IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.02.2025

\+ **ITA 244/2024**

AON CONSULTING PVT. LTD.
(SUCCESSOR ENTITY OF AON SERVICES
(I) PVT. LTD. .....Appellant

Versus

PRINCIPAL COMMISSIONER OF INCOME
TAX – 1 AND ORS. ....Respondents

Advocates who appeared in this case:

For the Appellant: Mr Deepak Chopra, Mr Harpreet Singh and Mr Priyam Bhatnagar, Advocates.

For the Respondents: Mr Indruj Singh Rai, senior standing counsel with Mr Sanjeev Menon, Mr Rahul Singh and Mr Anmol Jagga, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS JUSTICE SWARANA KANTA SHARMA

JUDGMENT

VIBHU BAKHRU, J.

1. The appellant has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 20.12.2023 (hereafter *the impugned order*) passed by the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) in ITA

No.5418/Del/2012 captioned *Hewitt Associates (India) Pvt. Ltd. v. DCIT Circle-10(1), New Delhi*, for the assessment year (AY) 2008-09.

2. Hewitt Associates (India) Private Limited (since merged with the appellant) had filed the said appeal (ITA No.5418/Del/2012) assailing the transfer pricing adjustment (hereafter *TP adjustment*). The said TP adjustment was in two parts. One that related to the international transactions between Hewitt Associates (India) Private Limited (hereafter *the Assessee*) and Associated Enterprises (AEs) in the US (hereafter *US Transactions*) and the TP adjustment in respect of international transactions other than US Transactions (hereafter *Non-US Transactions*). Whilst the TP adjustment relating to US Transactions was determined at ₹41,79,89,294/-, the TP adjustment in regard to Non-US Transactions were determined at ₹2,26,48,798/-. The US Transactions were subject to the Mutual Agreement Procedure (hereafter *MAP*) between the competent authorities of US and India under Article 27 of the India-US Double Taxation Avoidance Agreement (hereafter *the Indo-US DTAA*). The dispute is, thus, confined to the TP adjustment relating to Non-US Transactions, which was determined at ₹2,26,48,798/-.

3. The learned ITAT accepted the Revenue's contention and remanded the matter to the Transfer Pricing Officer (hereafter *TPO*) to determine the TP adjustment relating to Non-US Transactions on the same framework as adopted for determining the TP adjustment in

respect of US Transactions and as agreed between the competent authorities of the US and India as well as accepted by the Assessee.

4. It is the Assessee's case that MAP (Mutual Agreement Procedure) is based on consensus between the competent authorities of the contracting states and the basis for TP adjustments under the MAP cannot be applied to international transactions, which are not subject of negotiations under the MAP.

QUESTION OF LAW

5. The present appeal was admitted on 01.05.2024 on the following question of law:

> "A. Whether in the facts and circumstances of the case and in law, the impugned order passed by the Income Tax Appellate Tribunal is not in accordance with the mandate of the statute?"

FACTUAL CONTEXT

6. The appellant is a wholly owned subsidiary of AON PLC, ultimate parent company, incorporated in Ireland. During the relevant AY 2008-09, the Assessee was engaged in providing services such as human resources consulting services, payroll processing, business process outsourcing, and software development services. It had, during the relevant AY, rendered such services to its AEs as well as unrelated parties. However, the Assessee had confined rendering of software development services, business process outsourcing services to its AEs.

7. The Assessee filed its return of income for AY 2008-09 on 30.09.2008 declaring a total income of ₹9,46,63,523/-. The Assessee's return was selected for scrutiny. Since the international transactions exceeded the threshold figure, the Assessing Officer (hereafter *the AO*) made a reference to the TPO for the determining arm's length price (hereafter *ALP*) under Section 92CA of the Act.

8. The learned TPO passed an order dated 31.10.2011 under Section 92CA(3) of the Act making an upward TP adjustment of ₹44,06,38,092/-. As noted above, the said adjustment comprised of two parts as under:

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

9. The Assessee had furnished its transfer pricing analysis, however, the learned TPO did not accept the same.

10. Based on the recommendations of the TPO, the AO passed a draft assessment order. The Assessee filed its objections before the Dispute Resolution Panel (hereafter *DRP*). The DRP passed an order dated 13.06.2012 under Section 144C(5) of the Act and based on the said directions, the AO passed the final assessment order under Section 144C/143(3) of the Act on 24.08.2012.

