

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5404/DEL/2018  
[A.Y 2014-15]

Avery Dennison [India] Pvt.Ltd.,  
P-24, Green Park Extension,  
New Delhi.

Vs.

The A.C.I.T,  
Circle - 3(2),  
New Delhi

[PAN: AAACA 6163 D]

[Appellant]

[Respondent]

**Date of Hearing : 22.10.2018**

**Date of Pronouncement : 29.10.2018**

Assessee by : Shri Vishal Kalra, Adv  
Shri S.S. Tomar, Adv

Revenue by : Shri Sanjay I Bara, CIT-DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

This appeal by the assessee is preferred against order dated 17.07.2018 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to A.Y 2014-15.

2. The solitary substantive grievance of the assessee relates to the Transfer Pricing adjustment of Rs. 32,75,08,872/-.

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. Briefly stated, the facts of the case are that Avery Dennison Group is one of the leading developers and suppliers of innovative identification and decorative solutions for businesses and consumers worldwide. The group is engaged into three business segments, namely, (i) Pressure Sensitive Materials [PSM] (ii) Retail Branding and Information Solutions [RBIS] and (iii) other Speciality Converting Businesses.

5. PSM segment includes LPM and Graphics and Reflective Solutions sub-segments. These sub-segments offer various products/solutions ranging from pressure-sensitive labelling materials, packaging

materials and solutions, roll-fed sleeve, performance polymer adhesives and engineered films, graphic imaging media, reflective materials, pressure sensitive tapes for automotive, building and construction, electronics and industrial applications, diaper tapes and closures

6. RBIS Segment includes Apparel Solutions, Fasteners and Printer Systems sub-segments. Under these sub-segments, the Group provides creative services, brand embellishments, graphic tickets, tags and labels, sustainable packaging, inventory visibility and loss prevention solutions, data management services, price tickets, printers and scanners, radio-frequency identification (RFID) inlays, fasteners, brand protection and security solutions.

7. Other speciality converting business delivers advance medical tapes, films and technologies to medical products and device manufacturers.

7. The international transactions reported in Form No. 3CEB are as under:

S. No.	Description of the transactions	Amount (Rs.)
1	Purchase of Raw Material	1,347,132,039
2	Sale of Raw Material	29,190,959
3	Purchase of Finished Goods	977,148,014
4	Sale of Finished Goods	853,809,738
5	Receipt of services	83,684,249
6	Reimbursement of expenses paid	6,492,310
7	Reimbursement of expenses received	54,447,720
8	Rendering of services	191,249,106
9	Packing Material	37,512
10	Purchase of Stores, Spares	9,338,419
11	Purchase of fixed assets	18,427,930
12	Selling Commission paid	248,393,759
13	Service Fee paid	317,939,000
14	Repair and Maintenance	45,183
15	Rebate	125,221,575

8. During the transfer pricing proceedings, the TPO accepted all the above mentioned transactions to be at Arm's Length except international transaction relating to the receipt of intra group services in the two business segments, namely, PSM and RBIS. The TPO observed that the assessee has not bench-marked these services separately.

9. The TPO show caused the assessee and asked it to furnish the following information:

*"Pease furnish all the agreements entered in to by the assessee company, related to the Intra Group Services obtained by the assessee company from the AEs during the year.*

2. *Please identify each of the services actually received by the assessee company.*
3. *Please specify the amount of payment made for each of such services.*
4. *Please submit the contemporaneous documentary evidence to show that these services have actually been received by the assessee company.*
5. *Please justify the need for the receipt of such services for which payment has been made.*
6. *Please state with documentary evidence as to when and how these services were requisitioned from the AEs.*
7. *Please state as to how the rate or payment for IGS has been determined at the time of entering in to the agreement? Please also furnish the basis thereof.*
8. *Please state as to whether any cost benefit analysis was done while entering into the agreement and while requisitioning the services for payment of IGS?*
  - a. *If so the details of such cost benefit analysis should be furnished. The cost benefit analysis should include the expected benefit from the IGS vis a vis the payment made for the same.*
  - b. *Please specifically state as to whether any benchmarking analysis was done at the time of entering into the agreement so as to compare the payment of IGS to the AE vis a vis an independent party under similar circumstances. If so, the details thereof.*

