alia, using unreasonable comparability criterion.

5. That on the facts and circumstances of the case and in law, the DRP / AO / TPO have erred in arbitrarily selecting comparable companies based on incorrect appreciation of functional, asset and risk profile, and using arbitrary search filters.

6. That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred in rejecting/ modifying the search process and filters adopted by the Appellant for the purpose of benchmarking its international transaction of rendering business support services in an arbitrary manner.

7. That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred in not providing appropriate economic adjustments, as required under Rule 10B(1) (e)(iii) of the Rules, on account of differences in risk profile between the Appellant and the comparable companies.

8. That on the facts and circumstances of the case and in law, the DRP / AO / TPO have erred by ignoring the provisions

of Rule 10B(4) of the Rules and judicial pronouncements, which advocates the usage of multiple year data of comparable companies for the purpose of determination of the arm's length price as defined under section 92F of the Act.

9. That on the facts and circumstances of the case and in law, the DRP / AO / TPO erred in not providing the Appellant the benefit of (+/-) 5% range as provided by the proviso to section 92C(2) of the Act.

10. That on the facts and circumstances of the case and in law, the AD has erred in charging interest under sections 234A, 234B, 234C and 234D of the Act.”

2. Briefly stated the facts necessary to adjudicate the issues in controversy are : Wolters Kluwer (India) Pvt. Ltd., the taxpayer is engaged into business support services to its associate's enterprises, WKH Inc. and Ovid Technologies Inc., which primarily includes rendering marketing support services viz. Development of title, Contents of title, Printing and publishing, Market information and Co-ordination. During the year under assessment, the taxpayer entered into international transactions with its Associated Enterprises (AE) as under :-

<i>S. No.</i>	<i>Nature of Transaction</i>	<i>Method used by assessee</i>	<i>Amount (in crores)</i>
<i>1</i>	<i>Provision of Business support services</i>	<i>TNMM</i>	<i>4,13,79,296</i>
<i>2</i>	<i>Distribution of publications and online database</i>	<i>RPM</i>	<i>2,19,92,258</i>
<i>3</i>	<i>Payment of royalty for reprint of publication paid</i>	<i>TNMM</i>	<i>3,96,07,933</i>
<i>4</i>	<i>Export of books</i>	<i>CUP</i>	<i>11,70,705</i>
<i>5</i>	<i>Reimbursement of expenses paid</i>	<i>---</i>	<i>14,38,889</i>
<i>6</i>	<i>Recovery of expenses</i>	<i>---</i>	<i>2,67,267</i>

3. The issue involved in the case under consideration is qua determination of Arm's Length Price (ALP) of "Provision of business support services" of Rs.4,13,79,296/- only.

4. The taxpayer in its TP analysis applied Transactional Net Margin Method (TNMM) with Operating Profit / Total Cost (OP/TC) as Profit Level Indicator (PLI) with its own PLI at 8.94%. The taxpayer in order to benchmark its international transactions qua provision of business support services segment selected 14 comparables with mean average of 7.93% as against its own PLI at 8.94% on cost and found its international transaction at arm's length. TPO, however, rejected 13 comparables out of 14 comparables selected by taxpayer and introduced 9 new comparables and computed the average OP/OC at 22.42% and proposed the ALP for business support services at Rs.50,90,920/-.

5. The taxpayer carried the matter before the Id. DRP by raising objections who has rejected the objections. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, TNMM applied by the taxpayer with OP/OC as PLI has been accepted by the TPO. TPO after applying various filters rejected 13 comparables out of 14 comparables selected by the taxpayer, introduced 9 companies as its own comparables and finally selected the following companies as comparables for benchmarking the international transactions :-

