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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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DECIDED ON: 07.05.2015

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ITA 475/2012
CM APPL.11174, 13156 & 17819/2014

CIT Appellant
Through: Mr. N.P. Sahni, Sr. Standing Counsel
with Mr. Nitin Gulati, Jr. Standing Counsel.

versus

CUSHMAN AND WAKEFIELD INDIA PVT LTD Respondent
Through: Mr. S. Ganesh, Sr. Advocate with
Mr. Gajendra Maheshwari, Mr. Sumit Batra and
Ms. Swati Thapa, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. The present appeal, directed against the order of the Income Tax Appellate Tribunal ("ITAT") in respect of an international transaction in favour of Arm's Length Price (ALP) determination, led to this Court framing two questions of law on 24.02.2014 in the following terms: -

"1. Is the Tribunal correct in holding that benchmarking was not necessary in respect of the cost reimbursement, reported by the assessee, that was later subject to disallowance by the AO,

since the TPO held that ALP in respect of this component was nil?;

2. Did the Tribunal fall into error in accepting the assessee's argument that the referral fee in the given facts of the case was not subject to ALP adjustment?"

2. By judgment and order dated 23.05.2014, both the questions of law were answered against the assessee. Subsequently, the assessee filed R.P. No.321/2014; notice was issued in it. The Review Petition was heard stating that on the second question the Revenue had given up the challenge and consequently, the Court had no occasion to hear the assessee. The same was allowed after hearing on 17.11.2014 in the following terms: -

"Notice was issued in these proceedings at the behest of the assessee/review petitioner, who contended that the judgment of the Court dated 23.05.2014 in so far as it dealt with the liability of referral fees, was not argued and had been given up. The discussion in the impugned judgment on this question which is formulated as question no. (E), is to be found from para 38 onwards. Having regard to the averments of the review petitioner/assessee and the submissions made, this Court had required Sh. Sanjeev Sabharwal, learned Standing Counsel to be present today.

At the outset, Sh. Sanjeev Sabharwal, learned Standing Counsel states that this question had been given up during the hearing. It was, however, urged on behalf of the revenue that the concession could not be said to be binding since it pertained to interpretation of the power of the Assessing Officer, in the context of liability of certain instances under Section 37 of the Income Tax Act. Learned Standing Counsel relied upon paras 68 to 73 of the appeal, the proposed question nos. 3 and 4 and

certain other averments in the appeal in support. On the other hand, learned Senior Counsel for the review petitioner urged that once these questions had been given up during the hearing, it would be unfair to allow the judgment to stand so far as the findings on questions nos. (E) is concerned.”

3. On behalf of the Revenue it was submitted that whilst no doubt the concession was made, there was no authority in support of such a position. As a result, the Court after considering the submissions of the parties, allowed the Review Petition - so far as it concerned itself with question no.2, in the following terms: -

“We have considered the submissions. The notes made by both the members of this Bench during the hearing, in fact, support the review petitioner’s contention. The statement of learned Standing Counsel also bears out the averments that question no.(E) was given up. The Court, however, was of the opinion that since this is a question of law and had been squarely urged in the appeal at more than one place, such a concession would not be binding upon the revenue. In these circumstances, the appropriate and equitable order to be made would be recall and review the judgment to the extent it renders findings on questions nos. (E) and (F). Consequently, the judgment dated 23.05.2014 so far as it answered questions nos. (E) and (F) in favour of the revenue are hereby recalled. List ITA 475/2012 vis-a-vis for decision on the merits of question nos. (E) and (F) before the regular Bench according to roster on 12.01.2015.

The review petition is allowed in the above terms.”

4. Learned counsel for the Revenue urges that the AO after receiving the Transfer Pricing Officer’s (“TPO”) report and

determination, examined the claim of expenditure on account of Referral Fee, made by the assessee to the tune of ₹1,73,52,992/-. It was submitted that the Assessing Officer (AO) was of the opinion that the Referral Fee said to have been paid could not be linked with any verifiable transaction and that in the absence of any credible details, the assessee's claims were not substantiated. He, therefore, disallowed such claims under Section 37 of the Income Tax Act and added back the said amount of ₹1,73,52,992/-. The AO's order pertinently state as follows: -

“4.8 On close scrutiny of e-mails, copies of which have been given in the submissions, it is seen that most of them are cryptic mails in that most of them do not clearly mention either the client or the requirements of the client which is the mandatory requirement for any entity referring to any other entity. There is no evidence submitted regarding the services provided by the group entities to merit the referral fee. Copies of some invoices are also given but again raising invoices does not substantiate or gives proof of the work done by the group entities.

