

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 6842/Del/2014
(Assessment Year: 2010-11)

Saic India Private Limited, C/o. Wipro Energy IT Services India Pvt. Ltd, A-67, Sector-57, Noida PAN: AAACI6192A (Appellant)	Vs.	DCIT, Circle-7(1), New Delhi (Respondent)
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Assessee by :	Manoneet Dalal, Adv
Revenue by:	Shri Surendra Pal, CIT DR
Date of Hearing	10/03/2021
Date of pronouncement	07/06/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of Dy. Commissioner of Income Tax, Circle 7(1), New Delhi, passed under Section 143(3) read with Section 144C of the Income Tax Act, 1961 (the Act) on 14.10.2014 for assessment year 2010-11. Pursuant to the direction of the Ld. Dispute Resolution Panel-III, New Delhi, dated 19.08.2014, the assessee has raised the following grounds of appeal:-

"I. Corporate Tax Grounds

1. *That on the facts and circumstances of the case and in law, the Ld A.O erred in treating the payment of Rs 39,25,367 towards expenditure incurred in relation to recruitment and training of employee as enduring in nature and thereby allowing deduction of Rs. 7,85,073, being only 1/5th of the expenditure.*
2. *That on the facts and circumstances of the case and in law, the Ld A.O erred in treating the payment of Rs 1,31,54,017 toward Retention Bonus as capital expenditure to be spread over five years and thereby allowing deduction of Rs 26,30,803, being only 1/5th of the expenditure.*
3. *That the Ld. AO failed to appreciate that payment of retention bonus was pursuant to acquisition of SAIC India and hence the same, being distinct from the ordinary activities of the enterprise, has been accounted correctly in line with the provisions of section 145 of the Income-tax Act, 1961.*

II. Transfer Pricing Grounds

4. *That on the facts and in the circumstances of the case and in law, the order passed by Ld. AO is bad in law and void ab-initio.*
5. *That on facts and circumstances of the case and in law, the reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO did not record any reasons in the draft assessment order based on which he reached the conclusion that it was*

“expedient and necessary” to refer the matter to the Ld. Transfer Pricing Officer (“TPO”) for computation of the arm’s length price, as is required under section 92CA(1) of the Income Tax Act, 1961 (“Act”).

6. *That on facts and circumstances of the case and in law, the Ld. AO/Ld. TPO/Ld. Dispute Resolution Panel (“DRP”) erred in making an addition of Rs. 59,675,189/- to the returned income of the Appellant by re-computing the arm’s length price of the international transactions under section 92 of the Act.*
 7. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in re-computing of the margins of Appellant i.e. tested party by considering retention bonus as an operating expense*
 8. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in facts and in law to modify, based on his subjective grounds and presumptions, the comparability analysis conducted by the Assessee for determining the arm’s length price.*
 9. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in accepting comparable company suo-moto without providing the Appellant an opportunity of being heard. The said action is in complete violation of the fundamental principles of natural justice.*
 10. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in wrongly computing the margins of comparable companies selected by him.*
 11. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in rejecting the comparable companies set adopted by the Appellant in its transfer pricing documentation on the basis of additional/modified quantitative filters which lacked valid and sufficient reasoning;*
 12. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in including companies which were functionally not comparable to the Appellant in terms of Functions, Assets and Risk profile.*
 13. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in not providing adjustment for the difference in risk profile of the Appellant vis a vis comparable companies.*
 14. *That on the facts and circumstances of the case the Ld. TPO/AO/DRP erred in selecting the current year (i.e. financial year 2009-10) data for comparability despite the fact that at the time of preparation of Transfer Pricing Documentation by the Appellant, the complete data for financial year 2009-10 was not available within the public domain*
 15. *That on the facts and circumstances of the case the Ld. AO erred in determining interest u/s 234B, 234C and 234D of the Income Tax Act, 1961.”*
2. Brief facts of the case is that assessee is a company part of SAIC Group, which is a leading provider of engineering and technology application solutions, headquartered in USA with Science Applications. The assessee was engaged in design, development, and maintenance of software for its group companies, which essentially includes requirement analysis, documentation of a system’s software architecture, coding, compilation, software testing, engineering, or software documentation, digital integration, and software maintenance. Assessee charges its Group Companies on an hourly rate basis and provides some software development activity to its Indian customers under independent domestic contracts.

