

## TRANSFER PRICING

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### 3i India Private Limited {Supreme Court SLP (CIVIL) Diary No(s) 21872/2022}

In November 2021, the Bombay HC had dismissed Revenue's appeal (against characterisation of services and selection of comparables) as devoid of merit for AY 2010-11. Now the Hon'ble SC dismisses Revenue's appeal citing lack of good ground and reason to interfere with the impugned Bombay HC judgment. Hon'ble SC held that *"ITAT has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions as pressed raises any substantial questions of law"*. Hon'ble HC had relied on Jurisdictional HC decisions in case of Eight Roads Investment Advisors Pvt Ltd and Barclays Technology Centre India Private Ltd wherein HC had dismissed Revenue's appeal challenging ITAT's comparables selection absent substantial question of law. HC had further opined *"entire exercise of making transfer price adjustment on the basis of comparables is nothing but a matter of estimate of a broad and fair guesswork of the authorities based on factual relevant material brought before the authorities, i.e., TPO, DRP and the Tribunal which are the fact finding authorities"*.

### Facebook India Online Services Private Limited [ITA No 2386/Hyd/2018]

Facebook India Online Services ("the assessee") is engaged in the business of Service Sector, ITeS, BPO, back office support services for AY 2014-15. In this case Hyderabad ITAT ruled on comparables selection for assessee.

With respect to assessee's plea seeking exclusion of Infosys BPO Limited, ITAT found that assessee as well as Infosys BPO were earning good revenue from huge scale of operations and were using cloud service and incurring expenses for brand building and marketing of advertisements; However, considering assessee's reliance on catena of rulings including coordinate bench ruling in Infor India Pvt. Ltd, Hyundai Motor India Engineering Pvt. Ltd, Hon'ble Bombay HC ruling in Principal Global Services Pvt. Ltd, Hon'ble Madras HC ruling in Visual Graphics Computing Services India Pvt. Ltd etc, ITAT excluded this company on account of huge turnover and other aspects. However, ITAT rejected assessee's plea and included functionally similar Eclerx Services Limited, Microland Limited and MPS Ltd. Further remitted comparability of Crossdomain Solutions Private Limited back to TPO for fresh consideration after supplying the copy of financials available to the assessee.

Assessee's reliance on Hon'ble Bombay HC ruling in Aptara Technology Pvt. Ltd was distinguished since it belonged to AY 2008-09, the ITAT opined that *"each assessment year is a different assessment year and facts of each year are different"*.

- **Deletes penalty under Section 271G of the Act – Valid notice u/s 92D(3) must for penalty initiation. Notes qualitative difference between notices under Section 92D(3) and under Section 92CA(2) of the Act. Further hold absence of CFO a reasonable cause for delayed submission - JSW Energy Ltd [TS-572-ITAT-2022(Mum)-TP]**

#### Facts:

- The TPO levied a penalty under Section 271G of the Act noting a lapse on the part of Assessee for furnishing requisitioned information maintained under Rule 10D within the stipulated time of 30 days.
- The TPO noted that a notice under Section 92CA(2) of the Act was issued to the Assessee on 23.11.2016 and 22.12.2016.
- On 13.02.2017, the TPO issued a notice under Section 92D(3), which was partly complied. For the balance information, the Assessee prayed for to grant an adjournment which was not granted.
- The requisite TP study was filed on 7.07.2017. The Assessee's explanation for the delay in filing of the information mainly was that there was a change of the CFO.
- The TPO disagreed with Assessee's explanation and levied penalty u/ 271 G of the Act.
- Aggrieved, the Assessee carried the matter in appeal before the CIT(A) but without any success.
- Subsequently, the Assessee filed an appeal before the Hon'ble Tribunal.