4.9 The assessee has not been able to demonstrate as to how the Indian entities from whom income was generated on account of rendering off services etc. is linked to the associate enterprise of the assessee to whom referral fee is paid. In simpler words the link between the clients based in India and the associate enterprises of the assessee company which could enable their referral in the first instance has not been established. The assessee's case is a pure and simple case of tax planning otherwise”

5. The TPO's order had significantly noted that the materials

before the said officer did not lead him to doubt the assessee's claim in this regard. However, the Dispute Resolution Panel ("DRP"), to whom the assessee had appealed, had held as follows: -

"The assessee has not been able to demonstrate the genuineness of the transaction, the services rendered by the group entities to merit this referral fee at a high rate nor the business purpose of the same. Before us the AR of the assessee was not able to prove through the documentation that the observations of the AO are incorrect. Under these circumstances, no directions are being issued."

6. Before the ITAT, besides agitating the main question, the Revenue's chart which was the principal part of the transfer pricing exercise undertaken by the TPO and re-examined by the DRP, the disallowance of ₹1,73,52,992/- was contested by both the parties. The entire discussion is in paragraph nos.25-40 of the impugned order. The ITAT noted the assessee's contentions. Firstly, the assessee submitted that given the phraseology and structure of Section 92CA (4) and its past legislative history, the AO was precluded from examining the genuineness of the claim once the entire matter had been scrutinized by the TPO. On facts, the assessee urged that all the material which was necessary to verify the admissibility or otherwise of the claim of expenditure for ₹1,73,52,992/- was on the record and that the AO did not apply himself to the task appropriately. The respondent further urged that the AO's order betrayed a discriminatory approach. On this, it was pointed out that whereas the referral fee paid to non-AE sourced transactions, formed a significant

component - to the tune of ₹1,45,27,408/- (as against the related revenue of ₹4,68,98,175/-), the AO made no adverse findings on this aspect even though the referral fee was as high as 30.97%. On the other hand, the AO rendered adverse findings in respect of foreign AEs which yielded income of ₹6,27,45,515/- for which the referral fee paid was ₹1,73,52,292/- - constituting 27.65%. The Revenue, on the other hand, contended that the claim was essentially a bogus one as it was not supported by any material particulars. The Revenue relied heavily on the AO's order which noted that even though some materials had been furnished by the assessee, the documents did not point out with any particularity the details of the transaction on account of which such referral fee was paid and business transaction actually done.

7. The ITAT after considering the rival submissions and noticing the legislative changes brought about by the amendment to the provision (Section 92CA (4)) by Finance Act, 2007 w.e.f. 1.6.2007 and the effect of three CBDT Circulars, held that the structures of that provision virtually precluded the re-examination of the issue which had been considered by the TPO. Not resting its conclusions on this determination alone, the ITAT examined the merits of the rival claims and held as follows: -

“39. Right from the beginning it has been the case of the assessee that the Assessing Officer did not have jurisdiction to re-examine the allowability of referral fee as Ld. TPO has already held that this being international transaction of the assessee is at arm's length. In view of aforementioned discussion, we found that such contention of the assessee has a force and it is to be held

that once an international transaction has been made subject of determination of arm's length price by the TPO & TPO found that transaction at arm's length then it will not be permissible for the Assessing Officer to re-examine that transaction and make disallowance of the same under normal provisions of the Act.

40. Even on merits, the disallowance of referral fee is made only on the ground that the assessee was not required to incur it and there was no evidence placed on record to prove the same. The assessee had submitted ample evidence to support the expenditure and it was shown that such expenditure is incurred with respect to revenue earned by the assessee on property transaction referred to the assessee by its associate enterprises. It was submitted that the expenditure incurred by the assessee in respect of transaction referred by AE's was much less than the similar expenditure incurred vis-a-vis the independent parties. Such contention was also placed before TPO. No adverse material whatsoever has been brought on record to show that either the evidence submitted by the assessee in this respect was incorrect or the contention of the assessee that expenditure relating to transaction entered into with AE's were less costly was incorrect. Therefore, even on merits there is no justification in upholding the disallowance. Looking from any angle, the sustenance of addition of Rs.1,73,52,922/- is not justified and the same is deleted. This ground of the assessee is allowed."

