

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2' NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 9191/Del/2019
Assessment Year: 2015-16**

Whirlpool of India Ltd.,
Plot No. 40, Sector-44, Gurgaon.
PAN :AAACW 1336L

Vs ACIT, LTU Circle-2,
New Delhi

Appellant

Respondent

**Assessee by: Sh. Neeraj Jain, Advocate
Sh. RamitKatiyal, Advocate
Revenue by: Sh. Sunil Kumar, CIT/DR**

Date of Hearing: 09.01.2020

Date of Pronouncement: 20.01.2020

ORDER

PER K. NARASIMHA CHARY, JM

Aggrieved by the order dated 25/10/2019 passed under section 143(3) read with section 144C (13) of the Income Tax Act, 1961 (for short "the Act"), for the assessment year 2015-16 pursuant to the directions given on 25/9/2019 by the Ld. Dispute Resolution Panel (DRP)-1, New Delhi ("Ld. DRP"), M/s Whirlpool of India Ltd ("assessee") filed this appeal.

2. Brief facts of the case are that the assessee is a subsidiary of Whirlpool Corporation (WC), USA and has been engaged in the

production, sales and distribution of Whirlpool brand of home appliances which includes washing machines, refrigerators, microwave ovens and air-conditioners in India. Assessee is also engaged in the business of manufacturing as well as purchase and the resale of these products besides in the relevant financial year undertaking contract R&D activities, GIS services and IPO services for the Whirlpool group. For the assessment year 2015-16 they have filed their return of income on 26/11/2015 declaring a total income of Rs.2,60,80,35,500/-under the normal provisions of the Act and an income of Rs. 3,02,57,76, 948/-under section 115 JB of the Act.

3. During the assessment proceedings, learned Assessing Officer noticed that during the financial year 2014-15 the assessee had entered into international transaction with its Associated Enterprises (“AEs”) and the value of such transactions exceed more than 15 crores. Learned Assessing Officer, therefore, referred the determination of the arm’s-length price of the international transaction to the Ld. Transfer Pricing Officer (Ld. TPO) under section 92CA of the Income Tax Act, 1961 (for short “the Act”). Ld. TPO, by order dated 31/10/2018 observed that the Assessing Officer shall enhance the income of the assessee by Rs.1,17,99,480/-on substantive basis, and the protective adjustment of Rs.67,81,91,285/-was put on hold awaiting judgement of the Hon’ble Supreme Court. Learned Assessing Officer, accordingly, passed the draft assessment order dated 27/12/2018 proposing the transfer pricing adjustments and also certain other additions.

4. Aggrieved by proposed additions, assessee filed objections before the Ld. DRP and the Ld. DRP by order dated 25/9/2019 issued directions

to the learned Assessing Officer disposing of the objections. Finally learned Assessing Officer concluded the assessment at Rs. 3,30,52,15,022/-by order dated 25/10/2019 by making transfer pricing adjustment to the tune of Rs. 1,17,75,930/-and also Rs.67,81,91,285/- towards disallowance of AMP expenses. Learned Assessing Officer further made additions on account of excess claim of R&D expenses under section 35(2AB) of the Act to the tune of Rs.16,42,000/-, undisclosed income as per 26AS to the tune of Rs. 5,14,537/-, purchase and sale of vehicles to the tune of Rs.15,37,130/-, insurance premium payment to the tune of Rs. 18,640/-and daughter marriage fund to the tune of Rs. 35 Lacs.

5. Assessee is therefore before us in this appeal challenging the additions. Now we shall proceed to deal with the grievance of the assessee in respect of each addition.

6. In respect of the transfer pricing adjustment of Rs. 1,17,75,930/-, case of the assessee has been that the Ld. TPO did not dispute the benchmarking analysis in respect of the international transaction undertaken by the assessee and accepted those to be at arm's length price. Ld. TPO, however, undertook benchmarking analysis of the Advertisement, Marketing and Sales Promotion (AMP) expenses incurred by the assessee for the products having the brand name "Whirlpool". According to the assessee the AMP expenses were incurred by it on its own discretion without any reference to the overseas Associated Enterprises ("AEs") and all such expenses were incurred for its own business in order to cater to the local market needs. On this ground assessee complains that there is no material whatsoever on record to

support the conclusion of the Ld. TPO that the transaction of incurring the AMP expenses amounts to international transaction in terms of section 92B of the Act and therefore, such adjustment is not tenable.

