

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(TP)A Nos.1030, 1031 & 1032/Bang/2014
Assessment years : 2006-07, 2007-08 & 2009-10

M/s/. DRHL India Services P. Ltd., No.14, 7 th Main, 80 Feet Road, Subbannapalaya Extension, Bangalore – 560 033. PAN: AABCD 5225A	Vs.	The Deputy Commissioner of Income Tax, Circle 11(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Kaushik, Advocate
Respondent by	:	Shri C.H. Sundar Rao, CIT(DR)-I, ITAT, Bengaluru.

Date of hearing	:	19.12.2018
Date of Pronouncement	:	04.01.2019

ORDER

Per N V Vasudevan, Vice President

These are appeals by the assessee against the common order dated 28.05.2014 of CIT(Appeals)-IV, Bangalore relating to assessment years 2006-07, 2007-08 & 2009-10.

2. The assessee is a company engaged in the business of freight forwarding activities. It is a wholly owned subsidiary of DRH Logistics International, Sri Lanka. During the previous year relevant to AY 2006-07, the assessee paid a sum of Rs.3,45,08,976 and Rs.1,88,86,235 in AY 2007-08 and another sum of Rs.1,74,97,984 in AY 2009-10. It is the plea of the assessee that the payment in question was made to the holding

company for services rendered by the holding company. The assessee explained that the holding company has a network all over south-west Asia as well as connections worldwide with agencies at various locations who can procure orders from customers to and from India. The franchisee commission paid by the assessee was for such services rendered. Since the payment in question was a payment made to a holding company which was a payment made to AE, who happens to be a non-resident and therefore under the provisions of section 92 of the Income-Tax Act, 1961 ["the Act"], income arising from such transactions had to be determined having regard to arm's length price. The question before the AO in AYs 2006-07 & 2007-08 was with regard to the determination of ALP in respect of transaction of payment for services rendered intra-group by the assessee to its holding company which is the intra-group payment substantiates the arm's length test. The question of determination of ALP was referred to the TPO who by his order passed u/s. 92CA of the Act dated 30.10.2009 for AY 2006-07 came to the conclusion that the assessee failed to substantiate that services were rendered by the holding company to the assessee for which payment was made. The TPO suggested addition to the total income of the assessee on account of shortfall in arm's length price of a sum of Rs.3,24,20,445. Similarly, in AY 2007-08, the addition on account of determination of ALP to the total income was determined at Rs.1,88,86,235.

3. Against the aforesaid adjustments, the assessee filed objections before the DRP. The DRP vide directions dated 26.8.2010 for AY 2006-07 dismissed the objection of the assessee. For AY 2007-08, the DRP dismissed the objections of the assessee to the order of TPO.

4. The additions suggested for both the AYs 2006-07 & 2007-08 was incorporated in the fair order of assessment passed by the AO. The

assessee filed appeal against the aforesaid fair order of assessment for AYs 2006-07 & 2007-08 before the Tribunal. The Tribunal vide its order dated 10.07.2012 in ITA No.1211/Bang/2010 for AY 2006-07, set aside the order of the AO and remanded for fresh consideration by the TPO the determination of ALP. Similarly, the Tribunal vide order dated 05.10.2012 for AY 2007-08 in ITA No.1012/Bang/2011 set aside the order of assessment and remanded the question of determination of ALP to the TPO for fresh consideration. Consequent to the orders of the Tribunal, the TPO passed an order dated 25.09.2013 for both the AYs 2006-07 & 2007-08 observing that the assessee did not render any evidence to show that services were rendered by the AE and the benefit derived by the assessee from such services. The TPO also held that there was no basis of valuation of the payments for services by independent entities. Pursuant to the order of Tribunal dated 25.09.2013, the AO passed order giving effect to the order of the Tribunal and the order of the AO dated 11.3.2013, wherein the original addition suggested by the TPO was again made by the AO.

5. Against the aforesaid orders of the AO, the assessee preferred appeals before the CIT(Appeals) for the AYs 2006-07 & 2007-08. As far as AY 2009-10 is concerned, the facts are identical. The payment for intra-group services to the holding company by the assessee for AY 2009-10 was a sum of Rs.1,74,97,984. Since the assessee did not substantiate the ALP, the entire consideration paid was added to the total income by way of adjustment to the ALP. Against the aforesaid order of assessment, the assessee filed appeal before the CIT(Appeals).

