INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 64/Del/2017
(Assessment Year: 2012-13)

WM India Technical and Consulting Services Pvt. Ltd, E-20, First & Second Floor, Hauz Khas, New Delhi PAN: AAACW7112N	Vs.	DCIT, Circle-27(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Kanchan Kaushal, Adv Ms. Shruti Khimta, Adv
Revenue by:	Ms. Nidhi Sharma, Sr. DR
Date of Hearing	21/08/2020
Date of pronouncement	11/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by WM India Technical and Consulting Services Private Limited, assessee/appellant against assessment order for assessment year 2012 – 13 passed by The Deputy Commissioner of Income Tax, Circle-27 (2), New Delhi (the learned AO) u/s 143 (3) of the Income Tax Act 1961 (the act) dated 28/10/2016 determining total income of the assessee at ₹ 123,347,970/– raising following grounds of appeal:

"1. The Assessment Order passed in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') is a vitiated order as the Hon'ble DRP erred both on facts and in law in confirming the additions made by the Ld. Assessing Officer ('AO')/ Ld. Transfer Pricing Officer ('TPO') to the Appellant's income by issuing an order without appreciation of facts and law;

Transfer Pricing grounds of appeal

2. The Ld. AO/Ld. TPO and the Hon'ble DRP erred both on facts and in law in confirming the addition of Rs. 7.98,52,317 on account of transfer pricing to the income of the Appellant by holding that its international transaction relating to reimbursement of expenses (hereinafter referred to as 'expat support services') to its Associated Enterprise ('AE') does not satisfy the arm's length principle envisaged under the Income tax

Act, 1961 ('the Act'). While determining the Arm's Length Price ('ALP') of the said transaction to be NIL, the Ld. TPO erred in:

2.1. questioning the commercial / business wisdom of the Appellant for undertaking the said transaction;

2.2. disregarding sound TP principles and judicial pronouncements in India in undertaking the said judgment;

2.3. disregarding the fact that the transaction pertains to reimbursement of expenses and not provision of services by the AE;

2.4. holding that the expat support services are incidental and duplicative in nature and have not resulted in any economic and commercial benefit to the Appellant;

2.5. holding that the services rendered by the expats provides incidental benefit to the appellant and thus are in the nature of shareholder services.

2.6. disregarding the documentary evidence submitted by the Appellant substantiating the functions performed by the expats and the benefits received by the Appellant.

3. That the Ld. AO/Ld. TPO and Hon'ble DRP erred, on facts and circumstances of the case and in law, in re-determining the ALP of transaction relating to expat support services, assuming that no benefit has been conferred upon the Appellant from such payment. In doing so,

3.1. erred in rejecting the transfer pricing documentation and analysis of the Appellant.

3.2. erred in determining the ALP of the international transaction applying the CUP method prescribed under Rule 10B(i)(a) of the Income Tax Rules, 1962 (the Rules)

4. That on facts and law, the Ld. AO and the Hon'ble DRP failed to appreciate that the independent third parties operating in similar industry had availed similar expat support services.

5. Without prejudice to the above contentions, the Ld. AO and the Hon'ble DRP has erred on facts and in law by ignoring the fact that income earned by the expats has already been taxed in India and subsequent disbursal of post-tax salary does not lead to any tax base erosion in India;

6. That on facts and law, the Ld. AO/Ld. TPO and the Hon'ble DRP failed to appreciate the business model of the Appellant and ignored the fact that entire cost of expats which was reimbursed to the AE was included in the cost base and in turn charged by the Appellant to its customers.

<u>Corporate Tax grounds of appeal</u>

7. That on the facts and circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have erred in making disallowance under section 14A of the Act read with Rule 8D of the Rules.

8. *That the Ld. AO has grossly erred in interpreting Rule 8D(2)(iii) of the Rules.*

9. *That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in calculating interest to be charged under 234D of the Act and wrongly calculating interest withdrawn under section 244A of the Act.*

10. *That the Ld. AO and the Hon'ble DRP has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act."*

2. Ground No. 1 is general in nature and therefore same is dismissed.

3. Ground No. 9 is with respect to chargeability of interest u/s 234D and withdrawal of interest u/s 244A of the act. It is consequential in nature and therefore dismissed.

4. Ground number 10 is against the initiation of penalty proceedings u/s 271(1)(c) of the Act, which is premature, hence dismissed.