8. Learned counsel for the Revenue argued that the assessee was unable to support the claim of having incurred any expenditure at all. Mr. N.P. Sahni, Sr. Standing Counsel, appearing on Revenue's behalf submitted that by claiming to have paid Referral Fee, the assessee was in fact seeking to gain undue advantage. He highlighted the fact that

as against non-AE transactions, the expenditure for which could be verified easily, the Revenue was in difficulty to carry out a similar exercise in respect of AE driven business activity. Learned counsel submitted that it is in such circumstances that the AO had insisted upon details and the specifics of which were lacking. It was submitted that as a result, the disallowance made under Section 37 was warranted.

9. Learned counsel appearing on behalf of the assessee contested the Revenue's submissions. He argued that all details necessary to verify whether Referral Fee had been paid in respect of real transactions or otherwise, were available. He referred to the specific findings of the ITAT in this regard and the submissions made and stated that even though such materials were available with the AO, who made no adverse comments with respect to receipts both in respect of this head as well as in respect of the total income derived from the main activity which was the subject matter of the Revenue sharing transfer pricing exercise (ALP), the approach of somehow seeking to deny the legitimate expenditure was not warranted.

10. This Court has considered the rival submissions. Whilst, there is some merit in what the ITAT observed with respect to the change in law brought about on account of the amendment in 2007 (an aspect which was even commented upon and dealt with in the main judgment - which has now been since recalled), this Court is of the opinion that the said issue is best left open given its wide ramifications and importance. The Court, therefore, proposes to decide the merits on the assumption that the AO did possess the

power which he in fact exercised in the present case.

11. Here, it would be material to extract the chart which the ITAT had occasion to consider in respect of different streams of income earned by the assessee and relative Referral Fee paid. The same, extracted from the ITAT's order is as follows: -

S.No.	Particulars	Related revenues generated (in Indian Rupees)	Referral fee paid (in Indian Rupees)
1.	Foreign associated enterprises (AE's)	6,27,45,515	1,73,52,922
2.	Foreign Independent entities	4,68,98,175	1,45,27,408
3.	Domestic independent entities	23,55,263	4,57,955
	Total	11,19,98,953	3,18,80,330

12. The following concededly are a matter of record: -

- (i) The AO accepted the Referral Fee claim in respect of the non-AE transactions (to the tune of ₹4,68,98,175/- - for which the referral fee was ₹1,45,27,408/-).
- (ii) The AO accepted the transactions in respect of the domestic independent entities (leading to Revenue of ₹23,55,263/- and for which the Referral Fee paid was ₹4,57,955/-).
- (iii) The ITAT took note of the fact that the Referral Fee agreement had been placed on the record.

Furthermore, six transactions with different parties were involved from which the revenue had been derived by the assessee. This

operation was a common one and was the subject matter of the scrutiny insofar the first question of law (i.e. Revenue sharing ALP) was concerned.

13. The materials on record also show that the assessee relied upon the standard Referral Fee schedule which it had made recourse to (found at page 703-705 of the paper book and part of the AO's record). This schedule indicated the extent of commission/referral fee payable in respect of the concerned transactions on a sliding scale.

14. The ITAT after considering the above, in the light of its discussion with regard to the legal position arising from the amendment of 2007, was of the opinion that the assessee "*had submitted ample evidence to support its expenditure and it was shown that such expenditure is incurred with respect to the revenue earned*". The Revenue's submissions in appeal to this Court - concededly without any discussion or hearing on this aspect in the first instance when main judgment was delivered - that the details and specifics were unavailable despite repeated queries in that regard, *ipso facto* could not have been a circumstance for the disallowance which ultimately resulted in the present instance. The AO plainly and facially adopted a differential standard when he considered non-AE international transactions (which yielded substantial revenue of ₹4,68,98,175/-) as opposed to AE driven transactions that yielded ₹6,27,45,515/-. The AO also ignored the fact that the arm's length transactions in the present case in fact led to lower referral fee of 27.65% as opposed to the non-AE international transactions where the identical outgoing was up to 30.97%. Given these set of

circumstances, the undue emphasis placed upon lack of certain particulars which did not fit into the mould as to suit the understanding of the AO could not have led to the disallowance.

15. This Court is mindful of the fact that the AO did consider the materials before him in the light of his understanding. At the same time, the ITAT revisited entirety of the circumstances in an elaborate and reasoned order - it devoted as many as 15 paragraphs on this and rendered factual findings. Having regard to this background, the Court is of the opinion that the ITAT's findings on this aspect are entirely factual and cannot be characterized as perverse calling for interference. The above question of law is, therefore, answered against the Revenue and in favour of the assessee.

16. The Appeal to this extent is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

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