6. The CIT(Appeals) took up for consideration all the three appeals for AYs 2006-07, 2007-08 & 2009-10 for consideration. He noticed the

findings of the TPO in the order of assessment after the order of Tribunal which were as follows:-

“6.3. The TPO finds that none of the documents mentioned at Para 3 above, and admitted by the TPO pursuant to the directions of the ITAT, show (i) that services were actually rendered by the AE (ii) how' such services would be valued by an independent entity dealing in similar circumstances (iii) what is the tangible and substantial commercial benefit the taxpayer derived for which it made the payment of franchisee commission of Rs. 3,45,08,976/.

6.4. It is seen that, the taxpayer has not been able to prove either at the time of the original TP proceedings before the then TPO nor in the instant proceedings taken up consequent to the directions of the ITAT, that services were actually rendered by the AE, for which payment of franchisee commission of Rs.3,45,08,976/- has been made by the taxpayer to its AE. The taxpayer has also failed to show what tangible and substantial commercial benefit has been derived by it from the AE, for which the huge payment of franchisee commission has been made.

6.5. The TPO is of the view that; unless it is shown that tangible and direct benefit is derived by such payment or that the payment made is commensurate with the benefit that is derived when parties deal with each other are at arm's length, the ALP for such payment for intra group services, is to be treated as NIL.

6.6. The TPO therefore holds that, as the taxpayer could not file any additional evidences to show that it had received services and derived resultant benefit out of it, the CUP of the international transaction is treated as NIL and the payment of the entire amount of franchisee commission at Rs.3,45,08,976/- is treated as transfer pricing adjustment u/s. 92CA of the Income Tax Act, 1961.”

7. The CIT(Appeals) noticed that the assessee had not filed the evidence of registration of trade marks, list of franchisee agencies, flow

chart of operations, business model of the group, correspondence between the HSBC and the AE with respect to banking facilities offered to the AE, policy for freight forwarders issued by Sri Lanka Export Credit Insurance Corporation, agency agreement between the AE and the foreign German company. The assessee had claimed before the CIT(A) that the assessee does not have a manager or CEO for its operations in India and that it was handled by the AE and monitored by the AE. The CIT(A) after noticing the aforesaid facts narrated the requirements and the proof that is expected of the assessee to substantiate the ALP of payments made to AE for intra-group services. Thereafter, the CIT(Appeals) concluded as follows:-

“8.1. Thus it is evident that the assessee has failed to establish with cogent evidence with respect to the nature of services rendered and whether such payment can be said to be commensurate with the benefit received. It has not been able to prove beyond reasonable doubt whether any tangible benefit has been derived from such payments. Such transactions, to be Commensurate with Arms Length Price, necessarily involves the test of independent parties i.e. to say whether an independent party under the comparable circumstances would be willing to pay such an amount for that service to a third independent party, as the payment would necessarily be commensurate with the benefit derived for the services obtained. The assessee company has not in any manner discharged its primary onus with respect to the requirements of the TPO who on a sound basis has analysed the ingredients of the onus required to be discharged by the assessee. It has not established (i) that services were actually rendered (ii) brought out instances of similar payments by independent parties & (iii) failed the benefit test. Moreover the quantum of payment was fixed on ad-hoc basis without any sound basis, which tarnishes the transaction further. Before me, written submissions were filed which simply provided a description of the services so rendered. No material was placed before me to rebut the findings and assertions made by the TPO. In such circumstances, after considering the reasoning and inferences drawn by the Bangalore bench of the Hon’ble

Tribunal, the action of the TPO in rejecting the assessee's method and determining ALP utilizing the CUP method is upheld.”

8. The CIT(Appeals) in the impugned order noticed that the assessee has not filed any evidence to prove that services were rendered by the AE for which the assessee made the payment. Aggrieved by the aforesaid order of CIT(A), the assessee has filed the present appeals before the Tribunal.

9. The Id. counsel for the assessee explained that the following services were rendered by the AE:-

1. Provide the rights to use of LOGO of DRH Logistics International.

The DRHL International has made available to Indian Company to use its LOGO and Trade mark (drh logistics) (Annexure —I) which DRHL International established and made their presence in the Cargo Operation at International level.

The Brand equity of the company is very vital for any business entity to capture business at globally.

2. Provide access to the agent's network available with DRHL International.
3. Render all support to its Associates on worldwide **Marketing Efforts and route all Inbound cargo to India through the DRHL India and carry out outbound cargo for and on behalf of DRHL India.**
 - a. Provides set of standards procedures/instructions covering all aspects of DRHL International and its principal operation
 - b. Undertake the responsibility to provide the training program for the employees of its Associates.

- c. Undertake to Supply of DRH Logistics International Pvt Ltd Principal stationery, brochures, Promotional literatures and other companies bulletins on an ongoing basis to all its Associates Companies.
- d. Provide the necessary Management expertise to its Associates by deputizing suitable qualified staff

DRHL International has facilitated and entered into agreements with Overseas Agents (List of Overseas Agents Enclosed) (Annexure II) to do the operations by the Indian Company across the Globe.