9. *Please show with evidence as to what tangible and direct benefit has been derived by the assessee company from the use of such IGS.*
  10. *Whether the services availed from AEs, have also been performed by the assessee company itself or also availed from independent parties? If yes,*
    - a. *The details of such expenditure for each of the services should be furnished.*
    - b. *Please state as to why a separate payment has been made for such services to the AE.*
  11. *Please furnish details and documentary evidence of cost incurred by the AE for rendering each type of services purportedly received by the assessee company and the mark up applied, if any by the AE. Please also state as to whether the cost incurred by the AE is audited.*
  12. *Whether AE is rendering such services to any other AEs/independent parties also. If yes the details thereof including the rates/amount charged from such AEs along with mark up if any.*
- 
2. *If the AE has rendered services to more than one entity including the assessee company, then the basis of allocation amongst various entities may be furnished. Please also furnish the basis of choosing a particular allocation key.*
  3. *If the above information is not furnished, complete in all respects, along with contemporaneous documentary evidences,*

*the arm's length payment for these intra group services would be treated as Nil by applying CUP method.*

*Examination of the balance sheet reveals receivables thereby implying that the payment for the invoices raised by you have not been received within the stipulated time as provided in your service agreement with your AE. In this regard, you are requested to furnish the time period for payment as per your service agreement with your AE. However, to be reasonable and fair to the assessee, instead of charging penal interest, the delayed payments are being treated as unsecured loans advanced to the AEs and it is proposed to charge a normal rate as per the annual average yield of corporate bonds pertaining to credit rating of your AE for the period of delay in receipt of payment beyond the time stipulated in the services agreement. The interest rate has been charged on the basis of prevailing average SBI base rate during the year. You are requested to furnish credit rating of all the AEs for the FY 2012-13 with whom you have undertaken aforesaid transactions. You are requested to furnish invoice details along with the period of delay in receipt of payment as per details below:*

<i>S. No.</i>	<i>Invoice No.</i>	<i>Date of Invoice</i>	<i>Amount of/(NR)</i>	<i>Date of receipt of payment</i>	<i>Period of delay</i>

*You are also requested to give similar detail of receivable outstanding as on 01.04.2013. In case no payment terms is specified in the service agreement/ invoice raised to the AE, you are requested to give average receivable period for third party transactions. In case there are no such third party transactions, the details of average payable period for AE transactions should be mentioned."*

10. The assessee submitted its reply vide letter dated 22.09.2017 and gave details of services which are as under:

	Nature of Services	Amount (in INR)
<b>PSM</b>		
<b>1</b>	<b>Marketing Support Services</b>	<b>79,828,604</b>
<b>2</b>	<b>Operations, Logistics and Technical Services</b>	<b>44,130,518</b>
<b>3</b>	<b>Labor Law and Employee Relations</b>	<b>25,206,149</b>
<b>4</b>	<b>Finance, Accounting, Administration and MIS Services</b>	<b>8,797,719</b>
<b>5</b>	<b>Corporate Support Centre [CSC]</b>	<b>33,037,258</b>
<b>6</b>	<b>ITSSC services</b>	<b>1,432,989</b>
<b>RBIS</b>		
<b>1</b>	<b>Ticketing HUB</b>	<b>31,407,611</b>
<b>2</b>	<b>GVP Services</b>	<b>53,106,338</b>
<b>3</b>	<b>VIPFS Services</b>	<b>42,706,765</b>
<b>4</b>	<b>CSC Services</b>	<b>81,969,297</b>

11. Necessary documents were also furnished.

12. After considering the submissions, the TPO was of the opinion that any transaction that has bearing on profit has to be analysed separately. The TPO was of the firm belief that there is a high possibility of duplication of services in the sense that the tax payer itself could have performed the services itself and there was no need for the same to have been done by the AEs. Similarly, the tax payer has also not been able to demonstrate that any tangible gains achieved are indeed result of efforts of the overseas team and not as a result of efforts of the tax payer. The TPO was of the further opinion that no evidence has been brought on record to show exactly what services were rendered by the AE. The TPO concluded by holding that this is nothing but a device to shift the profits out of India.