3. For the year assessee filed its return of income on 24th September, 2010 declaring income of Rs.10,08,27,749/-. However, the assessee with effect from 1st September 2011 has undergone name change and further pursuant to the order of the Hon'ble Karnataka High Court this company is amalgamated with Wipro Ltd.
4. The assessee has entered into an international transaction of provision of software development services of Rs. 883715413/- . The assessee benchmarked above transaction adopting Transactional Net Marginal Method [TNMM] as the most appropriate method adopting the profit level indicator of operating profit / operating cost selecting 11 comparables whose margin was 11.75% whereas the margin of the assessee was computed at 15.14% and thus it was submitted that the international transaction entered into by the assessee is at arms' length.
5. The Ld. Transfer Pricing Officer modified the comparable sets except 5 comparables of the assessee and further populated with the final comparables of 15 companies, after allowing the working capital adjustment, computed the margins of the comparables at 24.26% and thus an adjustment of Rs. 7,08,12,972/- was made.
6. Ld AO has also made some disallowances in the draft assessment order. Expenses of staff recruitment and training of Rs.19,52,123/- and Rs.19,73,244/- respectively and retention bonus of Rs.1,31,54,017/- claimed by the assessee were disturbed, the Assessing Officer held that these are the expenditure of capital nature and allowed only 1/5th of such expenditure during the year. Thus 4/5th of such expenditure was disallowed. Consequently draft assessment order was passed.
7. The assessee filed objection before the Ld. Dispute Resolution Panel. In the transfer, pricing adjustment the Ld. DRP upheld the transaction proposed by the TPO except with respect to exclusion of Infosys Technology Ltd. Consequently the margins of the comparables were computed at 22.81% and transfer pricing adjustment was retained at Rs.5,96,75,189/-. With respect to the capital expenditure the Id. DRP, relying on its own direction for assessment year 2009-10 upheld the order of the Assessing Officer. Therefore, final assessment order was passed against which the assessee is in appeal.
8. The first ground of appeal is with respect to recruitment and training expenditure and retention bonus expenditure.
9. The Id. AR submitted that staff recruitment expenses have been incurred mainly for payment to third party recruitment agency and access to various job sites like Naukri.com and the referral books. He further submitted that the training expenditure have been incurred for training of new appointees and for on the job trainees of existing employees for up-gradation of their skills. Therefore, it was stated that looking to the nature of the business of the assessee above expenditure are of revenue expenditure in nature and, therefore, should have been allowed 100%. Assessee submitted that in its own case for assessment years 2008-09 and assessment year 2009-10, identical issue arose and the same was allowed by

- the co-ordinate bench. He referred to the various paras of the order of ITAT in assessee's own case. Thus, he submitted that this issue is squarely covered in favour of the assessee.
10. With respect to the transfer pricing adjustment, he submitted that assessee is contesting exclusion of 3 comparables, namely, Thirdware Solution Limited, Wipro Technology Services Ltd. and E-Infochips Bangalore Ltd. With respect to the Thirdware Solution Limited, he submitted that the comparable company is engaged in development of software 'PAPA'. Further segmental information is also not available. He further stated that the comparable company is in export business from software zone ACD and SPP units. He also referred that purchases and sales of licence and subscription charges is the revenue stream of that company and, therefore, it is not comparable. He submitted that this comparable was tested in assessee's own case for assessment year 2009-10 and it was directed to be excluded. With respect to exclusion of Wipro Technology Services Ltd., he submitted that this comparable is engaged in activity of providing programme management and third-party information securities adjustment services. It is also engaged in software quality management, quality assurance and business profits management services as well as technology infrastructure support. He further stated that this company provides service primarily to Citi Group Incorporation, which is related party of Wipro Ltd. and, therefore, it also fails on related party filter. He further relied on decision of DCIT Vs. Open Solution Software Service Pvt. Ltd. in ITA. 201 of 2018 of the Hon'ble Delhi High Court and also the order of the co-ordinate bench in ITA. 7083 (Del) of 2014 for assessment year 2010-11 in the case of Pyramid IT Consultancy Pvt. Ltd. Vs. ACIT. With respect to E-Infochips Bangalore Ltd., he submitted that as per the size extract this company provides a varied range of services, which include software, form-ware, hardware and field programmable gate array application specific incorporated circuit and quality assurance and testing. Therefore, he stated that it is engaged in providing complex programme development service in different areas. Such complex services are not provided by the assessee. Therefore, it is not functionally comparable. He further stated that as per the annual report, the company is engaged in software and IT enables services. However, segmental data is not available. He relied on the decision of the co-ordinate bench in some other cases wherein this comparable is excluded.
 11. He submitted that assessee does not want to press Ground Nos. 4 to 6 and 8 to 11.
 12. The Id. DR vehemently supported the order of the Id. Assessing Officer. With respect to the addition of capital expenditure. Further, with respect to the exclusion of the comparables the DR relied on the orders of the Id. TPO and DRP. With respect to the various judicial pronouncements on TP issue, he submitted that the cited decisions were rendered in case of some other assessee and it cannot be used for deciding exclusion or inclusion of the same in this case.