The entire, marketing arrangements have been established by DRHL international and the entire agents network is being maintained by DRHL International only.

The flow chart of DRHL International viz overseas agents and Indian company operations are enclosed herewith. (Annexure III)

- 4. Rendering coordination between customers/agents and DRHL India (organization chart enclosed)(Annexure (IV)

DRHL India services does not have any CEOs or General Managers for their operations in India. The entire operations from marketing to delivery is handled by the Indian company under the supervision and management of DRHL International

The finance department is also handled by DRHL International and the entire activity is being reported and monitored by DRHL international

- 5. Following up with overseas' agents for ensuring remittance of all overseas collections within 30 days or as per the terms of agreement
- 6. Making the settlement process for the group as a whole in collection and remittances under one platform to avoid delays and confusions

The agents situated outside India sends their invoices for all the group companies of DRHL International to the Holding company and also requires a consolidated statement of invoices for all the group companies for the services rendered.

DRHL International in turn makes the follow up for either collections on behalf of its group or makes the payment on behalf of its group which is called a settlement process.

After the settlement it distributes the collection or payment to the respective group companies by way of debit or credit notes followed by payment/collection

Few debit/credit notes are enclosed for reference (Annexure V)

7. Over and above the risks assumed by DRHL International by providing the following services to DRHL India services P Limited
 - a. Performance Risk - Insurance coverage undertaken by DRHL international on behalf of DRHL India, which covers all operational liabilities and third party claim (Document Attached)-Annexure VI
 - b. Performance Guarantee provide by DRHL International to DRHL India – DRHL India enjoys credit facility of 2.65 Cores from HSBC-India on the Financial Guarantee of USD 625,000 provide by DRHL Int'l.(Document Attached)-Annexure VI
 - c. Insurance cover of all overseas agents 'dues' on monthly basis through the Sri Lanka Credit Insurance Corporation. —Annexure VII.”

10. The Id. counsel for the assessee drew specific attention to Anneuxre-VI & VII of the written submissions filed before the AO, wherein the assessee has given insurance cover undertaken by the holding

company on behalf of assessee for covering operational liabilities and third party claim. He has also drawn our attention to Annexure-V which are debit and credit notes between the holding company and the assessee. As far as Annexures I to IV are concerned, these are general statement not substantiated by any evidence. The Id. counsel for the assessee has also drawn our attention to the orders that are procured by the assessee through the help of the holding company. The chart giving list of consignments is contained in the chart.

11. We have carefully considered the submission of the Assessee, with reference to material on record. The Hon'ble High Court of Delhi in the case of ***EKL Appliances Limited [(2012) 209 Taxman 200]*** as well as ***Cushman & Wakefield India Private Limited ITA No.475/2012 dated 23.5.2014 367ITR 730 (Del)***, rendered decisions on determination of Arm's Length Price in the case of payment made to an AE for intra group services. In the case of *Cushman & Wakefield (supra)*, the Hon'ble Delhi High Court observed that whether a third party – in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that

amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case. The following aspects would require consideration in order to identify intra group services requiring arm's length remuneration:

- * Whether services were received from related party.
- * Nature of services including quantum of services received by the related party.
- * Services were provided in order to meet specific need of recipient of the services.
- * The economic and commercial benefits derived by the recipient of intra group services.
- * In comparable circumstances an independent enterprise would be willing to pay the price for such services?
- * An independent third party would be willing and able to provide such services?

Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.

12. Keeping in mind the principles emanating from the aforesaid decisions, we shall now proceed to examine the material on record to see the nature of services received by the Assessee and as to whether the payment made for such service were at Arm's Length.

13. The first evidence that needs analysis is the agreement dated 1.6.2002 whereby DRH Logistics International (DRH International) the parent company at Sri Lanka agreed to the Assessee. The Agreement will be in force indefinitely from 1.6.2002. DRH International under this agreement (i) undertook to provide the Assessee with right to use their logo in premises, vehicles, signboards etc. (ii) undertook to train the Assessee's employees; (iii) include the Assessee in DRH International's world wide marketing efforts and render all possible support to the Assessee in its overseas marketing efforts. (iv) Include the Assessee management in all its regional agency meeting. (v) provide the Assessee with a set of standard procedure instruction covering all aspects of DRH International's or its principals operation (vi) supply stationary, brochure, promotional literature and other bulletin on an ongoing basis; (vii) provide necessary Management expertise to the Assessee by deputing qualified staff; (viii) extend world wide network coverage to the franchise company through its affiliates world wide. (ix) ensure remittance of all overseas collections within 30 days.