11. The Assessee appealed the said decision before the learned ITAT, which was disposed of by the impugned order. During the course of the

appellate proceedings, the Assessee invoked the MAP as included under Article 27 of the Indo-US DTAA for resolving the transfer pricing dispute for the relevant AY pertaining to US Transactions by making an application in accordance with Rule 44G of the Income Tax Rules, 1962 (hereafter *the Rules*). The competent authority of India as well as the competent authority of the USA agreed upon a framework to resolve the transfer pricing case relating to IT services and IT enabled services for the assessment years (AYs) 2006-07 to 2010-11. The said Agreement was arrived at on 15.01.2015/16.01.2015.

12. It is also material to note that the Assessee [then known as Hewitt Associates (India) Private Limited] merged with AON Consulting Private Limited (the appellant in the present appeal) under the Scheme of Amalgamation, which was approved by this court by an order dated 25.01.2017.

13. On 21.12.2017, the Assessee received a communication calling upon it to accept the framework for settlement of transfer pricing disputes as worked out by the respective competent authorities of the US and India under MAP. The Assessee consented to the same by a letter dated 26.12.2017.

14. The Assessee, thereafter, withdrew its grounds of appeal regarding transfer pricing adjustments in respect of US Transactions before the learned ITAT by a letter dated 24.01.2018.

15. The AO passed an order dated 06.02.2019 and reduced the TP adjustment amounting to ₹41,79,89,294/- in respect of US Transactions to ₹10,64,22,259/- in terms of the resolution under MAP. Thus, the dispute before the learned ITAT was confined to the TP adjustment in respect of Non-US Transactions (₹2,26,48,798/-). The learned ITAT disposed of the Assessee's appeal by the impugned order whereby the matter was remanded to the TPO to determine the TP adjustments on the basis of the framework as agreed between the competent authorities of the US and India in respect of the US transactions.

REASONS AND CONCLUSION

16. Hewitt Associates (India) Private Limited was a wholly owned subsidiary of Hewitt Associates LLC at the material time. It had during the relevant AY entered into several international transactions. It had furnished a report in Form 3CEB along with its return disclosing the following international transactions:

"Nature of transaction	Value of International transaction
Purchase of Capital Items	5,494,093
Payment of Royalty for use of trademark	26,064,000
Data analysis/Processing Support	29,063,167
Human Resource Related Management Services	164,043,460

HRO- Data analysis/Processing support	23,176,307
Business Process outsourcing & software development services	4,621,740,956
Management Fees for AHQ functions	89,407,203
Management services	105,048,403
Corporate overhead charges paid	52,812,926
Professional Fees	9,138,499
Reimbursement of expenses to AE's	73,077,448
Reimbursement of expenses by AE's	14,858,436

17. It had also furnished a transfer pricing study to establish that the international transactions were on an arm's length basis. The Assessee had adopted Transactional Net Margin Method (hereafter *TNMM*) as the most appropriate method and furnished a comparability analysis using various filters. A search conducted on the data base (Prowess and Capitaline data base) had yielded a set of sixteen comparable entities with the mean profit level indicator (PLI) as 13.06%. The Assessee's PLI (profit over cost) worked out to 15.69%. Thus, the Assessee claimed that the transactions were on the arm's length basis.

18. The TPO did not accept the said analysis and held that it had several defects. The TPO, *inter alia*, faulted the Assessee in not

applying the apposite filters and rejecting certain filters on the ground that they were functionally different. Additionally, the TPO found that the data used by the Assessee did not pertain to the financial year in which the international transactions were entered into and therefore the analysis was not compliant with Rule 10B(4) of the Rules. Accordingly, the TPO rejected the economic analysis. However, the TPO accepted TNMM as the most appropriate method for determining the ALP.