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

The Hon'ble Tribunal deletes the penalty under Section 271G of the Act for following reasons:

Valid notice under Section 92D(3) must at least allow 30 days of time to the Assessee for furnishing of the requisitioned information:

- The TPO issued only one notice under Section 92D(3) of the Act dated 13.02.2017 with direction to Assessee to comply by 24.02.2017, short of the statutory 30 day period. This itself would make the notice as illegal.
- Notes that *“Whether there is compliance to Section 92D(1) or not, on a standalone basis, cannot cause enough for the imposition of penalty under section 271G, or even non-furnishing of such information to the Assessing Officer can be visited with penalty under section 271G, unless the assessee is served with a lawful notice under section 92D(3) and such a notice has not been complied with. There is no, and cannot be any, a dispute about this fundamental legal position. Therefore, unless a non-compliance with a valid notice under section 92D(3) is established, there is no occasion to impose a penalty under section 271G.”*

Highlight differences in notices under Section 92CA(2) and Section 92D(3) of the Act. Only non-compliance of a valid notice under Section 92D(3) result in a penalty under Section 271G of the Act

- Notice under Section 92CA(2) of the Act deals with any evidence on which the Assessee may rely in support of the computation made by him of the ALP while notice under Section 92D(3) of the Act deals with the information prescribed to be maintained under Section 92D(1) read with Rule 10D of the Rules.
- In the instance case, the TPO in his notice dated 13.2.2017 has also called for information like balance sheet, P&L account and audit report, etc. Therefore, the notice, termed as notice under section 92D(3), requisitions information other than the information prescribed under section 92D(1) read with Rule 10D as well.
- Notes only under Section 92CA(3) and not 92D(3), can the TPO call for information like balance sheet, P&L account and audit report, which already stood filed and are un-prescribed. Thus the so called notice under section 92D(3) was vitiated in law for this reason as well.
- Non-compliance with a valid notice under Section 92D(3) may result in being visited with a penalty under Section 271G, no such consequence is visualized, for non-compliance with the notices under Section 92CA(2).

Reasonable cause for delay in furnishing requisitioned information:

- Holds that *“It cannot be in dispute that penalty under section 271G is not an automatic consequence of non-furnishing of the information maintained under section 92D(1) read with rule 10D, since section 273 inter alia provides that penalty under section 271G cannot be imposed in case the person concerned can demonstrate that there was a reasonable cause for his failure referred to in section 271G”*
- ITAT noted that the reason for non-furnishing of information within the stipulated time was that there was no CFO at the relevant point of time. Notes that the explanation of the Assessee deserved to be accepted as it was quite in harmony with the ground realities of life, and there was no good reason to reject the same.

**- Quashes TP-adjustment as NFAC’s final assessment order not in accordance with DRP’s directions : Toyota Tsusho India Private Limited [TS-612-ITAT-2022(Bang)-TP]**

**Facts:**

- The AO passed the draft assessment order dated 13.4.2021 incorporating the TP adjustment and also made disallowance under Section 14A of the Act.
- Aggrieved the Assessee filed the objections before the DRP. The DRP by order dated 18.1.2022 issued directions to the TPO to reconsider the inclusion of certain comparables and also excluded some of the comparables included by the TPO.
- In the final assessment order dated 11.2.2022, the AO retained the TP adjustment as in the draft assessment order by stating that the DRP has confirmed the addition made by the TPO.
- The TPO passed order dated 15.02.022 revising TP adjustment, and jurisdictional AO, modified the final assessment order in order giving effect (OGE) to DRP’s directions dated 28.2.2022 incorporating the revised the TP adjustment post DRP directions.
- Before the Tribunal, the Assessee contended that the final assessment passed by the NFAC is not in accordance with the directions of DRP and that the modification order passed by the jurisdictional is not tenable.

**Hon’ble Tribunal’s Ruling:**

Quashes TP-adjustment as NFAC’s final assessment order not in accordance with DRP’s directions, Hon’ble Tribunal observed as under:

*“12. We have considered the rival submissions and perused the material on record. We notice that the DRP in para 5.1.1 to 5.1.4 as extracted above has given clear directions to the TPO to re-examine the inclusion of M/s. Archroma India Pvt Ltd and M/s. Tarak Chemicals Limited*

and has also directed for the exclusion of M/s. Sirea India Private Ltd. This would mean that the TP adjustment should be recomputed and thus should undergo change. This is supported by the fact that the jurisdictional AO in the OGE to the directions of the DRP dated 28.2.2022 has revised the TP adjustment to Rs. 31,38,49,565. However, in the final assessment order passed by NFAC on 11.02.2011 which is passed prior to TPO's order dated 15.2.2022 revising the TP adjustment, the AO has retained the same TP adjustment amount as in the draft assessment order by observing that the DRP has confirmed the addition made by the TPO. From these facts, it becomes clear that the final assessment order passed by the NFAC to the extent of TP adjustment is not in accordance with the directions of the DRP and to this extent, the TP adjustment is quashed.

