

TRANSFER PRICING

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- **The Supreme Court holds profit attribution issue as a question of fact and the attribution of profit to PE of CRS companies based on FAR analysis as fair and reasonable – Travelport and Others CIVIL APPEAL NOS. 6511-6518/2010**

The Supreme Court recently dismissed the batch of appeals in favor of the non-resident Assessee engaged in providing electronic global distribution services to Airlines through the Computerized Reservation System (CRS). In these cases, the Department had alleged that these Assessee constituted Permanent Establishment (PE) in India and the debate was around how much profit should be attributed to the PE in India. The Supreme Court concurred with the orders of the Tribunal and the High Court by stating that the question of law does not arise in the factual matters of profit attribution to PE, wherein relevant factors are considered by the Tribunal and which is based on FAR analysis (Functions performed, Assets used, and Risks undertaken).

- **Holds draft Order and TPO order passed in the name of non-existent company post conversion into LLP as void and liable to be set aside - Allscripts (India) LLP (As a successor in interest of Allscripts India Pvt. Ltd) [TS-276-ITAT-2023(Ahd)-TP]**

Facts:

- The Assessee, Allscripts India Private Limited was a Private Limited company. During FY 2016-17 relevant to assessment, the Assessee was converted into Limited Liability Partnership (LLP), Allscripts (India) LLP.
- The Assessee intimated the fact that it had been converted into a LLP. However, despite the aforesaid intimations, the Transfer Pricing Order and draft Assessment Order were passed in the name of Allscripts India Private Limited - which was a non-existent entity.
- The DRP directions and Final Assessment order were passed in the name of correct entity i.e. LLP

Hon'ble Tribunal

Hon'ble Tribunal noted the fact that the conversion of AIPL into LLP was intimated to both the AO and the TPO much before passing of their respective orders, yet both the TPO and the AO passed the Transfer Pricing Order and the draft assessment order, respectively in the name of a non-existent entity.

Further, Hon'ble Tribunal held that draft Order and TPO order passed in the name of non-existent company post conversion into LLP as void and liable to be set aside.

"In our view, the view of the Courts and Tribunals on this issue is unanimous that once the draft assessment order and Transfer pricing order itself are bad in law, having been passed in the name of a non-existent entity, then the final assessment order based on the above orders is void ab initio as well. In view of the above settled position of law, we are of the view that the final assessment order sought to be appeal against is void and hence liable to be set aside."

- **Determines ALP for Management support services as NIL citing Assessee's failure to demonstrate need and receipt of such services - International Flavours Fragrances India Pvt Ltd [TS-251-ITAT-2023(CHNY)-TP]**

Facts:

- The Assessee paid management service charges aggregating to INR 20 crs pursuant to contractual terms to its ultimate parent AE. The said transaction was benchmarked on aggregation basis using Transactional Net Margin Method.
- The TPO proceeded to benchmark the payment of management service charges by the Assessee independently rejecting the Assessee's plea that the management services were received for carrying out day-to-day operations and the same was closely linked to main international transactions.
- The TPO benchmarked these services under Comparable Uncontrolled Price (CUP) method and proposed Arm's Length Price (ALP) as 'NIL'.

Hon'ble Tribunal

Ruling against the Assessee and upholding the TPO's order, Hon'ble Tribunal noted as under:

- Concurred with the TPO's view that unless the transactions are closely linked to each other and the same belong to particular class of transactions, aggregation approach could be discarded and the transactions could be benchmarked separately;
 - the Assessee is stated to have been availing similar services in the past but it has chosen not to pay for these services in earlier years;
 - the Assessee has filed 4 volumes of the paper-book. The same, inter-alia, contain snapshots of emails, published material, various correspondences. However, most of these emails do not pertain to this year but pertain to other years.
 - Further, the emails are very general in nature which does not demonstrate that the services rendered were of specialized nature which would require separate payment of that magnitude as done by the Assessee;
 - It could clearly be seen that the profits of earlier years are significantly higher than the profit of the years in which the Assessee has started paying management charges to its AE. There is no change in the nature of business of the Assessee;
 - Complete onus was on the Assessee to demonstrate that the actual services were rendered and received by it. The Assessee, in our opinion, has failed to demonstrate the same. In such a scenario, the determination of ALP by the TPO as 'NIL' could not be faulted with;
 - The details of cost allocation and report from independent accountant would not be of much relevance in the light of our finding that the Assessee has failed to establish the receipt of the services which would justify revenue's stand that there was no need for the Assessee to pay for such services.
- **Deletes adjustment citing acceptance of mirror transaction for AE - Tecnimont SPA India Office [TS-249-ITAT-2023(Mum)-TP]**

Facts:

- The Assessee is a project office/PE of M/s. Tecnimont SPA. The Assessee has been awarded inter-alia turnkey project by M/s. Indian Oil Corporation at Panipat Project.
- The Assessee in turn has entered into sub-contracting agreement with its one of its AE M/s. Technimont Private Ltd (TPL). For the sub-contract work carried out, the AE was remunerated by the Assessee, which according to the TPO was excessive. The TPO accordingly proposed a TP adjustment in the hands of the Assessee.
- The aforesaid action of TPO was upheld by DRP.

Hon'ble Tribunal

Deleting the adjustment made by the TPO, Hon'ble Tribunal observed as under:

"...we note that the payments made by the assessee PE to its AE/ TICB/TPL was accepted by the TPO as at Arm's length., and since the same international transaction of the instant assessee (being subcontracting income from the AE of assessee namely M/s TICB/TPL) has been accepted as "Arm's Length" for the AE (M/s TICB/TPL); and the same, being mirror transaction cannot be considered excessive in the hands of the assessee/appellant. Therefore, on the same reasoning/ratio of the decision of the Tribunal in the assessee's own case as well as decision of the coordinate bench in M/s UE Development India Pvt Ltd (supra) which has been upheld by the Hon'ble High Court (supra), we hold that when the TPO has accepted the international transaction to be at Arm's Length Price in the hands of AE, then the international transaction that the assessee/PE had with its AE also has to be at Arm's Length; and therefore no adjustment was warranted in the facts and circumstances of the case and the same is directed to be deleted."