<i>S. No.</i>	<i>Company Name</i>	<i>OP/OC</i>	<i>OP/OC (w/o FX)</i>
<i>1</i>	<i>Apitco Ltd.</i>	<i>40.09</i>	<i>40.09</i>
<i>2</i>	<i>Cameo Corp.Serv.</i>	<i>8.26</i>	<i>8.26</i>
<i>3</i>	<i>Crystal Hues Limited</i>	<i>9.05</i>	<i>9.10</i>
<i>4</i>	<i>Cyber Media Research Ltd.</i>	<i>13.00</i>	<i>14.85</i>
<i>5</i>	<i>Global Procurement Consultants Ltd.</i>	<i>32.26</i>	<i>37.19</i>
<i>6</i>	<i>H C C A Services Pvt. Ltd.</i>	<i>20.05</i>	<i>20.05</i>
<i>7</i>	<i>Quadrant Communications Ltd.</i>	<i>13.11</i>	<i>13.11</i>
<i>8</i>	<i>Quippo Valuers</i>	<i>24.88</i>	<i>25.49</i>
<i>9</i>	<i>T S R Darashaw Ltd.</i>	<i>41.15</i>	<i>41.15</i>
	<i>Average</i>	<i>22.42</i>	<i>23.25</i>

8. On the basis of aforesaid TP analysis, the TPO computed the ALP for business support services as under :-

<i>Operating Cost</i>	<i>3,77,04,030</i>
<i>Arm's Length Margin</i>	<i>23.25%</i>
<i>Arm's Length Price (ALP)</i>	<i>4,64,70,216</i>
<i>Price shown in the international transactions</i>	<i>4,13,79,297</i>
<i>Shortfall being adjustment u/s 92CA</i>	<i>50,90,920</i>

9. The ld. AR for the taxpayer in order to narrow down the controversy raised in the present appeal contended inter alia that the ld. TPO has applied incorrect filters of service income to total income greater than 75% as against taxpayer's filter of rejecting

companies having manufacturing/trading income greater than 50%; that the Id. TPO while analyzing the FAR of the taxpayer has adopted FAR of some other companies. The taxpayer also sought to exclude 5 comparables out of the final set of comparables selected by the TPO and sought to include 2 comparables for benchmarking the international transactions.

10. So far as the question of incorrect adoption of filter of service income to total income greater than 75% as against 50% applied by the taxpayer is concerned, the taxpayer has opposed this filter before TPO, as is evident from page no.208 of paper book-1, on the ground that it would result in rejection of companies for which relevant segments in audited financials are available, inspite of the total service income being less than 75% and further stated that application of this filter is totally unwarranted. The Id. DRP has not commented on this issue raised by the taxpayer by way of filing objections.

11. Keeping in view the contentions raised by the Id. AR for the parities to the appeal, we are of the considered view that filter of rejecting companies whose manufacturing/trading income is greater than 50% are required to be rejected is in fact broader one leading to the broader set of potential comparables. Moreover, TPO in the subsequent year has accepted taxpayer's filter of

rejecting companies whose manufacturing/trading income is greater than 50% in the subsequent year for AY 2012-13, particularly when the taxpayer has not undergone any change in its business model. So, in these circumstances, we are of the considered view that the matter is required to be set aside to the TPO to be decided afresh after providing an opportunity of being heard by applying the rule of consistency.

12. Furthermore, it is the contention of the Id. AR for the taxpayer that the TP analysis made by the TPO is based upon wrong FAR of the comparables and drew our attention towards page 518 of the paper book-II. Ld. TPO in his analysis to determine the arm's length nature made extensive search for comparables as under :-

“3.2.4 Analysis undertaken to determine the arm's length nature

The section below provides a summary of the analysis that has been undertaken to review the arm's length nature of the price charged by WK India for provision of business support services.

Search for comparables

To identify companies that could be considered to be comparable to WK India; the following two databases were used:

- *Prowess; a corporate database provided by Centre for Monitoring of Indian Economy, that contains financial data and reports of over 24,000 companies; and*
- *Capitaline Plus, a database of more than 21,000 Indian Companies provided and monitored by Capital Market Publishers India Private Limited.*

Search 1

Prowess

A search for broadly comparable companies was conducted using the Query by Products section of Prowess under the following heads:

Economic Activity / Products / Raw Materials

- *Commission agents' services;*
- *Market research services;*
- *Business services*
 - *Advertising*
 - *Accounting, auditing & book-keeping services;*
 - *Market research & public opinion polling*
 - *Business activity nec*
- *Placement & HR consultancy services*
- *Management consultancy services;*
- *Event management services; and*
- *Database services;*
- *Housekeeping service;*
- *Business brokerage activities*
- *Activity of membership organization*
- *Travel agencies and tour operators*
- *Tourism*
- *Services & consultancy*
- *Commercial complex*
- *Marketing of telefilms / serials / TV programmes*
- *Maintenance of buildings*

