

<p><b>TRANSFER PRICING</b>  <b>CA. Bhavya Bansal, CA. Bhavesh Dedhia,</b>  <b>CA. Shazia Khatri</b></p>	
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**ITAT adjudicates on operating / non-operating nature of various P&L items such as subvention receipt, forex gain, provision written back, etc. for PLI computation – Rieter India Private Limited [TS-256-ITAT-2022(PUN)-TP]**

**Relevant Facts:**

- The TPO carried out some alterations in the Profit level indicator (PLI) of the Assessee after adopting the external TNMM as the most appropriate method and recalculated the Assessee’s PLI.
- The Assessee approached the Dispute Resolution Panel (DRP) but without success.

**Hon’ble Tribunal Decision**

Sr. No.	Nature of P&L item	Hon’ble Tribunal decision on Operating / non-Operating
1	Subvention receipt - This amount was not included in the total income for the purposes of taxation. However, while determining the ALP, the Assessee included this amount in the operating revenue base.	As the Assessee admittedly did not include the said receipt in the total income, such an amount cannot be included in the operating revenue base for the ALP determination.  <i>Once the amount of Rs.5.01 crore is considered as not received for the purposes of taxation, it cannot crop up as a revenue receipt while determining the ALP. A claim dead for computation of total income cannot become alive for the ALP determination. If we accept the contention of the Assessee, the situation will be akin to considering Subvention amount as having been received only for the purposes of ALP determination and not for taxation, which, by no logic, can be a correct proposition.</i>
2	Other Income - Provision written back and Balance written back	<i>If a particular expenditure or provision has been allowed as deduction and taken as part of operating cost in preceding/current year and later on during the subsequent/current year it is realized that the provision earlier made was excessive or there was some adjustment in the actual expenditure leading to lowering of its incidence, then its reversal to that extent constitutes operating</i>

		<p>revenue. If, on the other hand, it is not proved that a particular amount reversed in the year under consideration and taken to the credit side of the Profit and loss account was treated as part of operating costs in the ALP determination of a preceding year, then obviously, such reversal would not qualify as an item of operating revenue.</p> <p>Issue remanded to file of the AO for factual verification.</p>
3	Miscellaneous income - Recovery of Telephone deposit	<p>Going by the nature, recovery of a deposit, cannot be considered as a part of operating revenue.</p>
4	Miscellaneous income - Recovery of contribution to Provident Fund on behalf of employees	<p>Non-operating revenue.</p> <p><i>Such payment, when made on behalf of employees, is ordinarily shown as Advance recoverable from employees, which again goes to the balance sheet. Recovery of such an amount cannot be construed as a revenue receipt. As the Assessee could not produce necessary details showing that the amount was taken as a part of the operating costs at the time of its payment, we hold that its recovery cannot be treated as a part of operating revenue.</i></p>
5	Extraordinary one-time cost due to change in assumption for actuarial valuation	<p>Operating in nature.</p> <p><i>The object behind actuarial valuation is to calculate the present value of the payments to employees which would be required to be made in future. Actuarial valuation is done at the end of an accounting year showing the charge to be made to the Profit and loss account for that year. This exercise is done on year-to-year basis. Actuarial valuation indicates the liability of the Assessee that it will incur for that year. The amount quantified by actuary is nothing but the obligation of the company on this account for the year. It is impermissible to</i></p>

		<i>bifurcate such liability into two parts viz., the part relating to year under consideration and another artificial part showing the effect of the provision made in earlier years, which also does not get reflected even in the actuarial report. Since the actuary determined the amount of the provision to be created at the end of the year, the same became an operating cost without any need for reduction. We, therefore, do not find any force in the submission of the Id. AR that a part of the provision for approved gratuity etc. should be treated as non-operating when the full amount of such provision has been claimed as deduction for the year only.</i>
6	Excess payment of non-cenvatable import duty	Operating in nature. Reliance on Hyundai Construction Equipment India Private Ltd. vs. ACIT (ITA No. 2453/Pn/2017).
7	Foreign exchange fluctuation	Operating in nature. Reliance on Hyundai Construction Equipment India Private Ltd. vs. ACIT (ITA No. 2453/Pn/2017).

### **Revisionary proceedings initiated with 'borrowed satisfaction' bad in law - Multi Commodity Exchange of India Limited [TS-254-ITAT-2022(Mum)-TP]**

#### **Facts:**

- In case of the Assessee, the assessment for AY 2014-15 was completed by passing order under Section 143(3) r.w.s 144C(3) of the Act.
- The Assessing Officer submitted before Pr. CIT that while passing order under Section 92CA(3) of the Act, the TPO has not taken cognizance of the findings of the Special Audit report while making the adjustment and to the extent, the final assessment order is erroneous in so far as it is prejudicial to the interests of the revenue.
- In view of the above, Pr.CIT initiated proceedings under Section 263 of the Act.