7. Ld. AR submitted that the facts relating to these international transactions are identical all through the years and for the assessment year 2008-09 this issue was dealt with by the Hon'ble jurisdictional High Court and by way of the decision reported in 381 ITR 154, Hon'ble High Court held that there does not exist any arrangement or undertaking between the assessee and the associated enterprises in connection with incurring of the AMP expenses. He further submitted that such addition of the Hon'ble High Court is followed by the Tribunal in assessee's own case for the assessment years 2009-10 to 2014-15 and facts being similar the issue remains covered by these decisions.

8. Ld. DR does not controvert any of the submissions made on behalf of the assessee nor does he bring to our notice any change of facts and circumstances of the case to say that this consistent view taken by the Hon'ble High Court and the Tribunal is not applicable to the facts of the present year. In view of this settled view taken in assessee's own case right from 2008-09 to 2014-15, facts being identical, while respectfully following the same we hold that the transfer pricing adjustment cannot be sustained and has to be deleted we accordingly allow grounds No. 3 to 3.21.

9. Coming to ground No. 4 to 4.4, it relates to the alternative disallowance on account of expenses incurred for AMP to the tune of Rs.67,81,91,285/-. Case of the assessee is that for promotion of the sales of products produced/traded and marketed in India, the assessee had

incurred such an expenditure; that the said expenditure was incurred at the local level to ensure the availability and visibility of the products; and that such expenses were incurred for sales promotion and encouragement in India only and that too in respect of products in which the assessee was dealing in India.

10. Ld. TPO, however, held that such expenses were incurred for the purpose of promoting the brand of the Associated Enterprises ("AEs") and, therefore, cannot be regarded as having been incurred wholly and exclusively for the purpose of the business of assessee alone.

11. It is the submission on behalf of the assessee by the Ld. AR that this issue has also been squarely covered by the decision reported in 381 ITR 154 of the Hon'ble jurisdictional High Court in assessee's own case for the assessment year 2008-09. He submitted that the Hon'ble High Court deleted the similar edition and following the same the Tribunal in assessee's own case for the assessment years 2009-10 to 2014-15 deleted the addition. Ld. DR admits this factual position.

12. We have gone through the order of the Hon'ble High Court wherein it was held that merely because there is an incidental benefit to Whirlpool USA, it cannot be said that the AMP expenses incurred by the assessee were for promoting the brand of Whirlpool USA. It was further held that the fact that somebody other than the assessee is also benefited by the expenditure, should not come in the way of an expenditure being allowed by way of deduction under section 10 (2) (xv) of the Income Tax Act, 1922 and therefore the Hon'ble High Court held the issue in favour of the assessee. We also find from the orders in

assessee's own case for assessment years 2009-10 to 2014-15 that the Tribunal followed the above decision of the Hon'ble High Court.

13. While respectfully following the above consistent view taken by the Hon'ble High Court and the Tribunal in assessee's own case for the assessment year 2008-09 to 2014-15 we hold the issue in favour of the assessee. Grounds No. 4 to 4.4 are allowed.

14. Grounds No. 5 to 7 relate to the disallowance of R&D expenses amounting to Rs. 8,21,000/-, addition of Rs. 5,14,537/-on the basis of Form 26AS and disallowance of Rs. 15,37,130/-on the basis of an AIR information. During the year assessee incurred R&D expenses to the tune of Rs. 23,75,20,985/- and claimed 200% deduction amounting to Rs.47,50,41,970/-under section 35(2AB) of the Act. Expenses to the tune of Rs.8,21,000/-was not approved by the Department of Science And Industrial Research (DSIR) and therefore the Assessing Officer disallowed Rs. 16,42,000/-which constitutes 200% of the disapproved expenses of Rs. 8,21,000/-. According to the assessee, even if the R&D expenditure under section 35(2AB) of the Act at 200% is not accepted, still the same is allowable under section 37(1) of the Act to the tune of actual expenditure of Rs. 8,21, 000/-.