NIC codes

- *Accounting, book - keeping and auditing activities*
- *Market research and public opinion polling;*
- *Business and management consultancy activities;*
- *Advertising;*
- *Other business activities nec.*
 - *Labour recruitment and provision of personnel*
 - *Building cleaning activities*
 - *Auctioning services*
 - *Business brokerage activities*
 - *Services rendered by liaison offices*
 - *Secretarial activities such as telephone answering, stenographic*
 - *Other business activities n.e.c.*
- *Activities of other membership organizations n.e.c.*

Further, Query by Product Name and Select Company by Name modules were used to identify all companies having the following variables in their product name / company name:

- *Admin*
- *Consult*
- *Advis*
- *Manag*
- *Marketing*
- *Advertis*
- *Publicity*
- *Promot*
- *Support*
- *Agency*
- *Account*
- *Commission*
- *Event*

This search produced 2,554 companies.

Search 2

Capitaline Plus

- *Engineering - Turnkey Services*
- *Travel agencies*

NIC codes

- *Activities of other transport agencies*
- *Activities of travel agencies and tour operators*
- *Activity of membership organization*
- *Advertising*
- *Advertising.*
- *Business and management consultancy activities*
- *Business brokerage activities*
- *Business services*
- *Commercial complex*
- *Commission agents dealing in agricultural raw materials*
- *Commission agents dealing wood, paper, skn*
- *Commission agents services*
- *Commission agents n.e.c*
- *Event management services*
- *Labour recruitment and provision of personnel*
- *Labour recruitment and provision of personnel.*
- *Management consultancy services*
- *Other consultancy*
- *Other rnerbershe organization*
- *Service activities incidental to oil and gas*
- *Service activities incidental to oil and gas extraction*

- *Services and consultancy*
- *Services incidental to offshore oil and gas extraction*
- *Services incidental to oil and gas extraction*
- *Supporting & auxiliary transport & travel activities*
- *Supporting and auxiliary transport activities*
- *Tourism*

A search for broadly comparable companies was conducted using the query option 'like' was used to identify all companies having the following variables in their product name:

- *Admin*
- *Consult*
- *Advis*
- *Manag*
- *Marketing*
- *Advertis*
- *Publicity*
- *Promot*
- *Support*
- *Agency*
- *Account*
- *Commission*
- *Event*

This search produced 1,484 companies

- *The following quantitative were used during to identify companies with required financial information:*
- *Financial information not available for years 2007-08, 2008-09 and 2009-10:*
- *Sales not greater than zero; .*
- *Ratio of manufacturing income to total income greater than 50 percent; and*
- *Ratio of trading income to total income greater than 50 percent.*

2,174 companies were rejected during the quantitative analysis. The rejected companies along with the reasons for rejection are enclosed in Annexure 2. “

13. The taxpayer in its TP analysis has given its functional analysis qua provision of business support services, available at

pages 111 & 112 of the paper book-II, which is extracted for ready perusal as under :-

“3 Provision of business support services

3.1 Functional analysis

3.1.1 Functions performed

WK India is engaged in rendering business support services to its associated enterprises, WKH Inc and Ovid Technologies Inc. Such services primarily include rendering marketing support services. In this regard, the functions performed by WK India and the associated enterprises are provided below:

Development of title

The associated enterprises are responsible for developing the title to be published in India. WK India is not involved in any decision making process of the development of title.

Contents of title

The associated enterprises carry out the functions of developing the content. This includes obtaining requisite permissions from authors, negotiations with publishing houses, restructuring of content etc.

Printing and publishing

WK India does not perform the printing and publishing activities pertaining to the titles.

Market information

WK India provides market information on business opportunities that exist in India in relation to products and businesses of the Group to its associated enterprises.

Co-ordination

WK India facilitates co-ordination and act as a communication channel between the associated enterprises and the customers in India.

Executing contracts

The customers directly enter into contracts with the associated enterprises of WK India.

Recovery

The associated enterprises are solely responsible to recover the payments from the customers for the purchase of the products/services.

However, WK India does not engage in negotiation and conclusion of contracts with customers or maintenance of inventory and local delivery to customers.