13. We have carefully considered the rival contentions and perused the orders of the lower authorities. With respect to the corporate ground, we find that Ground no 1 -3 are squarely covered in favour of the assessee in its own case for earlier years in **WIPRO LIMITED C/O WIPRO ENERGY IT SERVICES INDIA PRIVATE LIMITED (FORMERLY KNOWN AS, SAIC INDIA PRIVATE LIMITED) VERSUS DCIT CENTRAL CIRCLE-7 (1) , NEW DELHI**ITA No. 1594/DEL/2014 dated **April 11, 2018** as under :-

“3. As regards Ground No. 4 relating to Recruitment and Training employees for upgrading their skills, the Ld. AR submitted that the said issue is covered in favour of the assessee by Tribunal’s order in assessee’s own case 2008-09. The Ld. DR relied upon the orders of the Assessing Officer, TPO and DRP directions.

14. We have heard both the parties and perused all the relevant records. The Tribunal in para 20 held as under:

“20. Now, adverting to the case at hand, when the assessee has come up with specific pleas that he has made payment of ₹ 37,89,007/- to the third party recruitment agency, access fee to various job sites like naukari.com etc. and ₹ 16,01,153/- for imparting raining to the new employees who have recently joined and on job training to existing employees, which have otherwise been not disputed by the AO/DRP, recruitment of employees for efficient profit earning through a recruitment agency is recurring process and such expenditure cannot be avoided /deferred. At the same time, in the globalised set up, sudden upgradation of knowledge and skill of the IT engineers / technicians for providing IT Software Development Services particularly to foreign AE is also necessary for earning profit by a company. Moreover, when undisputedly there is no memorandum of understanding between the assessee company and its employees that the employee will work for specific period, as the attribution rate in software industry is highest, recruitment of employees and imparting of training to them cannot be considered as of enduring benefit. So, by following the law laid down by the Hon’ble Calcutta High Court Hindustan Aluminium Corporation Ltd. vs. CIT (supra) and Hon’ble jurisdictional High Court in CIT vs. Munjal Showa Ltd. we hereby decide ground no. 1 in favour of the assessee.”

Thus, the issue is squarely covered by the order of the Tribunal as there is no change in this Assessment Year as well. We therefore, allow Ground No. 4 of the appeal.

15. As regards Ground No. 5 which is a corporate tax. The said ground is raised by the Ld. AR in respect of treatment of retention of bonus as operative expenditure. The Ld. AR submitted that this issue is covered in favour of the assessee by Tribunal’s order in assessee’s own case 2008-09 wherein it has been treated as revenue expenditure to be allowed u/s 37 of the Act and accordingly to be treated as operative expenditure for the purpose of TP adjustment. The main claim for deduction of Retention of bonus paid to key employees is under Ground No. 5.