15. He further submitted that for the assessment year 2014-15, while adjudicating upon similar issue, Ld. DRP directed the Assessing Officer to allow the R&D expenditure not eligible for weighted deduction under section 35(2AB) of the Act, as deduction under section 37 of the Act. We do not find anything illegal or irregular in such a course adopted by the Ld. DRP for the assessment year 2014-15 and we deem it just and proper to extend a similar treatment to the case of the assessee for this year

also. We therefore direct the Assessing Officer to allow the deduction of Rs. 8,21,000/-under section 37 (1) of the Act of the Act.

16. In respect of the addition on the basis of form 26AS, according to the assessee the same was added on the basis of the difference in income recorded by the assessee in the books of accounts vis-a-vis form 26AS. Assessee submitted that at the time it was in the process of reconciliation of the differences between the income recorded in the books of accounts vis a vis form 26 AS. He further submitted that in assessee's own case for the assessment years 2010-11 to 2014-15, the matter was remitted to the file of the Assessing Officer for reconciliation of the differences and now the assessee is ready with the reconciliation statement to produce before the Assessing Officer if a similar direction is given.

17. We have gone through the record in the light of the submissions made on either side and from the orders of the Tribunal in assessee's own case for assessment year 2010-11 to 2014-15 we find that on the assessee reporting to have possessing all the relevant information to reconcile the difference between the income recorded in the books of accounts vis a vis form 26AS, the Tribunal took a view to direct the Assessing Officer to tally the data base of Revenue in the light of details to be filed by the assessee. In consonance with the view taken by the Tribunal for the earlier assessment years on this issue, we set aside the issue to the file of the Assessing Officer for a similar exercise and the assessee is directed to produce the relevant documents before the Assessing Officer. Ground No. 6 is therefore, allowed for statistical purpose.

18. Coming to ground No. 7 which is in respect of disallowance of Rs.15,37,130/-on the basis of aAIR information, the learned Assessing Officer held that the assessee has not been able to provide the supporting documents to establish the genuineness of the transaction and therefore the said sum is liable to be added to the income of the assessee. It is submitted on behalf of the assessee that the assessee had located the relevant supporting documents and when a similar question had arisen in the earlier assessment years from 2010-11 to 2012-13, the Tribunal set aside the matter to the file of the Assessing Officer for verification of information/documents to be submitted by the assessee and to take a view. This factual statement by the Ld. AR is not controverted by the Ld. DR. We therefore, taking a similar view set aside the issue to the file of the learned Assessing Officer with a direction to the assessee to produce the relevant information/documents before the Assessing Officer and the Assessing Officer to verify the same and decide the issue afresh. Ground No. 7 is, accordingly, allowed for statistical purpose.

19. In respect of ground No. 8, it is the submission of the Ld. AR that basing on the information contained in the AIR report, learned Assessing Officer made the addition of Rs.18,640/-holding that the assessee was not able to provide the supporting documents to establish the genuineness of the transaction. Before us the assessee filed an application for admission of additional evidence under rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 alongwith certain documents in support of their claim stating that there was an error in uploading the data relating to the premium paid by the assessee and instead of the

actual premium paid to the tune of Rs. 4, 61, 865/-an amount of Rs.18,640/- was uploaded in the website of the Income Tax Department as the amount of premium paid by the assessee and now that they have obtained a letter from Bajaj Aliens General Insurance Company Limited clarifying that the amount was correctly reported by them to the Income Tax Department, but it seems that there is a mistake while uploading the data by Income Tax Department on their portal and have wrongly considered the figure of Rs. 18, 640/-instead of Rs. 4,61,865/-.

