

## TRANSFER PRICING

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### Quashes assessment order for AY 2003-04 in remand proceeding as null and void. Upholds Assessment procedure under Section 144C of the Act applicable prospectively from AY 2011-12 - A.T. Kearney Ltd [TS-218-ITAT-2021(DEL)-TP]

#### Facts:

- The original Assessment Order for AY 2003-04 in case of the Assessee was completed vide order dated 28 March 2006.
- The matter travelled up to the Tribunal wherein Hon'ble Tribunal vide order dated 31 August 2009 set aside the assessment for de novo consideration.
- In the remand proceedings, the AO passed draft assessment order on 30 December 2010. The DRP issued directions on 10 August 2011 and culminating in final Assessment order dated 19 August 2011.
- Through the additional grounds of appeal, the Assessee challenged the validity and legality of the assessment on the ground that the provisions of Section 144C of the Act introduced by Finance Act (No. 2) of 2009 has no application for the assessment year under consideration.

#### Hon'ble Tribunal's Ruling:

Hon'ble Tribunal observed that that the provisions of Section 144C of the Act can be held to be applicable only prospectively i.e. from AY 2011-12 only and accordingly, that the draft assessment order framed by the AO was null and void. In doing so, Hon'ble Tribunal noted the following:

- Hon'ble Madras High Court in case of Vedanta Limited [Writ petition no. 1729/2011] had accepted taxpayer's submissions having regard to Circular No. 5/2010 dated 3rd June, 2010 issued by the Board clarifying that the substantive procedure of assessment enshrined in Section 144C of the Act would apply from AY 2011-12 onwards.
- Similar view was taken by Coordinate Tribunal Bench in case of Travelport L.P. USA [ ITA nos. 6499/Del/2012, 6500/Del/2012, 1480/Del/2012, 217/Del/2014 and 218/Del/2015].
- Relying on ratio laid down by Hon'ble Supreme Court in case of Karimtharuvi Tea Estate Ltd. vs. State of Kerala [60 ITR 262], observed that Assessment has to be made as per the law in force on the first date of the assessment year.
- None of the decisions relied upon by the Revenue including division Madras High Court Bench in case of Vijay Television Private Limited [369 ITR 13]), specifically deal with the controversy under consideration as the same was not canvassed before the Hon'ble Courts.
- Hon'ble Tribunal also distinguished Revenue's reliance on Hon'ble Delhi High Court decision in case of Headstrong Service India P. Ltd [ITA no. 77/2019] as in that case, the Revenue had contended that the procedure in Section 144C of the Act would not apply in the remand proceedings considering that sub section (1) of the said section uses the expression 'in the first instance'.
- Hon'ble Tribunal noted that Court is an authority for what it decides having regard to the facts and controversy projected before the Court. In doing so, Hon'ble Tribunal made reference to Hon'ble Supreme Court in case of Sun Engineering Works (P) Ltd. [198 ITR 297].

### Erroneously passed final order to be treated as draft assessment order - Alcatel Lucent India Ltd [TS-220-HC-2021(DEL)-TP]

#### Facts:

- An order dated 26 March 2021 under Section 143(3) read with Section 144C of the Act though titled as "Draft Assessment Order" was also accompanied by income tax computation, notice of demand and penalty notice; thus giving it a flavor of final assessment order.
- The Assessee through a writ petition challenged the impugned order as erroneous and a violation of the provisions of the Act.

### High Court's Ruling:

- Hon'ble High Court prima-facie agreed with the view of the Assessee that there is a violation of the provisions of the Act as the Assessing Officer was required to pass, in the first instance, a draft order under Section 144C (1) of the Act, which would have enabled the Assessee to file, if so aggrieved, its objections with the Dispute Resolution Panel.
- However, on the submission of the Department Counsel based on instruction from CBDT that that the impugned assessment order will be treated as a draft assessment order and that the consequential notice of demand and notice for initiation of penalty proceedings shall stand withdrawn, directed as under:
  - “(i) The assessment order dated 26.03.2021 shall be treated as a draft assessment order.
  - (ii) The petitioner will have 30 days' time to file its objections with the DRP. The aforementioned timeframe will commence from the date of the receipt of a copy of this order.
  - (iii) The notice of demand and the notice for initiation of penalty proceedings shall stand withdrawn.”
- Please note, the timeline for passing the draft assessment order for AY 2017-18, has been extended to 30 June 2021

### TP provisions inapplicable to Divestment of Shares - M/s. Value Labs LLP [TS-217-ITAT-2021HYD-TP]

#### Facts:

- The Assessee has divested its shares held in Associated Enterprise at face value of 1 Euro, 1 Sweden Croner and 1 Britain Pound.
- The Assessing Officer treated the same as an international transaction and made necessary reference to the TPO.
- The TPO in the order proposed a TP adjustment on this transaction adopting discounted cash flow method. TPO's order was upheld by the DRP.