16. The Ld. DR relied upon the Assessment Order as well as the orders of the TPO and DRP.

17. We have heard both the parties and perused all the relevant records. For A.Y. 2008-09, the Tribunal held as under:

“42. So, we are of the considered view that payment of retention bonus made by the assessee company partakes character of salary payable to its employee for the business purposes and has to be treated as revenue expenditure. Had the employees of erstwhile company not been retained by the assessee company its business would have adversely

affected and this fact goes to prove that the retention bonus was paid as an incentive to the employee, which is salary as per Explanation 2 to section 15 of the Act, and is a business expenditure not creating any enduring benefit. Since assessee company had undisputedly paid the retention bonus before filing the return of income of the relevant assessment year these expenditure are entitled to be allowed u/s 37 of the Act. So, we hereby determine ground no. 4 in favour of the assessee company.”

Thus, the issue is squarely covered by the order of the Tribunal in favour of the assessee in the present Assessment Year as well. Therefore, Ground No. 5 is allowed.

14. Thus respectfully following decision of coordinate bench in assessee's own case, we allow grounds of appeal Nos 1 -3 and direct Id AO to treat Training, staff Recruitment and retention bonus as revenue expenditure.
15. Ground no 4-6 and 8-11 are not pressed by assessee hence dismissed.
16. In fact before us assessee contested for exclusion of comparable companies sated above.
17. Regarding Thirdware solutions Pvt Ltd, this comparable has been considered in the case of assessee by Coordinate bench in **WIPRO LIMITED C/O WIPRO ENERGY IT SERVICES INDIA PRIVATE LIMITED (FORMERLY KNOWN AS, SAIC INDIA PRIVATE LIMITED) VERSUS DCIT CENTRAL CIRCLE-7 (1) , NEW DELHI**ITA No. 1594/DEL/2014 dated **April 11, 2018** and has excluded the same. There is no change in facts and FAR of assessee or comparable shown to us, therefore we following order of coordinate bench where in it has been held that :-

“6. As regards to Additional Ground No. 1, the Ld. AR submitted that the comparable Mindtree Ltd. is not contested by the Ld. AR during the time of hearing. The Ld. AR submitted that the assessee is only contesting the exclusion of Thirdware Solutions Ltd. which is set out in Additional Ground No. 1. The Ld. AR further submitted that the same should have been taken into account by the TPO as well as DRP. The said company is not a proper comparable as it is the functionally different company. To support his contention, the Ld. AR submitted that the company i.e. Thirdware Solutions Ltd. is engaged in diverse activities and assets. From the annual report of the said company it can be seen that the sales and operating income show sale of license, software services, export of SEZ unit, export from STPI unit and revenue from subscription. However, segmental results are not provided in the Annual Report. Thus, the Ld. AR submitted that this company's system of recognizing revenue is vague and apparently not based on cost matching principle. The Ld. AR submitted that this company has to be excluded and also relied upon the Tribunal decision in case of Fiserv India P. Ltd. Vs. ITO (2015) 60 Taxmann.com 48.

6. The Ld. DR submitted that the TPO has rightly included this comparable. The Ld. DR submitted that the details of purchase given by the assessee company was analyzed with the Thirdware Solutions Ltd. It was seen that majority of expenses are in the form of software service charges and salaries. Thus, the same establishes that the exports are software service export. Annual report of the said company has given detailed unit wise break of income and expenses. Thus, the said company is comparable with the assessee company.

7. We have heard both the parties and perused the material available on record. It can be seen that the assessee company is engaged in the design, development and maintenance of software for its group companies which essentially includes software architecture, coding, software testing, digital integration, software maintenance etc. It also provides some software activity to Indian Customers under independent domestic contracts. However, in Assessment Year 2008-09, the share of this activity in the total turnover was only 1.54%. As regards Thirdware Solutions Ltd. the same deals with sale of licenses Software, Services Export and Revenue from subscription. Thus, the Thirdware Solutions is not exclusively dealing with the Software Services. Infact, the TPO himself stated that majority of expenses are in the form of Software Service Charges and Salaries, but he has not considered exact expenses for the Software Charges and Salaries. This has not come up from the annual report to deal with the assessee company as a comparable as there is no segmental results provided by the said company. Thus, we direct the TPO/A.O to exclude this comparable as it is not having similar functions to that of the assessee company and also there is no segmental record given in the annual report of that company. Thus, we partly allowed Additional Ground No. 1.”

direct the Id TPO to exclude Thirdwave Technologies Limited.