5. Ground number 2 to 6 are related to the transfer pricing adjustment.

6. Brief facts of the case shows that assessee was incorporated on 24th of April 2007 as an indirectly wholly owned subsidiary of Walmart stores Inc. USA. It is engaged in providing various types of consultancy services and assistance to domestic Indian entities i.e. Walmart India Private Limited and an unrelated entity Bharti Retail Limited. The services rendered by the appellant were in connection with development, operation and management of wholesale business, retail business and related operations. Assessee filed its return of income on 27/11/2012 declaring income of ₹ 43,445,360. The ld Assessing Officer noted that assessee has entered into international transaction with associated enterprise during the year. Therefore, the reference was made to the learned Transfer Pricing Officer on 5th December, 2014. Assessee has entered into following international transactions which were benchmarked by the assessee as Under:

serial number	nature of international transaction	amount	methods applied for benchmarking by assessee	arithmetic mean of comparable companies	author metric mean of tested party

1	availing of technical services	8,03,08,259	transactional net margin method	11.09%	10%
2	rendering of technical services	1 91,30,581	transactional net margin method	10.25%	10%
3	reimbursement of expenses received	68,25,889	comparable uncontrolled Price		
4	Reimbursement of expenses paid	7,98,52,317	Comparable uncontrolled Price		

7. According to the transfer pricing study report by the assessee above transactions were stated to be at arm's-length. The learned Transfer Pricing Officer also did not object to the international transaction stated above at serial Nos. 1 to 3. The learned Transfer Pricing Officer however raised issue on reimbursement of expenses paid of ₹ 79,852,317/-. These services of reimbursement of expenses paid by the assessee are called as 'expat support services'. With respect to the above service the assessee stated that transactions are in the nature of reimbursement paid, it is the third-party cost reimbursed which is comparable uncontrolled Price for reimbursement. Therefore keeping in view the nature of transactions and the degree of comparability, CUP Method was considered as the most appropriate method for these transaction

8. The nature of services in the above reimbursement paid by the assessee is related to certain employees which were deployed by WME India for the purpose of carrying on its business from its associated enterprise, Walmart stores incorporation USA. It was stated that these employees are under the economic employment of the company. However for administrative convenience, salary and related expenses were paid by the associated enterprises and subsequently the same were reimbursed back by the appellant to the associated enterprise. The cost of the employee has been reimbursed to the associated enterprise on a cost to cost basis i.e. without markup. Appellant benchmarked this international transaction on the basis of internal CUP . However, as the assessee has rendered the services to the

associated enterprise using the services of these expat employees its domestic clients , which were remunerated at cost +10% markup basis.

9. The learned transfer pricing officer proposed an addition of ₹ 79,852,317/- by determining the arm's-length price of the international transaction of reimbursement of salaries of employees at Rs. Nil. The main reason for doing so was that the benchmarking approach followed by the assessee using internal CUP method is flawed, since the salary payments to employees is itself a controlled transaction. The TPO was also of the view that there was no business or commercial need for availing such services, they have not resulted in any economic and commercial benefit to the assessee, the benefit is only incidental and therefore in nature of shareholder service, no third party would have availed such services in similar manner under similar circumstances and the services received by the assessee from expat employees are nothing but a duplication of services for the reason that similar services have been provided by the parent entity for which technical service fee has been already paid by the assessee. Accordingly the learned Deputy Commissioner Of Income Tax, Transfer Pricing Officer–3(3)(2), New Delhi (The LD TPO) passed an order u/s 92CA(3) of the Income Tax Act on 20th January 2016 proposing above adjustment. Consequently draft assessment order was proposed by the learned assessing officer on 4 March 2016 wherein above adjustment was included over and above other two corporate tax adjustments/ additions. The first corporate adjustment was proposed by the learned AO noting that assessee has earned dividend income of ₹ 746,786/- which has been claimed as exempt income, however , no expenditure has been allocated by the assessee for disallowance u/s 14A of the Act. The learned AO asked the assessee that why expenditure should not be disallowed under that Section applying the provisions of Rule 8D. The assessee submitted that it has not employed any person for earning of such income and further investment has been made out of temporary surplus funds. Therefore, the claim of the assessee is that there is no incremental cost that has been incurred for the purpose of earning such exempt income. The learned AO rejected the explanation of the assessee and applied the provisions of Rule 8D of the Income Tax Rules, 1962 and disallowed 0.5% of the average value

of the investment. Such disallowance was ₹ 50,288. The other disallowance of ₹ 850,000/- on account of unverifiable expenditure was also made. Accordingly, in the draft order the total income of the assessee was computed at ₹ 124,197,970/- against the income returned by the assessee of ₹ 43,445,360/-.