19. The TPO, thereafter, proceeded to select a set of filters, which were materially different from those selected by the Assessee, and applying the said filters rejected some of the comparable entities selected by the Assessee. The TPO also selected certain other comparables. The arithmetic mean PLI of the comparable entities worked out to 26.2%, which after adjustment on account of working capital (2.31%) was computed at 23.89% for software development services. Similarly, for IT enabled services, the arithmetic mean PLI of comparables was worked out at 29.16% and after reducing the working capital adjustment of 2.81%, the average margin for computing the ALP was computed at 26.35%. Accordingly, the TPO directed a TP adjustment of ₹24,18,41,362/- under Section 92CA of the Act. Thus, the TPO directed an aggregate upward adjustment of ₹440,638,092/- as under:

Segment	Adjustment
Software Development Services	**Rs.198,796,730**

IT Enabled Services	**Rs.241,841,362**
Total	**Rs.440,638,092**

20. As stated above, the AO passed a draft assessment order on the aforesaid basis. The Assessee filed its objections to the TP adjustment as proposed on various grounds. Essentially, the Assessee challenged the decision of the TPO to summarily reject the Assessee's comparability analysis, which the Assessee claimed was without any basis. The Assessee contended that there was an inherent upward bias by adopting erroneous filters designed to select comparable entities with higher margins. Additionally, amongst other objections, the Assessee also objected to the use of data of the current year, which was not available at the material time.

21. The Assessee's appeal before the learned ITAT was, essentially, on the same grounds as its objections before the DRP.

22. As noted above, while the proceedings were pending before the learned ITAT, the Assessee had applied for deciding the transfer pricing dispute in respect of US transactions under MAP in terms of Article 27 of the Indo-US DTAA. And, the dispute relating to the TP adjustment regarding US Transactions was resolved. The same was reported to the learned ITAT.

23. Thereafter, during the proceedings before learned ITAT, it was contended by the Revenue that the TP adjustments for Non-US transactions be also determined on the same basis as agreed by the

competent authorities of the US and India under MAP. It is material to note that although the Revenue had not formally filed any such cross objections, the learned ITAT accepted the Revenue's contention and remanded the matter to the TPO for deciding on the basis of the framework agreed by MAP under the Indo-US DTAA.

24. Thus, the principal question to be addressed is whether it is apposite to use the framework agreed by competent authorities of the US and India under the MAP in terms of Article 27 of the Indo-US DTAA, for deciding transfer pricing issues that are not covered under the said framework.

25. The concept of MAP is evolved for resolving a dispute regarding double taxation by a consensual procedure, within the framework of the Double Taxation Avoidance Agreements. In cases where a taxpayer finds that the taxation is not in accordance with the Double Taxation Avoidance Agreement, it is entitled to apply for resolution by MAP. Article 27 of the Indo-US DTAA, which provides for resolutions by a Mutual Agreement Procedure (MAP), is set out below:

> "ARTICLE 27 - *Mutual agreement procedure - 1.* Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. This case must be presented within three years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.

> *2.* The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.
>
> *3.* The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.
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> *4.* The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure."

26. Article 25 of the model DTAA's (OECD Model and UN Model) provides for MAP. As is apparent from the above, MAP is the procedure where the issues are to be resolved through consensus and negotiations between the competent authorities of India and the US.

27. MAP, in effect, empowers the competent authorities of the contracting states to resolve issues arising out of interpretation or application of the DTAA by mutual agreement. However, this process

is triggered when a person considers that the actions of one or both of the contracting states would result in taxation, which is not in accordance with the DTAA. The clear objective of MAP is to eliminate double taxation issues by mutual consultation.

28. We also consider it relevant to refer to the introduction and basic information regarding MAP as set out in the Circular No.F.No.500/09/2016-APA-I dated 07.08.2020 and as modified by Circular No.F.No.500/09/2016-APA-I dated10.06.2022 (hereafter *the CBDT Circular*). The relevant extract of the same is set out below:

> "**Mutual Agreement Procedure (MAP)**
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> I. Mutual Agreement Procedure (MAP) is an alternate tax dispute resolution mechanism available to the taxpayers under the DTAAs for resolving disputes giving rise to double taxation or taxation not in accordance with DTAAs. MAP can help in relieving double taxation either fully or partially. Almost all DTAAs entered into by India have the MAP Article and it provides an additional dispute resolution mechanism to taxpayers in addition to those available under the domestic laws of India. A taxpayer can request for assistance under MAP regardless of the remedies provided under the Indian domestic law.
>
> MAP enables the CAs of India to engage with the CAs of other treaty partners and is a process which facilitates discussions and negotiations between both treaty partners as they endeavour to resolve international tax disputes, which are not in accordance with the relevant DTAAs. At present, India has two CAs for MAP cases and they are senior officers in Department of Revenue, Ministry of Finance (Joint Secretary, FT & TR-I and Joint Secretary, FT & TR-II). The two CAs have been designated as such by the Finance Minister of India. The two CAs have territorial jurisdiction

over the MAP cases depending upon the location of the treaty partner. The CAs of India are independent of the tax authorities who audit taxpayers and take their own decisions that are only administratively governed by an internal governance mechanism within the CBDT, Department of Revenue.

A MAP request can be made by a taxpayer when it considers that the actions of the tax authorities of one or both of the treaty partners results or will result in taxation not in accordance with the relevant DTAA. MAP cases involve cross-border double taxation that could either be juridical double taxation (same income taxed twice in the hands of the same entity in two different countries) or economic double taxation (same income taxed in the hands of two separate entities, who are Associated Enterprises, in two different countries).

Double taxation or taxation not in accordance with the DTAAs may arise in some of the following circumstances:

- Transfer Pricing adjustments
- Existence of a Permanent Establishment
- Attribution of profits to a Permanent Establishment
- Characterisation or re-characterisation of an income or expense."

29. Issues leading to double taxation, which is not in accordance with the DTAA, may arise in various circumstances including on account of transfer pricing adjustment. The issue regarding transfer pricing adjustment may arise where taxing authorities of both the contracting states may tax the same income resulting in denial of the benefit under the DTAA. Illustratively, the situation may arise where a higher ALP is imputed by taxing authorities of both the contracting nations resulting in double taxation of the same income. Typically, imputing a higher

ALP on the supply side of a transaction while not accommodating the full impact on the purchase side of the said transaction would inevitably result in double taxation. MAP provides for a resolution of such disputes by a consultative process. As noted above, a person who finds that the taxation is not in accordance with DTAA may apply to the competent authority for invoking the MAP.

30. Rule 44G of the Rules prescribes that such an application may be made in the prescribed Form (Form 34F).

31. The CBDT Circular also sets out the MAP Process. The same is reproduced below:

> "**IV. The MAP Process**
> Once a MAP application is accepted by the CA of India having jurisdiction over the case, she shall intimate the CA of the relevant treaty partner about such acceptance through a written communication (notification or invocation letter). In such written communication, she would also briefly indicate why she feels that the action of the tax authorities of the treaty partner results or will result in taxation not in accordance with the relevant DTAA. She would also request the CA of the treaty partner to provide her written position (position paper) on the order/action of the tax authorities of her country.
> If a MAP application is found to be not acceptable by the CA of India having jurisdiction over the case, she shall write to the CA of the relevant treaty partner informing her about the reasons for which the MAP application cannot be accepted and request the latter to send her views/comments on the same (notification and bilateral consultation). Once the CAs of both treaty partners have exchanged views and come to a common understanding, the decision on the MAP application shall be communicated by the CA of India having jurisdiction over the case to the Indian taxpayer who had made the MAP application.

As has been indicated above, once a MAP application is accepted, the CAs shall exchange views. In most cases, the views shall be communicated through position papers. Once a position paper is received from the other CA, the CA of India having jurisdiction over the case would examine the same and come to a negotiating position. She may also provide her own written comments to the other CA or ask for further clarification from her. After exchange of positions and comments, both the CAs would try and negotiate a resolution to the dispute at hand. They may meet in person or negotiate remotely through teleconference, video conference, or email.