13. The TPO found that the DRP, in earlier A.Ys i.e., 2010-11 to 2012-13 has accepted the Arm's Length Price ascertained by the assessee with regard to two intra group services received by the assessee i.e., ticketing hub and VIPFS. The TPO, accordingly, accepted the same but with regard to balance intra group services received by the assessee amounting to Rs. 32,75,08,872/-, ALP was ascertained to be NIL by application of CUP. The TPO, accordingly, made adjustment of Rs. 32,75,08,872/- by taking ALP of these services as NIL by holding

that no uncontrolled enterprise would have paid any amount for services which do not tantamount to intra group services with demonstrable benefits.

14. The assessee raised objections before the DRP but without any success.

15. Before proceeding further, let us first consider the past assessment history of the assessee. In A.Y 2007-08, similar view was taken by the TPO and the matter travelled upto the Tribunal and the Tribunal in ITA No. 4868/DEL/2014 has held that all services received by the assessee are part of composite contract/agreements which cannot be unbundled and concluded by holding that the agreement is an intrinsic one and it is wrong to split the same and hold that the same services are at Arm's Length and some services are not and decided the issue in favour of the assessee. The matter travelled upto the Hon'ble High Court and the Hon'ble High Court vide order dated 28.07.2016, in ITA No. 386 of 2016 and Ors held that the view taken by the ITAT is plausible one and does not warrant any interference.

16. In A.Y 2008-09, again the matter travelled to the Tribunal and the Tribunal in ITA No. 4869/DEL/2014 and 4934/DEL/2014 followed its earlier A.Y of 2007-08 and decided the issue in favour of the assessee.

17. In A.Y 2010-11, once again similar issue arose and the Tribunal decided it in favour of the assessee following its earlier orders of A.Y 2007-08 and 2008-09 and the High Court once again declined to interfere following its earlier order dated 15.07.2016.

18. In A.Y 201-12 also, the Tribunal followed its orders and the Hon'ble High Court dismissed the Revenue's appeal following its order dated 28.07.2016.

19. Surprisingly, in A.Ys 2012-13 and 2013-14, the Tribunal restored the matter to the file of the Assessing Officer with the direction to the assessee to lead proper and credible evidence with respect to the nature of services and how and when those services have been rendered by the AE.

20. Before us, the ld. DR heavily relied upon the findings of the Tribunal given in A.Ys 2012-13 and 2013-14.

21. As mentioned elsewhere, the TPO made the transfer pricing adjustment by holding that no uncontrolled enterprise would have paid any amount for services which do not tantamount to intra group services with demonstrable benefits. The Hon'ble Jurisdictional High Court of Delhi in the case of CIT Vs. Cushman and Wakefield Pvt Ltd 475 of 2012 has answered to such observation and the same reads as under:

*“36. In this case, the issue is whether an independent entity would have paid for such services. Importantly, in reaching this conclusion, neither the Revenue, nor this Court, must question the commercial wisdom of the assessee, or replace its own assessment of the commercial viability of the transaction. The services rendered by CWS and CWHK in this case concern liaising and client interaction with IBM on behalf of the assessee - activities for which, according to the assessee's claim - interaction with IBM's regional offices in Singapore and the United States was necessary. These services cannot - as the ITAT correctly surmised - be duplicated in India insofar as they require interaction abroad. Whether it is commercially prudent or not to employ outsiders to conduct this activity is a matter that lies within the*

