

TRANSFER PRICING

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Vedanta Ltd (Successor to Cairn Ltd) Vs ACIT Delhi ITAT {ITA No. 9495/Del/2019}

Brief Facts

Vedanta Ltd ("The assessee") is into the business of exploring & drilling, developing, producing refining, marketing of minerals and oil by-products. Its main source of revenue was from sale of crude oil and natural gas from the blocks at KG Basin. During the assessment year 2015-16, the assessee entered into certain international transactions and specified domestic transactions as were disclosed in the Form 3CEB with its Associated Enterprises ("AE"). After considering the contentions raised by the assessee, the TPO computed the Arm's Length Price of international transactions/specified domestic transactions. The AO in compliance to the proposed adjustment made by the TPO/DRP made an addition of Rs.191,13,18,674/- on account of transfer pricing adjustment qua international transactions entered into by the taxpayer with its AEs.

The assessee raised numerous grounds challenging the addition/adjustment made by the AO/DRP/TPO, more importantly, the AR for the taxpayer brought to the notice of the Bench that a specific ground was raised challenging the order passed by the AO/DRP/TPO on the ground that the same was void ab initio having been passed in the name of a non-existent entity vitiating the whole assessment proceeding.

Ruling of the ITAT

The erstwhile entity M/s. Cairn India Ltd. stood amalgamated with Vedanta Ltd. with appointed date 1st April, 2016, which fact has been duly brought to the notice of the AO. It is also not in dispute that in the assessee's own case in similar set of facts and circumstances of the case for AY 2014-15 assessment order in the name of non-existent entity has been held to be void and non-est.

Hence, the transfer pricing order passed in the name of erstwhile company which was not in-existence is held to be invalid as it cannot be considered as an "eligible assessee" u/s 144C(15)(b) of the Income Tax Act, 1961.

Case Law Update

(a) Approval given by the RBI with regard to rate of interest is a relevant factor for determination of rate of interest; and (b) Rate of interest should be determined on the basis of rate of interest prevailing at the time of availing the loan - CIT vs M/S GE India Technology Centre Private Limited [ITA no. 282 of 2013]

Facts:

- The TPO /DRP recomputed the interest paid / payable by the Assessee on ECB borrowings at 5.67% instead of 7.50% and 8.49% calculated by the Assessee.
- The Hon'ble Tribunal deleted the TP Adjustment for AY 2006-07 holding that the interest was paid at the same rates on the basis of loan agreement entered in AY 2000-01 and the same was accepted in AY 2004-05, 2005-06 and 2008-09.
- The Revenue department in appeal before Hon'ble High Court contended that (a) the RBI prescribes minimum and maximum rate of interest payable on ECB in order to regulate foreign exchange and does not determine ALP; and (b) transfer pricing issue / international transaction have to be determined / evaluated every year with respect to ALP.

High Court's Ruling:

Answering the questions of law against the Revenue Department and in favour of the Assessee, Hon'ble High Court held that:

- Approval given by the RBI with regard to rate of interest is a relevant factor while determination of rate of interest;
- Rate of interest should be determined on the basis of rate of interest prevailing at the time of availing the loan;
- TPO in earlier years and subsequent years have accepted the rate of interest fixed in the loan agreement and therefore there cannot be a departure for the year under consideration.

- Rejects recharacterization by the TPO of Compulsory Convertible Debentures (CCDs) and Optionally Convertible Debentures (OCDs) issued by Assessee to its AEs as Equity Share Capital. Also rejects TPO's attempt to treat financing by the AE as shareholder activity. – DCIT vs. M/s. Kolte Patil Developers Ltd. [TS-655-ITAT-2020PUN-TP]

Facts:

- The TPO re-characterized the transaction of issue of OCD and CCD by the Assessee to its AEs in India and abroad as Equity Share Capital and disallowed interest on said debentures treating ALP as NIL.
- The TPO defended his view point by stating that the availing of funds by the Assessee from its AEs was through hybrid instrument and a shareholder activity.
- Further, the Assessee's ratio of capital to borrowings was 1:23 and RBI Master Circular No.07/2009-10 dated 01-07-2009 stipulates Debt Equity ratio of 4:1 on External Commercial Borrowings (ECB). Accordingly, the TPO concluded that no independent third party would have invested in the convertible debentures issued by the Assessee except by way of participation in equity.
- CIT(A) reversed the observations of the TPO, however, restricted the interest rate at 13.75% instead of 15% paid by the Assessee.

ITAT's Ruling:

Rejecting the Revenue's appeal, the Hon'ble ITAT observed as under:

- The legislation has been provided to tackle the excess payment of interest in case of transactions of borrowing and lending between two AEs specifically with Section 94B and generally with the GAAR. However, it is pertinent to note that both these provisions have been brought in the statute prospectively w.e.f.1.4.2018 and therefore not relevant for year under consideration.
- Section 94B, even after insertion at a later point of time, does not prescribe any debt equity ratio as a thin capitalization rule, thereby rendering the action of the TPO meritless.
- Chapter X does not call for redetermining the nature of transaction in a way different from what has been actually entered into between two related enterprises. It simply requires redetermining the price of the transaction actually entered into.
- Evaluating the definition of 'shareholder activity' under the OECD guidelines, Hon'ble ITAT observed that transaction of subscribing by the related companies to the debentures issued by the Assessee does not fit into the description of a "Shareholder activity".
- On Facts, Hon'ble ITAT noted that the Assessee was in need to funds for on-going projects Further, there is no difference in the form and substance of the transaction. The amount was raised through debentures, reflected in the same way in its accounts and then such debentures also got redeemed by the Assessee (CCD were converted into OCD in subsequent year).

Regarding appropriate rate of interest, Hon'ble ITAT remanded the matter as neither Assessee nor CIT(A) has provided substantiate benchmarking documents / uncontrolled data points.

AO has no jurisdiction to frame the final assessment order before the time-limit as prescribed u/s. 144C(4) of the Act, quashes the final assessment order as null in the eyes of law. - Century Plyboards (India) Limited vs. CIT [TS-701-ITAT-2020Kol-TP]

The appeal involves a legal issue on jurisdiction of the AO to pass final assessment order under Section 143(3) read with section 144C(3) of the Act before the time-limit as prescribed under Section 144C(4) of the Act.

Relevant chronology of event is as under:

Event	Date
Draft Assessment Order passed by AO u/s. 144C of the Act	28.12.2019
Objections filed by Assessee in Form 35A before the DRP [within the time limit	24.01.2020

prescribed in section 144C(2)]	
Intimation given to the AO regarding the objections filed before the DRP	27.01.2020

Final Assessment order u/s. 143(3)/144C(3) passed by the AO 27.01.2020

The Hon'ble Tribunal held as under:

- Section 144C of the Act is a complete code in itself which has set out a separate assessment mechanism for eligible taxpayer's whose income are subject to transfer pricing variation or who are non-residents or foreign companies;
- The time period to legally frame final assessment order under Section 144C(3) of the Act is prescribed in sub-section (4) of section 144C of the Act i.e. within one month from the end of the month in which the AO receives the acceptance from the taxpayer regarding the draft assessment order or the period of filing of objection before the DRP expires.
- Even for sake of argument if it is considered that the Assessee accepted the draft order or did not prefer to go before the DRP, then also the time prescribed to the AO to frame final order under Section 144C(3) of the Act as given in sub-section (4) of section 144C of the Act would be between 01.02.2020 to 28/29.02.2020. Accordingly, the AO erred in passing the final assessment order on 27.01.2020.
- In the present case, the Assessee had filed objections before the DRP and till the DRP gives direction as per section 144C(5) of the Act, the AO does not enjoy jurisdiction over the Assessee's case. Therefore, the final assessment order under Section 144(3) of the Act dated 27.01.2020 along with demand notice is null in the eyes of law and is quashed.

- Delay in realization of receivables from AE beyond credit period tantamount to indirect funding to AE which constitutes separate international transactions. M/s. Serviont Global Solutions Ltd. vs. ACIT [TS-702-ITAT-2020(CHNY)-TP]

Hon'ble Tribunal concluded that interest needs to be imputed on receivables beyond normal credit period. This is despite the fact that the Assessee was a debt free company and its margins was much higher than that of comparable companies. The relevant extracts is reproduced for the sake of convenience.

".....We further note that after the amendment to clause (c) of explanation to Section 92B of the Act, realization of receivables after abnormal delay beyond credit period would tantamount to indirect funding to AE and merely because the assessee is almost a debt free company or the margin of the assessee is higher than the comparables, no such funds of the assessee should be allowed to be utilized for indefinite period. We further note that once delay in realization of AE receivables constitute an international transaction, whether or not, assessee charges interest on receivables from AE or not, has no relevance because any understanding or arrangement between the assessee and its AE which is detrimental to Revenue and against the principles of scheme of Chapter X of the Act, cannot come to the rescue of the assessee. We further note that merely because there is no provision to chargeability of interest in the agreement between the assessee and its AE for delayed realization and merely because assessee does not pay any interest to the AE on the security deposit, the Revenue cannot be deprived on its legitimate share in accordance with the scheme of Chapter X of the Act and the purpose behind the Chapter X...."