

TRANSFER PRICING

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Haier Appliances (India) Pvt Ltd [TS-340-ITAT-2021(DEL)-TP]

Ruling summary and findings

Haier Appliances (India) Pvt Ltd ("the assessee") is engaged in the business of manufacturing and distribution of consumer durables. It had incurred certain advertising, marketing and promotion ("AMP") expenses for the products having brand name 'HAIER',

The TPO undertook the benchmarking analysis of the AMP expenses incurred by assessee by applying the Bright Line Test ('BLT'). However, DRP following the jurisdictional HC decision in case of Sony Erickson Mobile Communication India Pvt. Ltd, rejected the application of BLT and directed that the ALP computation should be made by considering Cost Plus Method (CPM) as the most appropriate method ("MAM") and proposed a TP-adjustment of Rs. 11.19 crores. Being aggrieved, both the assessee as well as the tax authority preferred an appeal before the ITAT. The ITAT noted that similar issue had been adjudicated by the coordinate bench in assessee's own case for AY 2008-09 and AY 2009-10. Coordinate bench considered a mark-up of 9% on the reduced AMP expenses (as directed by the DRP) and had noted that ALP of the AMP expenses was lesser than the grant/subsidy received by the assessee. Accordingly, the coordinate bench had concluded by stating that since the grant received by the assessee exceeded the arm's length price of AMP, no TP adjustment in respect of AMP expenses is called for. Delhi ITAT directed deletion of TP-adjustment made on account of AMP expenses incurred by assessee for AY 2011-12.

Cadila Healthcare Limited [TS-344-ITAT-2021(Ahd)-TP]

Ruling summary and findings

Cadila Healthcare Limited ("the assessee") is a leading name in pharmaceutical, diagnostics and allied businesses in India. TP-adjustment was made in respect of corporate guarantee, interest on optionally convertible loans to its Irish subsidiary and reimbursement of expenses for assessee for AYs 2012-13 and 2013-14

Ahmedabad ITAT deleted the TP-adjustment made in respect of corporate guarantee and directed the TPO/AO to adopt the benchmarking @1% as was done by the assessee. It followed the decision in assessee's own case for AYs 2009-10 and 2010-11 by opining that "once in the earlier years a coordinate bench has approved the stand that 1% is a reasonable guarantee commission, there is no reason for us to deviate from the said stand as parties to the guarantees are broadly the same and most of these guarantees are continuing guarantees". ITAT also deleted TP-adjustment towards interest on optionally convertible loans to its Irish subsidiary. Facts being identical and considering that these loans are merely extensions of the earlier loans, ITAT applied coordinate bench decision for AYs 2009-10 and 2010-11 wherein similar adjustment was deleted by holding that assessee's transaction was in the nature of quasi capital and cannot be characterized as debt. ITAT further, deleted TP adjustment on account of reimbursement of expenses (product liability insurance charges, legal expenses, stability charges and analytical charges) to US based AEs, holding that since there is no mark up in the reimbursement of expenses, there is no question of making any ALP adjustment in respect of these reimbursements of expenses. ITAT noted that similar reimbursement to the US based AEs were made during AYs 2010-11, 2011-12, 2013-14, 2014-15 and 2015-16, but no such ALP adjustments were made, ITAT held that "there is no res judicata in tax proceedings but principles of consistency definitely have a crucial rule to play- particularly in respect of a factual matter which permeates through the different assessment years".

Case Law Update

Rejects DEPB incentive as an adjustment for arm's length price computation as it has an over-riding effect on application of Chapter-X of the Act - Nava Bharat Ventures Ltd [TS-314-ITAT-2021(HYD)-TP]

Facts:

- The Assessee, is engaged in manufacturing ferro alloys and sugar, fabrication of equipment and generation of power. The Assessee's international transactions with its AEs involved sale of Silico Manganese and ferro chrome.
- The Assessee contended to include incentives received for DPEB and FPS declared by the Government of India as an adjustment under Rule 10B(1)(a)(ii) of the Rules as such incentives amounts to differences materially affecting the arm's length price in open market. The said contention was not accepted by the TPO.
- CIT(A) accepted the Assessee's contention that DEPB are part of the operating profits and therefore directed the Assessing Officer to verify and consider the foregoing DPEB benefit for comparability analysis and re-work the consequential adjustment of the selling price.
- Department preferred an appeal before Tribunal.

Tribunal's Ruling

Hon'ble Tribunal accepting Revenue's grievance held that "assessee's argument seeking to include DEPB as an adjustment for "ALP" computation because it is in the nature of an operating income, ought not be accepted as it tends to have an overriding effect on application of chapter-X of the Act as per stricter interpretation rule."

Following points were noted by Hon'ble Tribunal in this regard:

- Chapter-X of the Act in the nature of (a) 'SPECIAL PROVISION RELATING TO AVOIDANCE OF ACT' introduced as an anti-avoidance measure by the legislature.
- The definition clause in Sec.92F(ii) defines "arm's length price" as 'a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in un-controlled conditions' and accordingly opined that the Assessee's arguments go against the said definition.
- Relied on Hon'ble apex court's latest Full Bench decision in Commissioner of Customs Vs. Dilip Kumar (2018) 9 SCC 1 (FB)(SC) holds that taxing and an exemption provisions have to be strictly construed and benefit of doubt in such an instance goes to the Assessee and Revenue; respectively.
- Cited legal maxim 'Generalia Speialibus Non-Derogant' meaning that a general provision does not apply at the cost of the special one or the former of them must make way for the latter; respectively.
- Distinguished Assessee's reliance on various rulings by stating that the Apex Court decision was binding on all the "Courts" within the territory of India as per Article 141 of the Constitution and that none of them considered the legislature scheme in Chapter-X.

Holds charging interest on outstanding balances and advances to an AE under liquidation cannot be treated as prudent practice - Hilti Manufacturing India Pvt Ltd [TS-321-ITAT-2021(Mum)-TP]

Facts:

- The Assessee is engaged in the business of manufacturing and sale of Diamond Saw Blades, segments, grinding tools and core drills.
- While the TPO has treated the international transactions of Assessee at arm's length price, he alleged an interest on outstanding advances and receivables based on the rate extracted from Bloomberg i.e. 5.84 percent.
- For of the AE, the Assessee contended that recovery of advance itself is doubtful as the AE is under liquidation / dissolved and therefore levying interest would not be feasible. However, the TPO rejected the said argument.
- DRP largely upheld the action of the TPO.

Tribunal's Ruling

The Hon'ble Tribunal observed as under:

- One of the AE M/s Peacock Diamond System Inc. USA to whom advances are provided by the Assessee, went into liquidation due to heavy losses and was dissolved as per the Governing Laws of the USA. Documentary evidences in this regard are placed on record.
- Appreciated that in such circumstances, the recovery of the amount due is doubtful and the TPO charging interest on such outstanding balances and advances cannot be treated as prudent practice.

- Considering the overall facts and the circumstances direct the TPO not to charge interest in respect of balance of advances and outstanding receivables of Peacock Diamond System Inc. USA.

Failure to report international transactions prescribed vide amendment in Section 92B of the Act by the Finance Act, 2012 with retrospective effect does not lead to penalty under Section 271BA of the Act - Batronics India Limited [TS-294-ITAT-2021(HYD)-TP]

Facts:

- The Assessee had duly filed its Form No. 3CEB for AY 2013-14, however not reported certain international transactions such as receivables, corporate guarantee etc.
- The Assessing Officer imposed and first level appellate authority confirmed the action imposing the penalty under Section 271BA of the Act for its alleged failure in reporting international transactions.
- Aggrieved the Assessee preferred appeal before Tribunal.

Tribunal's Ruling

Ruling in favour of the Assessee, Hon'ble Tribunal noted as under:

"He [Department Representative] fails to dispute that almost all the said international transactions alleged to have been omitted in assessee's Form- 3CEB came to be prescribed vide amendment in Section 92B of the Act by the Finance Act, 2012 with retrospective effect from 01-04-2002 whereas we are in the immediate next assessment year i.e. AY.2013-14. Coupled with this, the assessee had already succeeded on the very issues before the tribunal in AYs.2012-13 proceedings regarding the corresponding adjustments. All these facts sufficiently indicate that the assessee's alleged default in not having reported the corresponding international transactions in Form-3CEB appears to be very condonable in view of its explanation given throughout. We accordingly delete the impugned penalty for this precise reason alone."

Mere filing of voluminous documents during the assessment would not be sufficient. Remits ALP-determination for intra-group services - Exide Life Insurance Company Ltd [TS-310-ITAT-2021(Bang)-TP]

Facts:

- The Assessee is engaged in the business of life insurance and annuity.
- The Assessee has inter-alia entered into international transaction of receiving technical, administrative and training support services. The Assessee claimed that during the course of TP Assessment proceedings, it has filed voluminous documents evidencing receipt of services.
- However, the TPO disregard the documents terming them as "general" and proceeded to determine the arm's length price of intra-group payment as "NIL".

Tribunal's Ruling:

Hon'ble Tribunal remitted the determination of arm's length price to the TPO / AO for consideration afresh in the light of the following principles / observations:

- The AO / TPO cannot question the incurring of the expenses and has to confine his enquiry along with regard to the question whether the price for the services is what an independent enterprise would have paid;
- In case of cost allocation, the question would be to determine as to whether the costs claimed to have been apportioned between the various group companies has not been inflated or whether they are allocated on a proper basis
- Whether intra group services are duplication of services for which the AE has already paid in addition to what is paid by way of allocation is also to be looked into.
- If the AE charges a mark-up for the services rendered, than the ALP of such mark-up will have to be determined.
- To summarize, determination of the arm's length price of intra-group services would thus involve:—
 - o Identification of the cost incurred by the group entity in providing intra group services to the related party.
 - o Understanding the basis for allocation of cost to various related parties i.e., nature of allocation keys.
 - o Whether intra group services will require reimbursement of expenditure along with markup.

- o Identification of arm's length price of markup for rendering of services.
- The description alone would not suffice. Further filing of voluminous correspondence, reports etc., would not be a proper way of discharge of Assessee's burden to establish the ALP of expenditure in question.
- The Assessee needs to demonstrate as to how the evidence filed by the assessee was actually useful in its business as the assessee will be the best person to know these facts which are within its knowledge. It is only if such a stand is taken by the Assessee can the TPO take the issue forward to arrive at a proper conclusion.

- Profit margin of the Assessee adopted in MAP ought to be adopted as ALP mark-up for non-US based AE transactions also - Dell International Services India Pvt Ltd [TS-322-ITAT-2021(Bang)-TP]

Admitting and accepting the additional ground by the Assessee, Hon'ble Tribunal observed as under:

"We have considered the rival submissions and find merit in the same. As pointed out by the learned Counsel for assessee, the assessee or TPO have not made any distinction between US and Non-US AE transactions. In such circumstances, the margin accepted in MAP in respect of US AE transaction has to be regarded as Arm's Length mark-up cost for the Non-US AE transaction in the ITES segment. We hold and direct accordingly. In view of the above conclusion, the other grounds raised by the Revenue and assessee in their appeals on determination of ALP in the ITES segment become infructuous and calls for no adjudication and are dismissed."

Other Update

CBDT Notification No. 92/2021, dated 10 August 2021 - CBDT notifies rule for computation of tax relief when there is an increase in book profits due to Advance Pricing Adjustment/secondary adjustments

The CBDT has issued a Notification prescribing a new Rule 10RB for computation of tax relief when there is an increase in book profits due to APA/secondary adjustments provided under Section 115JB(2D).

The notification provides that for the purposes of Section 115JB(2D), the tax payable by the taxpayer under Section 115JB(1) shall be reduced by the following amount:

(A-B) – (D-C)	
A	Tax payable by the company on the book profit of the previous year including the past income
B	Tax payable by the company on the book profit of the previous year after reducing the book profit with the past income
C	Aggregate of tax payable by the company on the original book profit of those past year or years to which the past income belongs
D	Aggregate of tax payable by the company on

	the book profit of past year or years, referred to in item C, after increasing the book profit with the relevant past income of such year or years
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If the computed value of $[(A-B) - (D-C)]$ in the formula is negative, its value shall be deemed to be zero.

CBDT has also notified Form No 3CEEA for furnishing particulars for re-computation for any adjustment on account of income of past year(s) included in books of account of previous year by a company on account of secondary adjustment under Section 92CE or on account of an APA entered under Section 92CC.