### Hon'ble Tribunal's Ruling:

#### Ruling in favor of the Assessee, the Hon'ble Tribunal observed as under:

“3. ... It transpires at the outset that the instant issue as to whether such a transaction form part of assessee's capital account and its exigibility to Chapter X of the Act is no more res integra. Various judicial precedents and more particularly hon'ble Bombay high court decision in the case of PCIT Vs. PMP auto Components Pvt. Ltd. (2009) 416 ITR 435 (Bom) and Vodafone India Services Limited 368 ITR 001 (Bom) hold in view of the CBDT Circular No.2/2015 dt.29.01.2015 that such a capital account transaction does not give rise to income in the revenue count so as to be treated as an international transaction u/s. 92B of the Act. Their Lordships hold that there is no further distinction regarding insourced and outsourced transactions in the instant segment so far as provisions of the Act to this effect are concerned. We adopt the very reasoning mutatis mutandis and delete the impugned ALP adjustment of Rs.1,06,35,050. The assessee succeeds in its first substantive ground therefore.”

### Treatment of export incentives for computation of Profit Level indicator - M/s Tasty Bite Eatables Limited [ITA 1823/Pun/2018]

#### Hon'ble Tribunal's Ruling:

Holding that export incentives are liable to be considered as part of operating revenue for the purpose of computation of profit level indicator, the Hon'ble Tribunal observed as under:

“There can be no doubt that export incentives are part and parcel of export revenue. The Government of India allows incentives with a view to encourage exports and make Indian exporters more competitive in the world market. While finalizing the price at which goods are to be exported in the foreign markets, the exporters take into consideration the export incentives permitted by the government of India and announce the sale price accordingly so as to remain in fray in the competitive world market. No export incentive can be earned without making exports. In view of the matter, export incentives are nothing but an integral part of export revenue. Once the position is so, we fail to comprehend as to how export incentive can be treated as non-operating in nature.”

### The Bank of Tokyo Mitsubishi UFJ Ltd [TS-233-ITAT-2021(DEL)-TP]

The Bank of Tokyo Mitsubishi UFJ Ltd (“Assessee”) was engaged in the wholesale banking operations mainly catering to the requirements of Japan based corporate and individual clients. The Delhi ITAT upheld DRP's deletion of TP adjustment on counter guarantee commission received by assessee for AY 2011-12.

The Assessee had received counter guarantee commission from its Associated Enterprise ("AE") during the year and benchmarked the same using Comparable Uncontrolled Price ("CUP") and Transactional Net Margin Method ("TNMM") in the primary and secondary analysis respectively. However, TPO disagreed with the assessee's benchmarking and adopted average bank guarantee rate to arrive at ALP and proposed a TP-adjustment of Rs. 10.43 cr. The Dispute Resolution Panel deleted the said adjustment owing to assessee's own case for AY 2010-11. ITAT noted that the assessee only performed limited functions, such as, processing the request of issuance of guarantee from the AEs, issuance/delivery of the guarantee on stamp paper etc. Hence, the assessee performs secretarial functions assigned to it by its AE and all the significant functions are performed by its AE. With respect to risk, ITAT noted that assessee bears no risk as the counter guarantee issued by AE completely protects the assessee by way of reimbursement by the AE in the form of counter guarantee. Accordingly, ITAT held that DRP has rightly deleted the addition by using the analysis of the functions performed and risk assumed by the assessee qua the transaction under consideration. ITAT also noted that this issue was squarely covered in and was ruled in favor of the assessee for earlier AY's 1998-99 to 2010-11. In this backdrop, ITAT upholds the findings of the DRP and dismisses Revenue's appeal on the issue. Further relies on coordinate bench ruling in assessee's own case for AY 2009-10, wherein it was held "that transaction under consideration cannot be compared with bank guarantee rates..."