13. We see merit in the contention that the jurisdictional AO has become functus officio once the final assessment order is passed and that there is no authority for him to pass any order modifying the final assessment order. We therefore hold that the order dated 28.02.2022 passed by the jurisdictional AO giving effect to the revised TP adjustment is not sustainable in law and is infructuous. This ground of the assessee is allowed."

**- Section 153 time limit applicable to DRP directions/ AO order in remand cases - Cadila Healthcare Limited [TS-611-ITAT-2022(Ahd)-TP]**

**Facts:**

- Hon'ble Tribunal vide order dated 03.03.2017 remitted the matter to the file of DRP for fresh adjudication. The said order was served on PrCIT on 06.06.2017
- Subsequently, the DRP passed directions under Section 144C of the Act on 14.02.2019 and the assessment order was passed by on 15.03.2019.
- The Assessee has challenged the validity of order under Section 143(3) r.w.s. 144C(13) of the Act dated 15.03.2019 as being time barred.

**Hon'ble Tribunal's Ruling:**

Holding Assessment Order dated 15.03.2019 is barred by limitation and hence liable to be set aside, Hon'ble Tribunal observes as under: "...it may be seen that section 144C of the Act is with respect to initial assessment to be passed by the assessing officer. A perusal of the scheme of section 144C of the Act and more specifically subclauses (12) and (13) to section 144C of the Act speaks of timelines within which the assessing officer is required to pass the assessment pursuant to directions of DRP in the case of original assessment. The language of section 144C of the Act suggests that the timeline for completion of original assessment pursuant to directions of DRP shall not be governed by provision section 153 of the Act. However, in case of setting aside of original assessment to DRP for fresh adjudication by the ITAT under section 254 of the Act, the same is, in our view, would be required to be passed within 9 months from the end of the financial in which such order is communicated to the Principal Commissioner of Income Tax. To interpret otherwise would allow the DRP/assessing officer unrestricted time to pass the orders in pursuance of directions of ITAT, which would clearly be contrary to the intent of the Statute."

**- Rules on valuation of preference shares and treatment of excess premium as deemed dividend - Information Technology Park Ltd [TS-563-ITAT-2022(Bang)-TP]**

**Facts:**

- The Assessee has issued 0.5% redeemable non-cumulative preference shares on 6th January 2003 at face value. During the year under consideration, the Assessee has redeemed some of the preference shares at a premium based on the valuation done the expert valuer by adopting the Net Asset Value (NAV) method.
- The TPO accepted the method of valuation adopted by the Assessee i.e., NAV method, but reworked the redemption value based on book value of assets resulting in a TP adjustment due to differences.
- The CIT(A) held that the TP adjustment made by the TPO determining the value at which the preference shares should have been redeemed cannot be treated as income in the hands of the Assessee by relying on the decision of the Bombay High Court in the case of Vodafone India Services Ltd (2015) 53 taxmann.com 286 (Bombay). However since the ALP of the share price determined by the TPO is lesser than the price determined by the Assessee, the CIT(A) proposed to make addition to the extent of the same amount by treating it as deemed dividend under Section 2(22)(e) of the Act.

**Hon'ble Tribunal's Ruling:**

- Hon'ble Tribunal refers to Rule 11UA(1)(c)(b) of the Rules and notes that for the purpose of arriving at the fair market value of the unquoted equity shares the immovable property should be considered at guideline value. Though the Rule 11UA(1)(c)(b) is applicable specifically to equity shares the spirit of the rule should be looked into.
- Further observes that a combined reading of the said rule with Rule 11UA(1)(c)(c) of the Rules can be taken to mean that for the purpose of valuation of preference shares also the immovable properties to be considered at guideline value since the value based on the guidance note represents the economic and commercial value of the preference shares on the date of valuation.
- Observes that considering the guideline value of land and building for the purpose of valuation of preference shares under NAV method is correct. Takes note of the fact that the Assessee has obtained the valuation report from the Chartered Accountant (CA) complying with the requirement of the Rules.
- Accordingly holds the addition made by the TPO computing the differential premium basis the book value of assets as not sustainable.
- Further observes that the excess premium paid to the AE by the Assessee on redemption of preference shares cannot be taxed u/s.2(22)(d) or 2(22)(d) as proceeds are neither towards reduction of share capital nor towards advance or loan.