Functions articulated above can be summarised below:

<i>Functions Performed</i>	<i>WK India</i>	<i>Associated Enterprises</i>
<i>Development of title</i>	<i>No</i>	<i>Yes</i>
<i>Contents of title</i>	<i>No</i>	<i>Yes</i>
<i>Printing and Publishing</i>	<i>No</i>	<i>Yes</i>
<i>Market information</i>	<i>Yes</i>	<i>No</i>
<i>Co-ordination</i>	<i>Yes</i>	<i>No</i>
<i>Executing contracts</i>	<i>No</i>	<i>Yes</i>
<i>Recovery</i>	<i>No</i>	<i>Yes</i>
<i>Final sale</i>	<i>No</i>	<i>Yes</i>

Vendor supervision services

WK India is also engaged in providing support services to CCH Incorporated and Wolters Kluwer United States Inc. These services are in the nature of vendor supervision. The scope of WK India in this regard is articulated below:

- *To facilitate coordination and act as a communication link between its associated enterprises and vendors in India; and*
- *To supervise the vendors managing back office work of its associated enterprises in India.*

Since the Company primarily acts as a supervisor and communication link between its associated enterprises and the vendors in India, the activities being in the nature of business support services are aggregated with the marketing support services performed by WK India.”

14. The Id. AR for the taxpayer drew our attention towards para 5 at page 20 of the TP order which goes to prove that the TPO has taken into account functions of some other companies, as she has not disputed the functional analysis given by the taxpayer reproduced above. For ready perusal, functions alleged to be performed by the taxpayer referred at page 20 of the TP order are extracted as under :-

“ As per the TP report submitted, taxpayer is engaged in providing market support services to its AE. In respect of market support services, following functions are performed by it:-

- *Gathering Information about the market, consumer preferences etc. for developing marketing strategy and plans for India.*
- *Co-ordinate market surveys, packaging and brand related activities along with ensuring compliance with local regulatory requirements.*
- *Market support services in Nepal and Bangladesh also.*
- *Representation services to parent companies! other affiliates:*
- *Carrying out market research work and sharing market related Information with the AEs; and*
- *Logistics support to AE for supply of goods to other countries.*

It can be seen from the above that the services provided by the taxpayer to the AE are in the nature of business support services.

The tax payer has not gone into verticals/ horizontals within the business support service industry In Its comparability study. The taxpayer adopted the search process based on the following key words:-

- I. *'Service Industry' (Prowess)*
- II. *'Service Industry' (Capita line Plus)*

It is clear from the above search strategy that the taxpayer searched for comparables which are engaged in business support services immaterial of the vertical/functional or service line In

which the company is engaged. Vertical is the exact service segment like market research, market support, administrative support, financial services, accounting; Human Resource (HR) services etc. to which the services of the company cater to. Functional or service line Is the type of function being performed whether low end or high end. For example, a company providing pay roll services will be a low end HR service company. A company providing placement consultancy for middle and top management will be a high end HR service company.”

15. Aforesaid discussion made by the TPO in its order regarding functions performed by the taxpayer go to prove that the entire TP analysis has been made by the TPO on the basis of wrong FAR of the taxpayer as well as comparable. It is also brought to our notice that many of the comparables now challenged by the taxpayer in the appeal under consideration have been accepted by the TPO in the subsequent years in which no TP adjustment has been made.

16. When it is undisputed fact on record that the taxpayer has not undergone any change in its business model, the rule of consistency is required to be followed. So, when the entire TP analysis is based upon the wrong FAR of the comparables and the TPO has assumed wrong functions being performed by the taxpayer, the entire subsequent exercise as to selecting the comparables has become erroneous and is of no use to determine the arm's length price of international transaction for determining ALP of international transaction rather entire exercise needs to be carried out afresh.

17. In view of what has been discussed above, we are of the considered view that the case is required to be set aside to the file of the TPO to decide afresh by applying the principle of consistency and in the light of the view taken by the TPO in subsequent years. TPO is also directed to decide the issue in controversy in the light of the decision of the coordinate Bench of the Tribunal case cited as *Adidas Technical services (P.) Ltd. vs. DCIT, Circle 1 (2), New Delhi – (2016) 69 taxmann.com 401 (Delhi-Trib.)*. So, the appeal filed by the taxpayer is allowed for statistical purposes.

Order pronounced in open court on this day 6th of July, 2018.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Dated the 6th day of July, 2018
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT (A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.