*assessee's exclusive domain, and cannot be second-guessed by the Revenue."*

22. The Hon'ble High Court further held as under:

*"38. The second issue which arises in these proceedings concerned the disallowance of referral fees paid by the assessee to various AEs, for the referral of clients in the real estate business to the assessee. This was referred by the AO to the TPO, who in this Report stated that "no adverse inference is drawn". The assessee had - in its own Transfer Pricing analysis - conducted a benchmarking for these transactions, through the Comparable Uncontrolled Prices ("CUP") method, with which the TPO found no infirmity. The AO subsequently, however, found that no services were actually rendered for which referral fees was to be paid. The findings of the AO are extracted below:*

*"4.5 Repeatedly during the course of the hearings, the assessee company had been asked to match each transaction in the list to work done by the group entity specifically in relation to the property transaction done but this has not been given by the assessee in its submissions. This makes it clear that the assessee company is in no position to clarify or substantiate the work done or services rendered by the group concerns to men this payment of referral fee to them at a high rate of 30%.*

*4.6 In the submissions given the assessee company has simply filed some invoices raised on the group entities where it is written that the referral fee @ 30% of the gross*

*fee earned by C&W India.....None of the agreements filed by the assessee company specify the exact percentage of fee to be received by CWS. No prudent business person will leave the issue of payment of fee open. The assessee has not been able to demonstrate the genuineness of the transaction, the services rendered by the group entities to merit this referral fee at a high rate nor the business purpose of the same.*

*4.8 On close scrutiny of the e-mails, copies of which have been given in the submissions, it is seen that most of them are cryptic mails in that most of them do not clearly mention either the client or the requirements of the client which is the mandatory requirement for any entity referring to any other entity. There is no evidence submitted regarding the services provided by the group entities to merit the referral fee. Copies of some invoices are also given but again raising invoices does not substantiate or gives proof of the work done by the group entities.*

*4.9 The assessee has not been able to demonstrate as to how the Indian entities from whom income was generated on account of rendering off services etc. is linked to the associate enterprise of the assessee to whom referral fee is paid. In simpler words the link between the clients based in ITA 475/2012 Page 31 India and the associate enterprises of the assessee company which could enable their referral in the first instance has not been established. The assessee's case is a pure and simple case of tax planning ..."*

*39. The ITAT reversed this finding on two grounds. The first was that the AO, after having referred the matter to the TPO, could not*

*re- open or re-examine the transaction, which was done in this case. This, it was argued by the assessee, and held by the ITAT, amounts to doing something indirectly which cannot be done directly; secondly, on merits, the ITAT held that "[t]he assessee has submitted ample evidence to support the expenditure and it was shown that such expenditure is incurred with respect to revenue earned by the assessee on property transaction referred to the assessee by its associate enterprise."*

*40. On the first ground, this Court notes that the jurisdiction of the AO, under [Section 37](#), and the TPO, under [Section 92CA](#), are distinct. A referral by the AO to the TPO is only for the limited purpose of determining the ALP, based on a prima facie view that such a referral is necessary. It does not imply a concrete view as to the existence of services, or the accrual of benefit (such that allowance under [Section 37](#) must be permitted). This very argument was considered and rejected by the ITAT in *Delloite (supra)*:*

*"34. The second argument of learned counsel that the Transfer Pricing Officer is not empowered to disallow the expenditure and that the very reference to the Transfer Pricing Officer by the Assessing Officer presumes that the amount in question is allowable under section 37 of the Act ITA 475/2012 Page 32 and certain case laws were relied upon for this proposition.*

*35. We are unable to persuade ourselves to agree to this proposition for the reasons that the Central Board of Direct Taxes, by way of a circular, has directed the Assessing Officer to refer to all transactions beyond a specified limit, to the Transfer Pricing Officer for determining the arm's*

*length price. When the Assessing Officer has no discretion in the matter, in view of the binding nature of the Central Board of Direct Taxes instructions dated 20th May 2003, directing all the officers of the Department to refer the matters to the Transfer Pricing Officer for determination of the arm's length price where the aggregate value of international transactions exceeds Rs. 5,00,00,000, the Assessing Officer has a very limited role. He has to mechanically follow these instructions. There is no application of mind. There is no formation of any opinion at the stage of reference. Thus, to presume that he has allowed a particular expenditure under [section 37](#), does not seem to be the right view of the matter. In any event, this is not a case where the Transfer Pricing Officer or the Assessing Officer made a disallowance under [section 37](#) of the Act. It is a case where an adjustment has been made under [section 92C\(4\)](#) of the Act, after the Transfer Pricing Officer determined the arm's length price at nil under [section 92CA\(3\)](#). Hence this argument is devoid of merit."*

