

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No. 755/DEL/2016
[A.Y. 2011-12]**

WM India Technical & Consulting
Pvt. Ltd. 1st Floor
Orchid Center, Golf Course Road
Sector - 53, Gurgaon

Vs.

Dy. C.I.T
Special Range -7
New Delhi

PAN : AAACW 7112 N

**Date of Hearing : 10.12.2018
Date of Pronouncement : 17.12.2018**

Assessee by : Shri Kanchan Kaushal, CA

Revenue by : Smt. Namita Pandey, Sr. DR

ORDER

PER N.K. BILLAIYA, AM:-

This appeal by the assessee is preferred against the order dated 12.12.2015 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to assessment year 2011-12.

2. Ground No. 1 is general in nature and needs no separate adjudication.

3. Ground Nos. 2 to 6, with all its sub grounds, relates to the addition of Rs. 6.63 crores made on account of transfer pricing to the income of the appellant by holding that its international transaction relating to reimbursement of expense to its Associated Enterprise [AE] does not satisfy the Arm's Length Price.

4. Briefly stated, the facts of the case are that the appellant company was incorporated on 24.04.2007 as an indirectly wholly owned subsidiary of Wal-Mart Stores Inc, USA. The company provides various types of consultancy services and assistance to entities in India in connection with development, operation and management of wholesale business, retail business and related operations.

5. While going through the transfer pricing report submitted by the assessee, the TPO noticed that Wal-Mart, USA provides certain corporate services, technical knowledge, know-how, advice and assistance in connection with setting up of distribution centers, merchandising, advertising and marketing, quality standards and

training. The TPO found that for these services, the assessee has made payment of Rs. 4.70 crores. The TPO was of the opinion that there was no reason why the assessee actually needed the services of expats on whose account the assessee is making reimbursement of Rs. 6.63 crores. The TPO further observed that no independent party would make separate payments for similar kind of services. The TPO concluded by holding that the ALP of this international transaction related to reimbursement of salaries of employees of the AE is NIL and accordingly, directed for upward adjustment of Rs. 6.63 crores.

6. The assessee objected the matter before the DRP but without any success.

7. Before us, the ld. counsel for the assessee out-rightly submitted that a similar issue arose in assessment year 2009-10 and the dispute travelled upto the Tribunal and the Tribunal settled the dispute in favour of the assessee and against the Revenue by order dated 18.05.2016.

8. Though the ld. DR strongly relied upon the findings of the DRP, but could not bring any distinguishing decision in favour of the Revenue.

9. We have carefully considered the orders of the authorities below qua the issue. We find force in the contention of the ld. counsel for the assessee. The Tribunal in ITA No. 1090/DEL/2014 for assessment year 2009-10 had the occasion to consider an identical issue and restored the matter to the file of the TPO by observing as under:

"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 the assessee's 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. counsel for the assessee also support these

views. Since the authorities below have not considered these established question of law in right perspective 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. While giving effect to the order of the Tribunal, the TPO considered the issue in the light of directions given by the Tribunal and concluded as under:

"In light of the discussion above and after carefully pursuing submission in this case, no upward adjustment is proposed to the income of the assessee in relation to the international transaction which was the subject matter of

benchmarking. Hence, the upward adjustment of Rs. 13.07.20.653/- made in the original order for the expat support services u/s 92(A(3) is thus reduced to NIL. AO is requested to take the necessary action.”

11. In the light of the findings of the co-ordinate bench and that of the TPO, we are of the considered opinion that the transfer pricing adjustment of Rs. 6.63 crores deserves to be deleted. We direct accordingly. Ground Nos. 2 to 6 with all its sub-grounds are allowed.

12. Ground No. 8 relates to adhoc disallowance of 10% of the total staff welfare expenses.

13. The ld. counsel for the assessee brought to our notice the order of the DRP dated 21.09.2016 for assessment year 2012-13 and pointed out that the adhoc disallowance of 10% made by the Assessing Officer was directed to be deleted by the DRP.

14. The ld. DR fairly conceded to this.

15. We have carefully considered the order of the DRP for assessment year 2012-13 dated 21.09.2016. We find force in the contention of the Id. counsel for the assessee. While deciding the objection raised by the assessee in respect of adhoc disallowance of 10%, the DRP has directed the Assessing Officer to delete the same by holding that the disallowance has to be on some basis.

16. There is no dispute that the books of account of the assessee are audited and no specific defect has been pointed out by the Assessing Officer/TPO. Therefore, in our considered opinion, adhoc disallowance is unwarranted and deserves to be deleted as was deleted by the DRP in assessment year 2012-13. Ground No. 8 is allowed.

17. In the result, the appeal filed by the assessee in ITA No. 755/DEL/2016 is partly allowed.

The order is pronounced in the open court on 17.12.2018.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

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

Dated: 17th December, 2018

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	.12.2018
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	