#### **Tribunal's Ruling**

Regarding validity of proceeding under Section 263 of the Act, Hon'ble Tribunal noted as under:

*"8. Considered the rival submissions and material placed on record, we observed that Ld. Pr.CIT initiated the proceedings based on the recommendations filed by the Assessing Officer that TPO has passed the order u/s.92CA(3) of the Act without considering the SAR report in which the report containing various discrepancies relating the related party transactions. We observe that the 263 proceedings were initiated mainly based on the satisfaction recorded by the Assessing Officer that Ld. Pr.CIT needs to revise the Assessment Order u/s. 263 of the Act. It clearly*

indicates that the 263 proceedings were initiated on the behest of the satisfaction recorded by the Assessing Officer not by the Ld. Pr.CIT. It is submitted before us the mandatory twin conditions provided u/s. 263 of the Act are (i) the Commissioner calling for and examining the record and (ii) in his consideration and Assessment Order is erroneous as well as prejudicial to the interest of the Revenue *sin qua non* for exercise of the power u/s.263 of the Act, and both the conditions stated above must be fulfilled together. In the given case both the conditions are not fulfilled by the Ld. Pr.CIT....

10. .... we are also of the view that Ld. Pr.CIT cannot initiate the proceedings with the borrowed satisfaction and not satisfying the twin conditions laid down u/s. 263 of the Act. Therefore, in our considered view the proceedings initiated u/s.263 of the Act with a borrowed satisfaction is bad in law. Accordingly, proceedings initiated u/s. 263 of the Act are set aside."

### **Prefers segmental analysis vis-à-vis Assessee's TP analysis at entity level under combined transaction approach. Accepts TPO's application of export revenue filter of 25% for comparables - M/s. STEER ENGINEERING PRIVATE LIMITED [TS-240-ITAT-2022(Bang)]**

#### **Facts:**

- Assessee submitted that it manufactured extruders and its parts and elements, and the AEs acted as distributors selling them to third parties for which Assessee paid AEs commission as a part of business promotion expenses. Assessee grouped the AE purchases and AE and Non-AE sales as single business segment and conducted TP analysis at entity level under combined transaction approach.
- The TPO rejected Assessee's approach and performed a fresh TP analysis with respect to manufacturing activity based on segmental analysis i.e. bifurcation of the financial statement into international (AE) and domestic segment (non-AE).
- The Assessee argued that if international segment of the Assessee is to be benchmarked, then the comparables should pass the 75% export turnover filter. On contrary, the TPO observed that export revenue filter of 75% cannot be adopted in the Assessee's case because, no comparables will get selected and therefore export revenue filter of 25% is appropriate.

#### **Tribunal's Ruling**

##### **Benchmarking at entity level vs segmental level**

- Hon'ble Tribunal rejected Assessee's adopting profit margins at entity level - stated that the TP study did not spell out as to how international transactions were interlinked and interdependent as by its nature, these transactions appeared to be independent.
- Further notes that revenue for international segment included sales made both to AE and non AE and holds that sale and proportionate expenses relating to sale to AE alone to be considered to arrive at the profit margin of the Assessee for the purpose of comparison of Assessee's profit margin.
- Regarding segmental information for comparable companies, views that the TPO could exercise power under Section 133(6) to seek details from the comparables to identify expenses relating to export sale to AE to assess the profit margins of the two comparables.

##### **Application of 25% export revenue filter**

- Hon'ble Tribunal noted that Rule 10B(1)(e) of the Rules, do not prescribe any fixed filters. An element of flexibility is always inbuilt in the rules. The idea is to get data for comparison. The Assessee's transaction with AE has to be compared with that of an uncontrolled transaction.
- Assessee's export turnover is also less than 75%. The two comparable companies which are admittedly comparable companies available for comparison, cannot be excluded on the basis of a filter which has no relevance to the factual scenario in the present case.
- In such circumstances, the reasoning of the TPO in applying export turnover filter at 25% of the turnover is proper.

### **Holds recovery of expenses as provision of intra-group services - Paraxel International Clinical Research Pvt Ltd [TS-271-ITAT-2022(Bang)-TP]**

#### **Facts:**

- The Assessee is engaged in business of facilitating and coordinating clinical trial services for Paraxel International LLC USA. The Assessee is remunerated at a cost plus mark-up.

- The Assessee enters into an agreement with the Investigator on behalf of and as an agent of the Sponsor and makes payment to the Investigator. During the year under consideration, the amount so paid to the Investigator was recovered from the AE on cost to cost basis.
- The TPO held that the said expenses paid ought to be considered as operating cost of the Assessee. The TPO accordingly imputed a mark-up on the recovery of expenses and proposed a TP adjustment.
- DRP upheld the approach of the TPO.

### **Tribunal's Ruling**

Relying coordinate bench decision in the Assessee's own case (Parexel International (India) Private Limited [TS-506-ITAT-2021(Bang)-TP]), upheld as under:

- Selection of the investigator for clinical trial is an important task in the whole work undertaken by the Assessee. The Assessee acted as coordinator and facilitator in selecting the investigator and invested considerable time and resources on this.
- Regarding the contention of the Assessee that remuneration for these services has already been included in the provision of clinical trial services and no separate fee is charged for coordinating and facilitating with the investigators, Hon'ble Tribunal opined that coordinating and facilitating is a separate intra-group services provided by the Assessee and the Assessee must charge some fee as it would have, had the services been provided to a third party. Reliance was placed of OECD TP Guidelines.
- Regarding the Assessee reliance on the Addendum to Services Agreement which stated that 'pass-through costs' are to be recovered on cost to cost basis, observed that the addendum was only a self-serving document solely made with an intention to evade payment of taxes. In the earlier years, investigator payments were reimbursed to the Assessee with a mark-up