*Indeed, a Division Bench of this Court, in [Sony India Pvt. Ltd. v. Central Board of Direct Taxes and Anr.](#), [2007] 288 ITR 52 (Delhi) (albeit considering the law prior to the 2007 amendment to the Act), concurred with this view:*

*"18 ... a reading of [Section 92C](#) and [92CA](#) does not indicate that the AO is required to form a prior considered opinion after considering all the available materials even ITA 475/2012 Page 33 before making a reference to the TPO. A prima facie opinion would suffice at the stage of making the reference.*

*35 ... It correctly interprets the law as requiring only a formation of a prima facie opinion by the AO at the stage of the reference. Therefore, the question of the CBDT supplanting the judicial discretion of the AO does not arise. It is perfectly possible that, independent of the circular, the AO might still "consider it necessary or expedient" to refer an international transaction of such value to the TPO for determination of the ALP. At the same time it is not as if the transactions of the value of less than Rs. 5 crores cannot be referred to the TPO by the AO. Ultimately, any exercise of discretion by the AO is bound to be judicially reviewed by the statutory appellate authorities as well as by courts. Therefore, it is not as if there is no check on the exercise of discretion by the AO."*

*The AO can, therefore, determine under [Section 37](#) that the expenditure claimed (in this case, the referral fees) was not for the benefit of the business, and thus, disallow that amount. This does not restrict or in any way bypass the functions of the TPO. Quite to the contrary, it represents the correct division of jurisdiction between the two entities."*

Thus, the conclusion of the TPO does not hold any water in as much as the commercial prudence cannot be questioned by him while making transfer pricing adjustment.

23. In so far as the evidences furnished by the assessee in support of the services received from its AEs are concerned, the counsel has furnished a detailed chart of 12 pages giving details of the documents furnished in support of its claim of receiving services. The evidences are in respect of each and every service received by the assessee. These plethoras of evidences have been rubbished by the TPO/DRP only on the ground that these are of very general in nature and are nothing but emails and correspondences. We do not find any merit in the action of the lower authorities.

24. In the present days, such businesses are mostly done through emails and service provider, who is providing service through emails and electronic media. None of the lower authorities have made any adverse comment in respect of services provided through emails. Moreover, such is the practice since A.Y 2007-08 and in earlier A.Ys, the same has been accepted. Above all, composite contract/agreement is same and there is no change in the business profile of the assessee. The assessee has made payments in accordance with the written agreements which are supported by detailed evidences regarding receipt of services. Since the payments have been made in pursuance to written agreements, in our considered

opinion, the same should be a reasonable basis to confirm that payments are legitimate.

25. The coordinate bench in the case of Abhishek Auto Industries 15 ITR [Trib] 168 has held that legally, an agreement entered into between parties cannot be disregarded without assigning cogent reasons. In our considered view, the services, by their very nature, are intangible and therefore, the evidences regarding availing such services and benefits received as a result of availing such services can be best demonstrated by narration and descriptions as evidenced by supportive emails. Considering the facts of the case in the light of the past history of the assessee we do not find any merit in the transfer pricing adjustment made by the Assessing Officer. We accordingly, direct for deletion of the same. Substantive grievance of the assessee is allowed.

26. Other grievance relates to charging of interest u/s 234B and 234C of the Act.

27. We direct the Assessing Officer to levy interest as per provisions of law.

28. In the result, the appeal of the assessee in ITA No. 5404/DEL/2018 is allowed.

**The order is pronounced in the open court on 29.10.2018.**

**Sd /-**

**[SUCHITRA KAMBLE]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 29<sup>th</sup> October, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	