20. Having regard to the facts and circumstances involved in this matter in the light of the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. Text Hundred India Private Limited reported in 39 CTR 263 we are of the considered opinion that inasmuch as the documents now sought to be produced by the assessee would throw some light on the issue, we allow this application under rule 29 of the Income Tax (appellate Tribunal) Rules, 1963 and receive the documents. Since the verification of these documents could conveniently be done at the end of the Assessing Officer, we set aside the issue to the file of the Assessing Officer to consider these documents and to take a view afresh. Thus the ground No. 8 is, accordingly, allowed for statistical purpose.

21. Ground No. 9 relating the disallowance of Rs. 35 Lacs being the expenditure on account of the expenditure amount paid to the employees of the assessee at the time of marriage of their daughters. It is the submission of the Ld. AR that considering the location and eligibility of the employees, the assessee has been making a provision in the books of accounts and such provision is offered for taxation at the time of filing the return and the actual amount paid during the year is claimed as

expenditure. According to the Ld. AR it has been the practice of the assessee quite for a long time and all through these years no disallowance was made by the learned Assessing Officer. Learned Assessing Officer, however, disallowed the expenditure claimed by the assessee on the basis that the assessee is not a company registered under section 25 of the Companies Act so as to carry out welfare activities and the expenditure incurred in marriage of the employees' daughters is not wholly and exclusively for the purpose of business of the assessee.

22. Basing on the decision of the Hon'ble Apex Court in the case of ShahzadaNand& Sons vs. CIT 108 ITR 358, Ld. AR submitted that the ex gratia compensation paid to an employee is an allowable expenditure. He further submitted that under section 37(1) of the Act, deduction is admissible for expenditure incurred wholly and exclusively for the purpose of business and such expenditure is justified by business consideration and incurred out of commercial expediency is allowable deduction. He drew our attention to details of this expenditure incorporated at page Nos. 485 to 490 of the paperbook in respect of the beneficiaries of this expense.

23. Insofar as the alliance of this expense in the earlier years is concerned, it is the submission of the Ld. DR that no such material is available with him right now and he further submitted that, be that as it may, the details furnished by the assessee are to be verified with reference to the expenditure so incurred by the assessee in the earlier assessment years. He therefore prays that the matter may be remitted to

the file of the learned Assessing Officer for verification of all these details.

24. Considering the request of the Revenue we deem it just and necessary that the allowance of this expenditure in the earlier years needs verification vis a vis the details furnished by the assessee. We therefore set aside the issue to the file of the learned Assessing Officer to carry out such an exercise of verification. Ground No. 9 is accordingly allowed for statistical purpose.

25. Lastly coming to the ground No. 10 challenging the disallowance of the claim of the assessee towards foreign tax credit, it could be seen from the record that the assessee had claimed foreign tax credit of Rs.98,13,926/-in respect of taxes withheld by Whirlpool SA and Whirlpool Polska SP Zoo. According to the Ld. AR the assessee had furnished a statement of reconciliation in respect of the tax deducted by the foreign group entities and the credit claimed in the tax return; that the learned Assessing Officer required the assessee to furnish the certificate in respect of tax withheld by the foreign group entities; that since the assessee was in the process of obtaining the certificate from the associated enterprises, the same could not be furnished before the Assessing Officer during the course of assessment proceedings; and that the learned Assessing Officer disallowed the claim of the assessee towards foreign tax credit in the absence of such a certificate. Assessee submits that now they are ready to furnish such certificate before the Assessing Officer.

26. Ld. AR further brought to our notice that the Tribunal in assessee's own case for the assessment year 2013-14 in ITA No. 8272/Del/2018 set

aside the matter to the file of the learned Assessing Officer for allowing the tax credit on verification of certificates to be submitted by the assessee. Since this submission of the assessee is not controverted by the Revenue we are of the considered opinion that a similar course could be taken for this assessment year also. We accordingly set aside this issue to the file of the Assessing Officer with a direction to the assessee to produce the requisite certificate before the learned Assessing Officer, on which the learned Assessing Officer will take a fresh view after verification. Ground No. 10 is, therefore, allowed for statistical purpose.

27. In the result, appeal of the assessee is allowed in part for statistical purpose.

Order pronounced in the Open Court on 20th January, 2020.

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

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 20/01/2020

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI