

TRANSFER PRICING

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TP-adjustment outside “book profits” ambit under Section 115JB of the Act – M/s. SSP India (P) Ltd. vs. DCIT [TS-295-ITAT-2020(DEL)-TP]

Facts:

The Assessee is engaged in supply of software services industry worldwide. In return of income filed by the Assessee, the income under normal provision was shown as NIL whereas while making the calculation under the Minimum Alternate Tax (MAT) provisions the income was calculated at INR 2.8 crs.

The Transfer Pricing Officer (‘TPO’) proposed an adjustment of INR 1.3 crs. in respect of international transaction of provision of support services to the Associated Enterprise (‘AE’).

The Assessing Officer (‘AO’) treated the transfer pricing adjustment as an adjustment under the provisions of MAT and thus assessed the income at INR 4.1 crs.

Dispute Resolution Panel upheld the approach of the TPO and AO.

Tribunal’s Ruling

Book profits of the Assessee can be adjusted only in relation to adjustments as provided in Explanation 1 Section 115JB(2) of the Act.

Tribunal relying on various judicial precedence, held that transfer pricing adjustment is not one of the adjustments contemplated under Explanation 1 Section 115JB(2) of the Act and, therefore, could not have been added back to the book profits under Section 115JB of the Act.

Accordingly, TP adjustment deleted.

TP Adjustment cannot be made on mere presumptions and surmises – Pr. Commissioner of Income Tax V/s. Solar Turbines India P. Ltd. [TS-309-HC-2020(BOM)-TP]

Facts:

Turbomach SA (the AE) undertook contract to supply gas turbines to the public works department (PWD) of Government of India in carrying out construction for Common Wealth Games (CWG). The Assessee, (Indian entity) provided installation, commissioning and annual maintenance services. There was clear demarcation of work between overseas AE and the Assessee in the contract.

Considering PWD’s requirement, the contract was entered by the Assessee while it was clearly understood by PWD that gas turbine generation system would be provided the Assessee’s AE (the OEM of gas turbines). The consideration to the AE was also quantified in the contract.

The TPO alleged that the contract was entered into by Assessee as an agent of its AE and that the Assessee provided sales, marketing and after sales services to its AE.

The TPO adopted secret comparable and imputed indent commission in the hands of the Assessee.

The Assessee contended there is nothing on record to suggest that it had rendered services to its AE for sale of its gas based turbines either to PWD and other customers in India

On Appeal, the Tribunal held that there was no evidence on record to show that Assessee had provided any services to its AE. In case of sale made by the AE directly to unrelated customers, the Assessee was not involved.

The Revenue filed an appeal to High Court.

High Court’s Ruling

Hon’ble Bombay High Court upheld the following view of the Tribunal:

Transfer pricing adjustments cannot be made on mere presumptions and surmises. The TPO cannot benchmark a transaction on notional basis, when there is no evidence to prove that Assessee in fact has rendered such services.

When the Assessee mentions that it has not provided any services, then the TPO cannot ask the Assessee to prove the negative.

Both the questions raised by Revenue department were negated by the Hon'ble High Court stating *"We do not find any error or infirmity in the approach of the Tribunal which is quite reasonable and pragmatic. That apart, the finding returned by the Tribunal that the assessee did not provide any marketing support services to the AE and did not receive any commission from the AE for providing such marketing support services is a finding of fact based on appreciation of evidence and materials on record. Such a finding of fact cannot be said to be vitiated by any material irregularity or perversity. In the absence thereof, no substantial question of law arises from the impugned order of the Tribunal."*

Assessee eligible for deduction under Section 10AA of the Act in respect of voluntary Transfer Pricing adjustment - DCIT vs. M/s. EYBGS India Pvt. Ltd [TS-289-ITAT-2020(Bang)-TP]

Facts:

The Assessee is engaged in providing back office support services, which are in the nature of 'Information Technology Enabled Services' (ITES).

The Assessee adopted TNMM to benchmark its international transaction. It made a voluntary TP adjustment to its financial results and claimed deduction under Section 10AA of the Act against it.

The TPO proposed an adjustment by making certain changes in the comparable companies. The DRP directed the AO/TPO to exclude certain comparable companies.

It is pertinent to note that while the AO had allowed deduction under Section 10AA of the Act on the voluntary TP adjustment, the DRP directed to disallow the claim on following reasons:

- o The Assessee has not furnished any details as to how the above said amount was worked out;
- o Section 10AA mandates the export consideration should be brought into India;
- o The unit for which deduction has been claimed has actually incurred losses.

Assessee and Department both filed an appeal to Tribunal.

Tribunal's Ruling

Tribunal upheld DRP's direction to exclude certain companies namely eClerx and Acropetal as comparable company to the Assessee.

In respect of disallowance of Section 10AA claim on voluntary adjustment, Tribunal noted that the first proviso to Section 92C(4) of the Act is applicable only to situations where adjustment to the ALP is made by the AO/TPO / DRP.

Tribunal also appreciated that the Assessee computed the adjustment in a scientific manner by comparing its margins with that of comparable companies selected by the Assessee.

Replying on Pune Tribunal ruling in case of Apoorva Systems (P) Ltd (2018)(92 taxmann.com 82), the Tribunal observed that artificial income cannot be part of export turnover and hence there could not be any condition for getting such foreign exchange to India.

Relying on the Bangalore Tribunal ruling in case of I-Gate Global Solutions Ltd. upheld by Hon'ble Karnataka High Court in ITA 453/2008 and other judicial precedences, held that the Assessee was entitled to deduction under Section 10AA of the Act on voluntary transfer pricing adjustment.

Tribunal rules on various comparability factors affecting the selection of most appropriate method; and (b) For purpose of computing time period under Rule 34(5) of the ITAT Rules, lockdown period owing to COVID-19 should be excluded. – Mott MacDonald Pvt Ltd vs. Deputy Commissioner of Income Tax [TS-291-ITAT-2020(Mum)-TP]

Facts:

The Assessee adopted internal Cost Plus Margin method for benchmarking its international transaction of providing engineering consultancy services. However, TPO rejected the same and adopted external TNMM to propose a TP-adjustment.

The TPO rejected internal CPM method citing significant difference in (a) volume; (b) functions, assets and risks ('FAR') analysis; (c) geographical location; (d) impact of problem faced in respect of funding and environment clearance.

DRP confirmed TPO's selection of most appropriate method.

Tribunal's Ruling

Tribunal remarked that choice of method for determination of arm's length price is not an unfettered choice and it had to be exercised on the touchstone of principles governing selection of most appropriate method under Section 92C(1) of the Act.

Tribunal further opined that TPO do have powers to alter and adopt what he perceives to be the most appropriate method, however this can only be done by following the course laid down in proviso to Section 92C(3) of the Act i.e. by issuing specific show cause notice to that effect by the TPO, and the reasons so assigned for rejection of the most appropriate method, adopted by the Assessee, are subject to judicial scrutiny.

The Tribunal concluded that in the present case, the reason adopted by the TPO were not sustainable in law in view the below discussions:

- o Volume difference: One of the factors affecting comparability is volume, and therefore volume difference is relevant. However, in the Assessee's case, the quantum was not so material (transaction value of INR 23 crs with AE vs. INR 12 crs with non-AE) so as to affect the degree of comparability.
- o Difference in FAR analysis: This is a valid reason but needs more than macro observations without any specifics. In the present case, the TPO made sweeping generalization without an effort at any stage to demonstrate / elaborate nature of these differences.
- o Geographical location: Bearing in mind Rule 10B(2)(d), the Tribunal opined that "Geographical location, by itself, is not an important factor for deciding comparability of an uncontrolled transaction, its importance lies in being one of the factors which could affect the market conditions in which respective parties operate". Thus, unless market conditions are materially different, geographical location is of no consequence in judging comparability. The Tribunal further observed that unlike the market for a physical product, the market for consultancy services is unlikely to be restricted to national boundaries.
- o Impact of problem faced in respect of funding and environment clearance: The Tribunal observed that Assessee made an uncontroverted factual claim that there were no such issues in the relevant financial year.

Regarding procedural aspect, the Tribunal ruled that for purpose of computing time period under Rule 34(5) of the ITAT Rules, lockdown period owing to COVID-19 should be excluded. In this regard, reliance was placed on Hon'ble Prime Minister speech on 24th March 2020, Hon'ble Supreme Court of India, order dated 6th May read with order dated 23rd March 2020, Hon'ble Bombay High Court's order dated 15th April 2020, etc.

Safe Harbour rules notified

Central Board of Direct Taxes ("CBDT") notified the Safe harbour rules for AY 2020-21. The previous rates will continue to apply for this year as well.

JDIT designated as authority before whom CbCR information to be notified

The Income Tax Department has designated Joint Director of Income tax (Risk Assessment)-1 as the Income tax Authority before whom particulars of parent entity and alternate reporting entity to file Country by Country Report (CbCR) would be notified. This comes into effect from April 1, 2020. The JDIT has his office in New Delhi