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INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1. Where the assessee had advanced a loan in USD to its AE and received interest at LIBOR + 2.47 per cent viz., 7 per cent, the same was to be considered at ALP in light of the decisions of the Tribunals wherein LIBOR + 1.50 / 1.70 per cent were held to be the ALP rate

Pr. CIT UFO Moviez India Ltd – TS-883-HC-2016 (Del.) – TP

Facts

1. The assessee, engaged in the business of digital cinema distribution network, had advanced a loan in USD (equivalent to INR 45.61 crore) to its AE for a term of five years at an interest rate of 7 per cent per annum and adopted the CUP method to justify the ALP of the interest receivable using LIBOR as the benchmark rate. The TPO rejected the assessee's contention and indicated that the ALP rate of interest would be 17.26 per cent, applying the domestic rates and made a consequent upward adjustment. The DRP held that the TPO was incorrect in applying the domestic interest rates and adopted LIBOR + 4 per cent as the ALP i.e. 8.53 per cent per annum.

2. Aggrieved, the assessee filed an appeal before the Tribunal, wherein the Tribunal set aside the DRP's ruling and held that in light of various decisions of the Tribunal wherein the ALP rate was taken at LIBOR + 1.50 per cent / 1.70 per cent, the interest received by the assessee at LIBOR + 2.47 per cent (7 per cent) was to be considered at ALP. If further held that the DRP itself had stated that Indian banks were charging LIBOR + 2.50 per cent and therefore there could not be any reason for holding that the interest on loan advanced by the assessee to its subsidiary was not at ALP.

3. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Court held that the question urged before it was not a question of law and noted that the Tribunals findings were a question of fact. Accordingly, the appeal of the Revenue was dismissed.

2. Where the assessee failed to substantiate the ALP of technical fee paid by it to its AE and merely relied on the agreement stating that it was its obligation to make such payment, the matter was to be remitted to the file of the lower authorities for re-adjudication

Magneti Marelli Powertrain India Pvt. Ltd. vs. DCIT – TS-869-HC-2016 (Del.) – TP

Facts

1. The assesse was incorporated in India as a joint venture company of Magneti Marelli Powertrain SPA, Italy, Maruti Suzuki India

Ltd. and Suzuki Motor Corporation, Japan to manufacture and sell Engine Control Units ('ECUs'). It had entered into an agreement with its AE for acquiring technology required for the purpose of manufacturing ECUs for which it made a payment of INR 38.58 crore as technical assistance fee. It had also entered into 5 other international transactions viz., import of raw materials, sub-assemblies and components, payment of royalty, payment of software and purchase of fixed assets, the benchmarking of which was done on an aggregate basis under the TNMM method. The assessee compared its ratio of projected operating profit margin to operating revenue at 18.78 per cent with the mean operating profit margin at 6.65 per cent of comparable companies on the basis of past three year's data.

2. The TPO accepted the other transactions to be at ALP and with respect to the technical assistance fee held that TNMM had to be applied separately for the said international transaction and not collectively and rejected the assessee's entity level approach and adopted the CUP method and determined the ALP of payment of technical assistance fee at Nil. The DRP upheld the adjustment of ` 38.58 crore made by the TPO.

3. Aggrieved, the assessee filed an appeal before the Tribunal. The Tribunal held that the combined benchmarking of transactions by the assessee was not in accordance with law and the mere fact that the overall profit earned by the assessee was more than that of the comparables would not *ipso facto* mean that the international transactions were at ALP. It also held that the assessee was incorrect in using its projected operating profit margin while benchmarking its international transactions and that the use of 3 years data to arrive at the operating margins of the comparable companies was also not warranted. However, the Tribunal held that the TPO's approach in determining ALP under the CUP method for benchmarking the technical fee was incorrect as the TPO failed to compare the price paid with an uncontrolled comparable transaction and simply proceeded to adopt the ALP at Nil. Accordingly, it remitted the matter to the file of the TPO for reconsideration.

4. Accordingly, the assessee filed an appeal before the Hon'ble High Court contending that the separate examination of the technical fee was not warranted and the payment of the said fee was a commercial decision of the assessee which enabled it to obtain access to technology and could not be questioned by the TPO. It further, contended that the TPO was incorrect in applying the CUP method.