10. The assessee filed its objection before the learned Dispute Resolution Panel – 2, New Delhi (The Learned DRP). The learned DRP passed direction u/s 144C (5) of the act on 21st September 2016 whereby the objections of the assessee were rejected on account of transfer pricing adjustment. With respect to the disallowance u/s 14A of the Act the learned AO was directed to follow the decision of the Hon'ble Delhi High Court in case of Cheminvest Ltd. Based on the above direction AO passed an assessment order on 28th of October 2016 determining total income of the assessee at ₹ 123,347,970/– against the returned income of ₹ 43,445,360/–. The addition on account of transfer pricing of ₹ 79852317/- and disallowance u/s 14A of ₹ 50,288/– were retained. Therefore, on these two adjustments the assessee has preferred an appeal before us.

11. The learned Authorised representative submitted a detailed chart and the written submission on the issue stating that for Assessment Year 2009-10 the coordinate bench has set aside the issue on identical facts and circumstances back to the file of the learned transfer pricing officer and in the set-aside proceedings the learned transfer pricing officer deleted the entire transfer pricing adjustment on account of reimbursement of expenses and held that the services of the expats were neither duplicative in nature no in the nature of shareholder services. It was also held that these services do not result in erosion of tax base in India. It is further stated that identical issue arose before the coordinate bench for Assessment Year 2011-12 when the learned CIT(A) deleted the above addition and revenue approached the coordinate bench. The coordinate bench upheld the order of the learned CIT(A). For Assessment Year 2011-12 it was submitted that ITAT deleted the entire adjustment made by the TPO. For assessment year 2013-14 the coordinate bench has set aside the issue to the file of the learned Assessing Officer as per direction given in the assessee's own case for assessment year 2009-10 and the learned Transfer Pricing Officer has

deleted the entire transfer Pricing adjustment on account of reimbursement of expenses as the services of the expats were neither duplicative in nature nor the shareholder services. Therefore, it was submitted that the issue is squarely covered in favour of the assessee.

12. The learned Authorised Representative in spite of the above orders in favour of the assessee, substantiated the facts of the present year stating that the CUP method adopted by the appellant is the most appropriate method since the assessee reimbursed at exactly the same cost of these employees to its associated enterprises. It was further stated that it is the prerogative of the appellant as to how it wants to conduct its business and therefore the commercial or business wisdom questioned by the learned Transfer Pricing Officer is incorrect. It was also stated that what is needed for the purpose of the business of the assessee should be judged by the learned Transfer Pricing Officer from the perspective of the assessee. With respect to the shareholder activities and duplicative services, he also referred extensively the orders of the coordinate bench in assessee's own case and submitted that there is no change in the facts and circumstances of the case of the present year. In view of this, it was submitted that the adjustment made by the learned transfer pricing officer is not justified.

13. With respect to the second issue of the disallowance u/s 14A of the income tax act, He contended that assessee had only two investments made during the year in the growth plan and the dividend plan in mutual funds. It was further stated that there are no expenditure incurred by the assessee with respect to any interest payment or any other administrative expenses. He further pressed upon the fact that the learned assessing officer has not recorded his satisfaction with the correctness of the claim of the assessee that assessee has not incurred any expenditure but straightway proceeded to apply the provisions of Rule 8D of the Income Tax Rules, 1962 and disallowed ₹ 50,288/-. He referred to plethora of judicial precedent to support his contentions. Therefore, he submitted that this disallowance made by the learned assessing officer is not sustainable.

14. On the issue of the transfer pricing adjustment, the learned departmental representative vehemently supported the orders of the learned Transfer Pricing Officer and the learned Dispute Resolution Panel. He submitted that

assessee has failed to demonstrate that the services were needed, the services were duplicative in nature and they are in fact shareholder services. In fact his arguments were similar to the arguments of the lower authorities.

