TRANSFER PRICING

CA. Bhavya Bansal, CA. Bhavesh Dedhia,
CA. Shazia Khatri

Case Law Update

- Penalty under Section 271AA not leviable as acquisition of an undertaking under Slump Sale from sister concern not a Specified Domestic Transaction ('SDT') - Ruchi J. Oil Pvt Ltd [TS-31-ITAT-2022(Ind)-TP]

Facts:

- The Assessee has entered into a transaction of acquisition of an undertaking under Slump Sale from its sister concern.
- The Assessee / its auditor has mentioned a clarificatory note in Form no. 3CEB in respect of this transaction to state that since the transaction was not in nature of revenue expenditure, it was not SDT as per Section 92BA of the Act.
- The AO not satisfied with the explanation considered the said transaction as SDT and initiated & levied penalty under Section 271AA of the Act @ 2 percent of value of transaction.
- CIT(A) deleted the said penalty. Aggrieved, tax department filed an appeal before Hon'ble Tribunal.

Tribunal's Ruling

Dismissing Revenue's appeal, Hon'ble Tribunal observed as under:

- Transaction of purchase of an undertaking is capital in nature. The Assessee has not claimed deduction against revenue for the year in this regard.
- Thus, the said transaction is not an expenditure for making any payment to a person referred to Section 40A(2)(b) of the Act, nor a transaction referred in Section 80A of the Act or transfer of goods or services referred to in Section 80IA(8) or 80IA(10) of the Act. As it is not SDT under Section 92BA of the Act, there is no room for application of Section 271AA of the Act.
- The said transaction was duly disclosed by the Assessee / its auditor by way of note in Form no. 3CEB and relevant details were provided during the course of assessment proceedings. There is no finding of the revenue authorities that particulars furnished by the Assessee were inaccurate. Accordingly, provision of Section 271AA of the Act cannot be invoked.
- The penalty notices issued by the AO were vague as it does not bring out the purported default for which the penalty was initiated. Reliance placed on Hon'ble High Court ruling in case of Kulwant Singh Bhatia (2018) 33 ITJ 777 (MP)

- The duty of Assessee does not extend beyond disclosure of primary facts. When such facts are duly considered by the TPO and averted to by the AO, reopening basis subsequent AY proceeding not sustainable - Oracle Financial Services Software Ltd [TS-17-HC-2022(BOM)-TP]

Facts:

- The AO sought to reopen the assessment on the ground that he had reason to believe that the Assessee's income chargeable to tax for the AY 2014-15 has escaped assessment.
- The primary reason for re-opening was that on an identical issue i.e. reimbursement of employees cost to AE was disallowed in AY 2015-16 under Section 40(a)(i) of the Act for non-deduction of TDS.

- The AO alleged that applicability of TDS provisions to reimbursement of employee cost was neither discussed nor considered and examined during the course of assessment for AY 2014-15 and hence reopening was initiated.
- The Assessee filed a writ before High Court challenging reopening of the assessment

High Court's Ruling

Hon'ble High Court held disallowance of employee cost reimbursement in subsequent AY did not constitute a reason to believe that income had escaped assessment and was a mere change in opinion. In doing so, Hon'ble High Court noted the following:

- The case of the Assessee for AY 2014-15 was selected for scrutiny inter-alia on the parameter of large outward remittances to a non-resident. On the core issue of overseas remittances, the AO had called the Assessee to furnish the information and explanations. The details submitted by the Assessee duly mentions payment for employee cost reimbursement.
- The said transaction was also examined by the TPO. In fact, the TP order noted that the overseas AE was used as conduit and Assessee was carrying out entire business activity in overseas location through its employees.
- Though the order under Section 92CA(3) of the Act was restricted to ascertain correctness of the amount paid to the companies outside India. However, the fact remains that the issue of remittances concerning the employee cost was agitated before and considered by the TPO, and the observations of the TPO were, in turn, adverted to by the AO in the assessment order.
- The duty of Assessee did not extend beyond disclosure of primary facts. Once the primary facts necessary for assessment were fully and truly disclosed based on which the AO proceeded to form a conclusive view, then reopening basis same material considering disallowance in subsequent AY was not permissible.

- The penalty under Section 271BA not leviable when the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by statue.

Facts:

- The Assessee has paid salaries and other expenses in respect of employees deputed overseas and recovered the same from its AE.
- The Assessee was under a bonafide belief that the above transaction is not an international transaction. However, when made aware that such a transaction would be covered under the ambit of International Transaction, the Assessee filed the Form No. 3CEB before the Assessing Officer during the course of proceeding.
- The AO levied penalty under Section 271BA for non-filing of Form no. 3CEB which was upheld by CIT(A)

Tribunal's Ruling

Invoking Section 273B (Penalty not to be imposed in certain cases) of the Act, Hon'ble Tribunal remarked as under:

"11. From the above mentioned facts and law, it is evident that MTNL was under bonafide belief that it is not required to file form 3CEB but later on realization of the facts and law, MTNL filed the same with the concerned authority….

16. Thus, we find that the provisions of Section 273B can be invoked in the case of the assessee as a reasonable cause for failure could be substantiated.

17. Further, in the case of CIT Vs. MP Electricity Board (MP HC) based on the judgment of the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa held that the authority competent to impose the penalty would be justified in refusing to impose the penalty when there is a technical or venial breach of the provision of the Act are where the breach flows from a bonafide belief that the offender is not liable to act in the

manner prescribed by statue. The assessee is a public sector undertaking cannot be deemed to have any deliberate inclination to avoid payment of tax or to follow the statutory provisions.

18. Hence, keeping in view the entire facts of the instant case, the law laid down and the provisions of the Section 92E, Section 271BA and Section 273B of the Act, we hereby direct that the penalty levied be obliterated."

Other Update

Key Transfer Pricing proposals in India Union Budget 2022-23

- TP Order now subject to revisionary powers under Section 263 of the Act, if prejudicial to the interest of revenue. Revisionary powers granted to jurisdictional transfer pricing CIT:

o Consequential changes also made to provide two months' time to the Assessing officer (AO) to give effect to the TP order consequent to the directions in revision order (Section 153 (Sub-section 5A)) - Effective 1 April 2022

- Timelines (nine-months) as originally provided for passing an order of fresh assessment by AO owing to remand back / setting aside / cancellation of assessment (Section 153(3)) and for passing an order giving effect (Section 153(5)) shall now also be applicable to fresh order / order giving effect to be passed by the TPO - Effective 1 April 2022

- Timeline for notifying faceless schemes for Transfer Pricing, International Taxation (DRP) matters and ITAT appeals extended till 31 March 2024.

OECD Releases Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022

The OECD Transfer Pricing Guidelines provide guidance on the application of the "arm's length principle", which is the international consensus on the valuation of cross-border transactions between associated enterprises. The OECD Transfer Pricing Guidelines were approved by the OECD Council in their original version in 1995. The revised OECD Transfer Pricing Guidelines January 2022 edition was released on 20 January 2022. It includes the revised guidance on the application of the transactional profit method and the guidance for tax administrations on the application of the approach to hard-to-value intangibles agreed in 2018, as well as the new transfer pricing guidance on financial transactions approved in 2020. Further, consistency changes have been made to the rest of the OECD Transfer Pricing Guidelines. You may refer to the guidelines at the following link:

https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm

M/s. Kellogg India Private Limited v, Asst CIT [ITA No.7342/Mum/2018]

Kellogg India Private Limited ("the assessee") is engaged in manufacturing and sales of breakfast cereals and convenience foods and operating as a licensed manufacturer of ready to eat cereals. TPO rejected selection of foreign AE as the tested party on the ground that the financial details of the foreign AE and the foreign comparables were not available (which assessee claimed it had provided). Revenue also contended that the foreign AE could not be taken as the tested party in view of the fact that the said AE was in Singapore and that the comparable companies were not stationed in Singapore and were located in different countries. ITAT viewed Singapore AE as the least complex entity (since assessee bore significant entrepreneurial risk in India and Singapore AE undertook limited functions) and upheld it being taken as the tested party by the assessee.

Further, with respect to AMP expenditure, the ITAT noted that the facts were identical with assessee's own case for AY 2013-14. The coordinate bench had held that in absence of an express agreement between the assessee and its AE for incurring AMP expenditure to promote the brand of the AE, AMP expenditure incurred by making payment to third parties for promoting and marketing the product manufactured by the assessee, did not come within the purview of international transaction and therefore BLT method was not valid to benchmark the

transaction. ITAT noted that the decision rendered was applicable for the year under consideration and directed the TPO to delete adjustment made in respect of AMP expenditure.

ITAT deleted the TP adjustment made in respect of import of finished goods and AMP expenditure for assessee.