Judgment

1. The Court, relying on the decisions of the Delhi HC in EKL Appliances, Sony Ericsson Mobile and Denso India held that the aggregation of various payments and outgoings was permissible under the Act and the rules and that the TPO's rejection of TNMM method applied by the assessee at an entity level was incorrect. It noted that the TPO accepted TNMM as the most appropriate method in respect of all other international transactions but applied the CUP method only for the payment of technical assistance fee. It further held that the adoption of a method as the most appropriate method assured the applicability of one standard to judge an international transaction and that each method was a package in itself and therefore if the assessee's approach was to be disturbed, it would result in the adoption of two or even five methods for the determination of ALP for a single year which would spell chaos.

2. However, the Court noted that the assessee was unable to substantiate the need for payment of technical assistance fee to its foreign AE and the justification provided by the assessee that the technology obtained by it was only due to such payment of the fee was not sufficient. It held that the initial burden to provide that the international transaction was at ALP was always on the assessee. It held that mere obligation to make payment under an agreement could not justify the arm's length price of an international transaction. Accordingly, it upheld the remit directed by the Tribunal.

3. Companies in whose case extraordinary events have occurred during the year cannot be considered as comparable

Ameriprise India Pvt. Ltd. – TS-875-HC-2016 (Del.) – TP

Facts

1. The assessee, Ameriprise India Pvt. Ltd, a wholly owned subsidiary of Ameriprise, US, is engaged in the business of insurance, annuities, asset management and brokerage. During the year under review, the assessee provided Information Technology (IT) enabled services to Ameriprise US.

2. In its TP report, the assessee benchmarked its international transactions using Transactional Net Margin Method (TNMM) with its Operating Profit/ Operating Cost (OP/OC) at 15.66% and considered 11 comparables to demonstrate its transactions at ALP. TPO and thereafter the DRP included certain other comparables thereby making a total of thirteen companies having average margin of 30.56%.

3. In appeal, the Tribunal accepted assessee's contentions and excluded 6 comparables out of which 3 companies viz., Accentia Technologies, iGate Global Consultants Ltd and Infosys BPO were excluded on the ground of extra-ordinary events occurred during the year. It also remitted inclusion of 2 companies.

4. Aggrieved by the exclusion of 3 comparables viz., Accentia Technologies, iGate Global Consultants Ltd. and Infosys BPO, Revenue filed an appeal before Delhi HC.

Judgment

1. The Court held that the Tribunal had excluded the impugned comparables on the ground that certain extraordinary events had occurred during the previous periods which distorted the profitability thereby increasing the margin and held that it's findings could not be characterized as unreasonable. Further, the Court also opined that even if the figures of comparables were to be included, no adjustment would be permissible due to the fact that the margin of variation would be within the limits of the "Safe Harbour Provision" embodied in the Rules framed by the Board in exercise of its power under Section 92CA(3). Accordingly, it held that no question of law arose and dismissed Revenue's appeal.

4. In light of the decision of the High Court in Sony Ericsson Mobile Communications India Pvt. Ltd., wherein the Bright Line Test was disapproved, the Court stayed ` 33.65 crore demand raised by the AO by adopting the Bright Line Test for determining the ALP of AMP expenses

Bacardi India Pvt. Ltd. vs. DCIT – TS-884-HC-2016(Del.)-TP

Facts

1. The TPO had completed the transfer pricing assessment in the case of the assessee and raised a a demand to the tune of over ` 33.65 crores by adopting "Bright Line" Test as favoured in LG Electronics SB ruling.

2. Aggrieved, the assessee filed a stay application before the Tribunal wherein the Tribunal directed the assessee to pay a pre-deposit to the extent of 20 per cent of the demand.

3. Therefore, the assessee filed a petition before the Hon'ble High Court and contended that the demand was unenforceable by relying on the decision of the HC in the case of Sony Ericsson Mobile Communications India Private which had disapproved the Bright Line Test. On the other hand, Revenue urged that ITAT's order requiring pre-deposit to the extent of 20% cannot be faulted with.

Judgment

1. The Court noted that the Delhi High Court itself had ruled against the adoption of the Bright Line test for benchmarking AMP transactions and held that in the given circumstances, the assessment and the order to the extent it resulted in substantial additions and the demand in question could not have been enforced pending the assessee's appeal before the Tribunal. Accordingly, it directed the Revenue to keep the demand in abeyance and not take any coercive measures till the final order of the Tribunal.

2. It further stated that nothing in the present order should preclude the contentions of the parties on the merits of the pending appeal and requested the Tribunal to dispose of the pending appeal for the relevant assessment year at its earliest convenience, preferably by the end of December 2016. Accordingly, the Court allowed assessee's writ petition.