15. With respect to the disallowance u/s 14A with Rule 8D of the Income Tax Rules, he submitted that the learned assessing officer has correctly applied the provisions of Rule 8D and disallowed the sum as per the method provided therein. He submitted that assessee has earned substantial dividend income and therefore the disallowance u/s 14A is mandatory. He submitted that assessee has not disallowed any sum and has also not demonstrated that how it has not incurred any expenditure for earning of exempt income. It was further stated that investment in mutual funds does involve certain efforts of the human resources as well as certain administrative expenditure, therefore, there are elements of the expenditure which has been incurred by the assessee for the earning of the exempt income. He therefore submitted that there is no infirmity in the orders of the lower authorities in sustaining the disallowance u/s 14A ₹ 50,288 according to the method provided Under rule 8D.

16. We have carefully considered the rival contentions and perused the orders of the lower authorities. The only dispute with respect to the transfer pricing adjustment is with respect to the reimbursement of the expenses paid by the assessee of ₹ 79,852,317 to its associated enterprise on account of the expats salary which is utilised by the assessee for providing services to the other parties and cost +10% markup is charged. As stated by the learned authorised representative that identical issue arose in the case of the assessee for the earlier years and for all the years when the issue is set aside to the file of the learned transfer pricing officer, such adjustment has been deleted. The latest order of the learned Transfer Pricing Officer passed for assessment year 2013-14 dated 26th of June 2019 was placed before us. The facts in that order shows that the coordinate bench set aside the issue back to the file of the learned Transfer Pricing Officer with respect to determining the arm's-length price of the adjustment of ₹ 77,948,576/- on account of the reimbursement of salaries of employees of associated enterprises by the assessee. The learned Transfer Pricing Officer in para number 5 noted the direction of the coordinate bench for assessment year

2009-10 wherein it has been held that expat support reimbursement is not duplicative in nature since assessee has earned income from its customers at a cost +10% after including cost of such services. It was further held that had the services been duplicative in nature than absolutely independent customer i.e. Bharti Retail Ltd would not have obliged to pay anything for such services. It was further held that same are also not shareholder services since assessee would not have availed the services from its associated enterprise then it would have had to hire similarly experienced personnel from external sources. It was further held that assessee was the sole and absolute beneficiary of the services. In view of this, for assessment year 2013-14 the learned Transfer Pricing Officer has deleted the addition on account of determination of the arm's-length price of the similar services for that year. In view of the above facts, respectfully following the decision of the coordinate bench in assessee's own case for the earlier years, and subsequently when the learned Transfer Pricing Officer himself has deleted the addition for subsequent year i.e. assessment year 2013-14 and for earlier years i.e. assessment year 2009-10 and 2010-11, we direct the learned Transfer Pricing Officer/AO to delete the addition of ₹ 79,852,317/- and accordingly we allow ground No. 2-6 of the appeal.

17. Coming to the ground No. 7-8 which is against the disallowance u/s 14A of the Income Tax Act, we find that assessee has earned a tax free income in the form of dividend of ₹ 746,786. Admittedly, the assessee has not disallowed any expenditure u/s 14 A of the Income Tax Act. The claim of the assessee is that it has not incurred any expenditure for earning of the exempt income. However, the learned Assessing Officer without recording of the any satisfaction with respect to the correctness of claim of the assessee, invoke the provisions of Section 14A of the Income Tax Act and applied the computational methodology provided under Rule 8D of the Income Tax Rules. According to Section 14A(2)of the Act, the learned Assessing Officer should have recorded his satisfaction about the correctness of the claim of the assessee. If no such satisfaction is recorded, no disallowance can be made. In the present case admittedly Assessing Officer has not recorded any satisfaction as provided u/s14A (2) , which is a mandatory requirement,

therefore, we allow ground No. 7-8 of the appeal of the assessee and delete the disallowance u/s 14A of the Income Tax Act of ₹ 50,288/–.

18. In the result appeal of the assessee is partly allowed.

Order pronounced in the open court on 11/09/2020.

Sd/-	Sd/-
(BHAVNESH SAINI)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 11/09/2020
A K Keot

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	11.09.2020
Date on which the typed draft is placed before the dictating member	11.09.2020
Date on which the typed draft is placed before the other member	11.09.2020
Date on which the approved draft comes to the Sr. PS/ PS	11.09.2020
Date on which the fair order is placed before the dictating member for pronouncement	11.09.2020
Date on which the fair order comes back to the Sr. PS/ PS	11.09.2020
Date on which the final order is uploaded on the website of ITAT	11.09.2020
date on which the file goes to the Bench Clerk	11.09.2020
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	