If both the CAs successfully resolve a MAP case, they would formalise a mutual agreement amongst themselves at the earliest possible. The CA of India having jurisdiction over the case would intimate the Indian taxpayer who had applied for MAP about the terms and conditions of the resolution. Acceptance or rejection of the MAP resolution is the prerogative of the Indian taxpayer but in either situation, the MAP case would be closed by both the CAs as resolved.

If both the CAs are unable to resolve a MAP case, they would close the MAP case as unresolved. The CA of India having jurisdiction over the case shall inform the Indian taxpayer about the non-resolution of the dispute.

In a reverse situation, where the MAP application has been accepted by the CAs of treaty partners, some of the processes described above would flow in the reverse direction.

In addition to the above bilateral MAP process, in appropriate cases, the CAs of India can participate in multilateral MAP discussions with more than one treaty partner. Multilateral MAP cases shall involve all the above processes (like exchange of position papers, negotiations, finalization of mutual agreements, etc.) on a multilateral basis amongst the CAs concerned. However, a multilateral MAP case shall be executed in the form of a series of parallel bilateral MAP cases. The CAs of India can agree to accept a multilateral MAP request if all the following conditions are fulfilled:

- All the participating countries or specified territories have DTAAs with each other;
- The transaction or issue in dispute has a bearing on all the treaty partners, directly or indirectly, and non-resolution of the dispute would result in taxation not in accordance with the relevant DTAAs; and
- The CAs of all the participating countries or specified territories agree to negotiating a multilateral MAP."

32. It is clear from the above that MAP is a resolution process by competent authorities of contracting states by negotiations and consensus.

33. In a case of a transfer pricing adjustment, an assessee may not be aggrieved by an upward revision if the overall taxation between the assessee and its AE is acceptable to it. A multi-national group may accept a situation where an upward TP adjustment by a taxing authority of one country has a corresponding mitigating effect on the taxable revenue of its constituent entity in the other contracting state. It may do so even though it considers the same to be incorrect as the adverse effect in one jurisdiction may even out in another. However, this would not justify a TP adjustment in respect of transactions which are disputed and not subjected to MAP.

34. It is important to note that MAP procedure is based on an agreement between the competent authorities of the contracting states, which is accepted by the Assessee. The effect of imputing a framework arrived at between competent authorities of India and the US in respect of US Transactions to Non-US Transactions has an effect of imposing a

consensual and negotiated settlement regarding one set of transaction to another where there is no such consensus. This in effect seeks to foreclose a right of an assessee to dispute a TP adjustment on the basis of the assessee's acceptance of an agreement in a situation, which is materially different. It is of vital importance to note that there is no agreement between the tax authorities of other Non-US countries regarding the determination of the ALP of Non-US Transactions. Thus, the TP adjustments made on the basis of MAP under the Indo-US DTAA, does not bind the tax authorities of the non-US countries.

35. At the cost of repetition, it is necessary to reiterate that the resolution under MAP is by consent and negotiations; such resolution cannot be imposed in a contested case where there is no consensus.

36. An agreement arrived at by the competent authorities of two contracting states under MAP cannot substitute the determination of ALP under the Act and the Rules in cases which are not covered under the MAP. The ALP in such cases must necessarily be determined in accordance with Section 92C of the Act and Rule 10B of the Rules. As noted above, MAP is a specific procedure for addressing issues arising out of DTAA and must necessarily be confined to those issues and the subject transactions. The Agreement under MAP cannot be extrapolated as a determination of ALP of international transactions, which are not subject to MAP, under Section 92C of the Act or Rule 10B of the Rules.

37. The decision of the learned ITAT to direct the determination of the ALP for Non-US Transactions on the basis of framework as agreed

to by the competent authorities under MAP for US Transactions, is not in accordance with law and thus, the said decision cannot be sustained.

38. The question of law as framed is, thus, answered in favour of the Assessee and against the Revenue. The Assessee's appeal is restored to the learned ITAT for decision in accordance with the Act.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

FEBRUARY 06, 2025
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