14. The Assessee agreed to remunerate DRH International at 50% of its net transaction profit i.e., total bill out of the shipper and or consignee less direct transportation costs.

15. The first evidence to substantiate evidence of services rendered is Annexure-I which is a policy of insurance dated 17.3.2008 taken by DRH International to cover freight forwarders liability of the Assessee. This has no relevance because it does not cover the period relevant to Previous Year relevant to AY 2006-07 & 2009-10 with which we are concerned in these appeals but they are relevant to AY 2007-08. It is not clear as to who paid the insurance premium and how it benefitted the Assessee. These

aspects were neither explained nor is discernible from material on record and has not been spelt out by the Assessee.

16. Annexure-II is a request for issue of performance guarantee dated 11.4.2008 by DRH Logistics International on behalf of the Assessee to HSBC, Colombo for availing some banking facilities to International Air Transport Association, Mumbai. This is not relevant as it does not pertain to any of the previous year relevant to the AYs in appeal before the Tribunal. The relevance of this document and the letter dated 10.4.2008 given in Annexure-II has neither been explained by the Assessee nor is it discernible from the contents of this letter.

17. Annexure-III is a comprehensive services policy dated 27.1.2004 for freight forwards taken out by DRH Logistics International. The Assessee's name is also found in Schedule-E to this agreement. As to what is the relevance of this agreement for the previous years relevant to AY 2005-06, 2007-08 and 2009-10 have neither been explained nor is it discernible from the said agreement. It is at best evidence relevant to other AYs not to the AYs in these appeals.

18. Annexure-IV is an agreement dated 20.11.2003 between DRH International and ITG-GmbH International Spedition (ITG). As per this agreement ITG agreed to act as exclusive agent of DRH International in Germany/Austria to handle Air and ocean business originating from India, Pakistan, Sri Lanka, Bangladesh, Nepal, Kenya and Madagascar. There is another agreement dated 15.10.2002 between K Line Air Service Ltd., Japan, DRH International and the Assessee and other DRH group entities in Bangladesh, Pakistan, Mauritius and Nepal. The Assessee is appointed as agent of the Japanese company in India to perform functions customarily performed by consolidators and forwarders in connection with

air cargo shipments originating in each country. There are other agreements between the Assessee and non-residents but they do not relate to any of the AYs in these appeals. We conclude that Annexure-IV documents neither proves that DRH international rendered services to the Assessee.

19. Annexure-V is Trade Mark registration certificate evidencing registration of DRH Logistics group in favour of the Assessee. Annexure-VI is a list of Overseas Agents. Annexure-VII is a flow chart of operation by DRH International to the Assessee. None of the above documents prove that any services were rendered by DRH International to the Assessee or as to how DRH international allowed use of trademark by the Assessee.

20. Annexure-VIII is franchise Agreement dated 1.6.2002 between DRH International and the Assessee. This agreement is for indefinite period of time. This Agreement by itself does not prove any services having been rendered by DRH International to the Assessee. Annexure-XI is expenses incurred by DRH International on behalf of the Assessee. This annexure merely sets out in the form of a statement names of certain consultants to whom payments were made, insurance charges and bank charges. This document by itself does not prove any rendering of service by DRH International to the Assessee. Annexure-XII is again a statement which gives a list of cargo operations with Associate Enterprises and Overseas agents. This by itself does not prove any services having been rendered by DRH international to the Assessee. Thus the evidence filed by the Assessee does not even prima facie establish that services were rendered by DRH International to the Assessee. Therefore the other requirements of justification and establishing ALP of payment for intra group services, does not arise for consideration at all.

21. As discussed in the earlier paragraphs, the material brought to our notice by the Id. counsel for the assessee do not substantiate the nature of services rendered by the holding company to the assessee for which the assessee made the payment. In other words, a mere explanation of the process by which the business of assessee is conducted and the placement of holding company in such chart does not establish that services were indeed rendered by the holding company. The fact that there were agreements between the assessee and the holding company for rendering of certain services, again is not sufficient to discharge the onus that lies on the assessee. Mere furnishing of details of consignment without evidence of participation of holding company in procuring those business would not be sufficient to discharge the burden that lies with the assessee. In the given facts and circumstances of the case, we are of the view the conclusions of the revenue authorities that assessee failed to discharge the burden to establish the ALP of the transaction is justified. We find no grounds to interfere with the order of the CIT(Appeals). Therefore, these appeals by the assessee are dismissed.

22. In the result, all the appeals of the assessee are dismissed.

Pronounced in the open court on this 04th day of January, 2019.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 04th January, 2019.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.