18. Now we come to another comparable argued by the assessee for exclusion is Wipro technology services Ltd. This comparable is included by the learned transfer-pricing officer at the time of analyzing the additional companies requested by the assessee to be included. The learned transfer-pricing officer included this comparable on his own without giving any show cause notice to the assessee. This is apparent from paragraph number 29 of the order of the learned TPO. For its inclusion, the learned transfer-pricing officer has given reasons in paragraph number 30. The learned TPO considered the argument for exclusion of the above company given by some other assessee's and not by the assessee before us. Therefore, it is apparent that above comparable is included by the learned transfer-pricing officer without giving any opportunity to the assessee. Before the learned dispute resolution panel assessee objected to the same stating that, it has a relationship of associated enterprise with the Citigroup. This is apparent from the note given by the learned transfer-pricing officer himself that on 16th of March 2009 this company i.e. Citigroup (CTS). Was acquired by Wipro. In view of this, the learned authorised representative argued that the transactions are with a related party; therefore this comparable cannot be included. We also find that learned departmental representative could not controvert this fact as well as the reason that assessee was not given an opportunity by the learned transfer-pricing officer and he included this comparable on his own. Learned dispute resolution panel discussing this comparable at serial number 11 at page number 16 did not consider this argument at all and merely relied upon the decision of willis processing services Ltd versus Deputy CIT and stated that turnover criteria is not a valid criteria for exclusion or inclusion of a comparable. The DRP though further held that Wipro technology services Ltd is functionally comparable however not dealt with the argument of the assessee with respect to its transactions with Citigroup. In view of this, we find that there is controlled transaction in this

company and therefore it cannot be included. We direct the learned AO/TPO to exclude the same.

19. The next comparable challenged by the assessee is E Info chips Bangalore Ltd the learned TPO included this company stating that this company is also engaged in software development services. The assessee contested that this company as per its information available on the website shows that it is engaged in development of software and hardware products and further with respect to the financial statements it was submitted that various schedules of profit and loss account are not available in the annual report for financial year 2009 – 10. Before us, assessee also submitted the annual report of this comparable company at page number 92 – 109 of the paper book. This compilation has directors report, auditors report, balance sheet, profit and loss account, cash flow statement and schedules 1 – 6 and straight way schedule 11 notes forming part of the accounts. Though in profit and loss accounts there are set schedules mentioned from 7 to 10. However, same are not available. This fact is also stated by the assessee before the learned dispute resolution panel, which is evident at page number 8 – 9 of the direction of the learned dispute resolution panel. There is no finding of the learned DRP on this aspect of the argument. When the profit and loss account schedules are not available it is not possible to know about the revenue stream, the expenses incurred for software development, administrative expenses and other income of this comparable. This fact was also pointed out before the learned transfer-pricing officer, as it is clear on reading of para number 19.1 of the order of the learned TPO. The assessee submitted before him that there is an incomplete data as schedule number 7 – 10 relating to the profit and loss account are missing in the audited financials of the company and thus the employee cost details et cetera are not available for the company to clear the employee cost filter. The learned assessing officer tried to draw the support for deriving the conclusion that this company passes the employee cost filter by showing the profit and loss of financial year 2010 – 11 however, the learned assessing officer has not given the profit and loss account schedules for the year ended on 31st of March 2010 of this comparable. The learned departmental representative could not show us any reason that why this schedules of the profit and loss account are not provided to the assessee. Even the learned DRP as we have already held is silent on this aspect. When the complete information about the comparable is not available in a reasonable manner, it cannot be considered for the comparability analysis of an international transaction of the assessee by including it. For this reason only, we direct the learned transfer-pricing officer to exclude this comparable.
20. Accordingly all the above three comparables i.e. Third ware Techonologies Solutions Limited, Wipro technologies Ltd and E Infochips Bangalore Limited are directed to be excluded from the comparability analysis. To this extent, the transfer pricing grounds of the appeal of the assessee are allowed.

21. The assessee did not advance any argument with respect to ground number 12 – 14 of the appeal and therefore same are dismissed.
22. In the result, appeal of the assessee is partly allowed.
Order pronounced in the open court on 07/06/2021.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 07/06/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi