

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

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.5418/Del/2012
Assessment Year: 2008-09

Hewitt Associates (India) Pvt. Ltd. Hewitt Tower, Sector-42, DLF City, Gurgaon Haryana PAN No.AABCH1559D	Vs.	DCIT Circle – 10 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Ajit Jain, CA Sh. Arpan Khanna, CA Sh. Piyush Aggarwal, CA
Respondent by	Sh. Rajesh Kumar CIT DR

Date of hearing:	15/12/2023
Date of Pronouncement:	20/12/2023

ORDER

PER N. K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order dated 24.08.2012 framed u/s. 143 (3) r.w.s. 144 C (13) of the Act.

2. The revised grounds of appeal read as under :-

“The addition amounting to INR 22,618,798 undertaken by the Learned Deputy Commissioner of Income-tax, Circle 10 (1), New Delhi (the Ld. AO) vide final assessment order dated August 24, 2012 (received by the Appellant on August 29, 2012) passed under section 143 (3) read with section 144C (13) of the Income Tax Act, 1961 (the Act) is not in accordance with the law and therefore not sustainable.

Transfer Pricing ("TP") Adjustment - INR 22,648,798

That the Hon'ble Dispute Resolution Panel (DRP), New Delhi has erred both in law and on facts by summarily rejecting the Appellant's objections to the draft order dated November 24, 2011 passed by the Ld. AO under section 143(3) read with section 144C(1) of the Act.

The Hon'ble DRP while issuing directions under section 144C(5) of the Act did not consider the facts and merits of Appellant's objections to the proposed adjustments, and merely relied on the reasoning given by the Additional Commissioner of Income-tax, Transfer Pricing Officer-1 (2) vide order under section 92CA(3) of the Act dated October 31, 2011 without due application of mind and without affording a reasonable opportunity of being heard in the matter to the Appellant on the following grounds:

1. By summarily rejecting/disregarding the comparability analysis without giving any cogent basis and without demonstrating the inadequacy or infirmity in the economic analysis so conducted by the Assessee.

In this regard, the Ld. TPO erred in demonstrating correctness of the presumption/hypothesis so framed to reject the comparability analysis of the Assessee and has accordingly misconstrued the provisions of Section 92C (3) (c) of the Act.

2. *By substituting the comparability analysis conducted by the Assessee for its software development services and BPO services function with a fresh comparability analysis based on his own conjectures and surmises.*

3. *By misconstruing Rule 10B (1) of the Income Tax Rules, 1962 (Rules) and its applicability on the facts and circumstances of the case. In this context the Ld. TPO has erred in disregarding independent legal status accorded to an overseas branch of an Indian company in view of the provision of clause (iii) of Section 92F of the Act.*

4. *By using data called pursuant to issuance of notice under Section 133(6) of the Act which was not available to the Assessee at the time of maintenance of Transfer Pricing Documentation.*

5. *By not providing the complete information which was called pursuant to issuance of notice under Section 133(6) of the Act and by conducting the assessment based on unfair analysis.*

6. *By misconstruing the functional and risk profile of the Assessee and by not allowing risk adjustments.*

7. *By selecting comparable having dissimilar functional profile vis-à-vis the Assessee.*

8. *By applying the wages-to-sales ratio based upon conjectures and surmises and further, applying an arbitrary filter of 25 percent without following a cogent economic basis and without establishing any statistical veracity of the presumption/ hypothesis framed.*

Further, the Ld. TPO has also erred by juxtaposed application of two or more methods to conclude a single benchmarking analysis as application of wages-to-sales screen tantamount to adoption of the cost-plus method.

9. *By changing the computation methodology by misconstruing certain line items as operating/ non-operating which represents an unjustified approach.*

10. *By relying upon data of the comparables for financial year 2007-08 only for determination of the arm's length price, disregarding the multiple year data approach followed by the Assessee.*

11. *By relying upon updated data of the Comparables which was not available to the Assessee at the time of maintenance of Transfer Pricing Documentation within the time- frame mentioned in Rule 10D(4) of the Rules.*

12. *By not allowing appropriate comparability adjustment on account of risk of the comparable companies for the purpose of comparison with the results of the Assessee.*

13. *By not appreciating that there was no intention whatsoever on the part of the Appellant to shift profits outside India by under-reporting revenue since the Appellant was eligible to claim 100 percent of such profits as tax exemption under section 10A of the Act.”*

3. Briefly stated the facts of the case are that the assessee company is involved in the business of BPO and Technology Development Services, Human Resource Consultancy and Human Resources Outsourcing Service.

4. During the course of the scrutiny assessment proceedings the AO noticed that the assessee has international transactions for which it filed form No.3CEB as per provisions of section 92E of the Act relating to international transactions. Since the total transactions were excess of Rs.5 crores. The case was referred to

the TPO and the TPO vide order dated 31.10.2011 proposed an addition of Rs.440638092/-.

5. Objections were raised before the DRP and the DRP vide order dated 13.06.2012 dismissed the objections and pursuant to the order of the DRP the final assessment order was framed by making addition of Rs.440638092/-against which the assessee is in appeal before us.

6. The Transfer Pricing Adjustment comprises of two parts

(i)	TP adjustment – US Transactions	Rs.417989294/-
(ii)	TP adjustment – non US Transactions	<u>Rs.22648798/-</u>
		<u>Rs.440638092/-</u>

7. While hearing the Counsel, Bench came to know that the associated enterprise of the assessee in the USA filed an application under mutual agreement procedure (mAp) with the competent authority of the US under article 27 of the India US-DTAA and the settlement has been arrived at between the competent authority of India with respect to the adjustment on account of Transfer Pricing issues relating to the US transactions.

8. The DR vehemently stated that the same treatment should be given to the non US transactions as there is no difference in FAR of US transactions and non US transactions.

9. The Counsel vehemently objected to this contention of the DR stating that it is the appeal by the assessee and the revenue cannot raise any additional plea.

10. The DR stated that he is raising the issue under rule 27 of the ITAT rules to which the Counsel placed strong objections.

11. We have given a thoughtful consideration to the rival submissions. It is true that this is an appeal by the assessee but it is equally true that the other party i.e. the revenue can raise issue under rule 27 orally as settled by the Hon'ble Jurisdictional High Court of Delhi in the case of **Sanjay Sahney 316 CTR 392** and respectfully following the same the oral request of the DR is accepted.

12. It would be better to refer to the settlement arrived between the competent authority of India and the competent authority of USA to resolve the cases relating to Hewitt India for A.Y. 2006-07 to 2010-11 by adopting the values relating to US related international transaction as below :-

S.No.	AY	IT Services				
		US related transactions				
		Operating Revenue	Operating Cost	Determined Margin	Arm's Length Price	Adjustments
1	2006-07	12402,95,222	10850,44,129	15.52	12534,42,977	131,47,756
2	2007-08	19987,63,336	17654,91,360	16.01	20481,46,527	493,83,192
3	2008-09	26252,49,063	23217,80,520	16.22	26983,73,320	731,24,258
4	2009-10	25340,13,028	24124,57,402	16.48	28100,30,382	* 1890,92,519
5	2010-11	30799,95,632	27414,91,435	16.93	32056,25,934	1256,30,302

S.No.	AY	IT Enabled Services				
		US related transactions				
		Operating Revenue	Operating Cost	Determined Margin	Arm's Length Price	Adjustments
1	2006-07	10164,28,253	8891,71,480	14.50	10181,01,344	16,73,091
2	2007-08	12859,75,096	11359,68,102	14.99	13062,49,721	202,74,624
3	2008-09	17589,34,409	15557,57,300	15.20	17922,32,409	332,98,001
4	2009-10	18489,04,217	17600,53,806	15.46	20321,58,125	# 1542,70,030
5	2010-11	22825,74,395	20316,87,903	15.91	23549,29,448	723,55,054

Note1: Operating cost and operating revenue have been recomputed on the basis of the agreement reached with the US Competent Authority.

* - As per the agreement, operating cost shall exclude the following: Forex loss, financial charges, donation, any provisions, any written off expenses, loss on capital and includes reimbursement of expenses (received).

** - As per the agreement, operating revenue is the revenue received for rendering export services excluding forex gain and including reimbursement of expenses (received).

The adjustments are restricted to the amount of adjustments made by the TPO in the TP Order.

Accordingly, in pursuance of the mutual agreement, corresponding relief to the adjustments made by the TPO/ AO has been computed as follows.

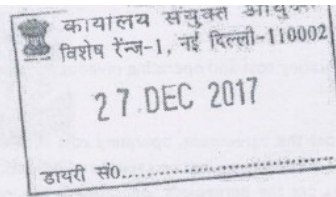
S.No.	AY	IT Services						
		Adjustments made towards US transactions		Income adjusted by TPO not under MAP	Total adjusted income		Relief	Adjustment sustained
		TPO	As per agreement		TPO	As per agreement		
1	2006-07	1665,02,090	131,47,756	143,99,790	1809,01,880	275,47,545	1533,54,335	131,47,756
2	2007-08	1774,17,608	493,83,192	134,36,101	1908,53,709	628,19,293	1280,34,416	493,83,192
3	2008-09	1885,78,578	731,24,258	102,18,152	1987,96,730	833,42,410	1154,54,320	731,24,258
4	2009-10	1890,92,519	1890,92,519	85,16,969	1976,09,488	1976,09,488	0	1890,92,519
5	2010-11	2407,87,748	1256,30,302	119,81,251	2527,68,999	1376,11,553	1151,57,446	1256,30,302
	Total	9623,78,544	4503,78,026	585,52,262	10209,30,806	5089,30,288	5120,00,518	4503,78,026

S.No.	AY	IT enabled Services						
		Adjustments made towards US transactions		Income adjusted by TPO not under MAP	Total adjusted income		Relief	Adjustment sustained
		TPO	As per agreement		TPO	As per agreement		
1	2006-07	565,67,945	16,73,091	48,92,230	614,60,175	65,65,321	548,94,854	16,73,091
2	2007-08	2055,90,890	202,74,624	155,69,706	2211,60,596	358,44,330	1853,16,266	202,74,624
3	2008-09	2294,10,716	332,98,001	124,30,646	2418,41,362	457,28,647	1961,12,715	332,98,001
4	2009-10	1542,70,030	1542,70,030	143,31,096	1686,01,126	1686,01,126	0	1542,70,030
5	2010-11	3938,18,012	723,55,054	407,63,771	4345,81,783	1131,18,815	3214,62,958	723,55,054
	Total	110396,57,593	2818,70,800	879,87,449	11276,45,042	3698,58,249	7577,86,793	2818,70,800

13. The assessee vide letter dated 26.12.2017 gave its acceptance as under:-

December 26, 2017

The Joint Commissioner of Income tax
Special Range -1, New Delhi
Room No. 159A, 1st Floor, CR Building,
New Delhi



Dear Madam,

Subject:

- (1) Aon Consulting Private Limited (Successor entity of Aon Services India Private Limited (ASIPL))
- (2) PAN: AAHCA0739J (PAN of ASIPL :AABCH1559)
- (3) Assessment Years ('AY'): 2006-07 to 2010-11
- (4) Letter regarding effect to resolution under Article 27 - Mutual Agreement Procedure ('MAP') of India-US double Taxation Avoidance Agreement ('DTAA') dated 21 December 2017

This is in reference to the letter no. F.No.Jt.CIT/SpI.Range-1/2017-18 (copy enclosed as Annexure 1) issued by your office in connection with the resolution achieved under MAP between Competent Authority of USA and Competent Authority of India in respect of the subject AYs.

As per the MAP resolution shared with the Assessee by your office, the Assessee understands that the adjustment of INR 2002,036,137 on account of transfer pricing issues relating to US related transactions have been reduced by INR 1269,787,311 as per the following table between the two competent authorities consequent to the MAP proceedings:

Particulars	Disallowed by Transfer Pricing Officer towards US transactions	Relief allowed in MAP towards US transactions	Adjustment sustained in MAP towards US transactions
IT services	9,623,78,544	512,000,518	450,378,026
IT enabled services	1,039,657,593*	757,786,793	2818,70,800
Total	2,002,036,137	1,269,787,311	732,248,826

*the above figure has been inadvertently reported in the letter as 11,039,657,593.



In this respect, the Assessee wishes to submit as under:

- (1) The Assessee hereby gives his acceptance to the resolution taken under MAP proceedings;
- (2) The Assessee is in the process of filing applications for withdrawal of appeal(s) before the Hon'ble Income Tax Appellate Tribunal (Hon'ble ITAT)/ Commissioner Appeals (CIT(A)) for the subject AYs and requests your office to grant some time to submit acknowledgement copies/ proofs for withdrawal of such appeals. The Assessee would prefer to continue to appeal before the Hon'ble ITAT/ CIT(A) on the transfer pricing adjustments relating to non-US transactions and on other corporate tax grounds.

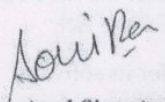
We hope our above request would be acceded to.

In the meanwhile, should your office require any further information/ clarifications, the Assessee shall be pleased to provide the same.

Yours truly,

for Aon Consulting Private Limited

(Successor entity of Aon Services India Private Limited)


Authorized Signatory
Encl: As above



14. In the light of the above we have no hesitation to direct the AO / TPO to adopt the same approach for the non US transactions as adopted in the MAP for US transactions and determine the TP adjustment, if any, after affording a reasonable and sufficient opportunity of being heard to the assessee. For this proposition we draw support from the decision of the Hon'ble High Court of Bombay in the case of **J.P. Morgan Services India Private Limited 105 taxmann.com 40**. The relevant findings read as under :-

“2. For convenience, we may record facts from Income Tax Appeal No.4/2017.

The Respondent-Assessee is a private limited company. In the return of income-tax filed by the assessee for the assessment year 2007-2008, the question of determination of Arm's Length Price of the transaction entered into by the assessee with its international Associated Enterprises came up for consideration. The Assessee has 96% of its such transactions with its US based associated enterprise. The rest of the transactions are non-US based transactions. In relation to the US based transactions, the Government of India and that of United States of America entered into a Mutually Agreed Procedure for determining the tax to be levied in the two countries in relation to such transactions. This Mutually Agreed Procedure culminated into an order being formally passed in this regard. When it came to the question of determining the Arm's Length Price of assessee's similar transactions, which were non-US based, the tribunal by the impugned judgment, applied the same parameters and determined the Arm's Length Price on the basis of determination contained in MAP in relation to US based transactions. This approach of the tribunal has given rise to the present Appeals.

3. The main contention of the Department is that the MAP is a non-adjudicatory process and therefore the culmination of such process cannot be automatically projected for determination of Arm's Length Price in terms of section 92C of the Act, where no such agreement has been arrived at. The case of the assessee on the other hand is that in the present case the tribunal has not automatically lifted parameters laid down in the MAP. Firstly, the MAP itself has been drawn after detail consideration of the Arm's Length Price. In absence of any material difference between the US based transactions and assessee's non-US based transactions, the

revenue cannot raise any such objection to approach adopted by the tribunal.”

15. In the light of the above the issues restored back to the AO / TPO to be decided afresh as direct here in above.

16. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 20.12.2023

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

NEHA

Date:- .12.2023

Copy forwarded to:

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

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	15.12.2023
Date on which the typed draft is placed before the dictating Member	19.12.2023