TRANSFER PRICING

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Louis Dreyfus Company India Pvt Ltd Vs DCIT [ITA 808/DEL/2021]

Louis Dreyfus Company India Pvt Ltd ("the Assessee") applied Comparable uncontrolled Price ("CUP") for benchmarking transactions relating to import and export of agricultural commodities undertaken by assessee with its AEs for AY 2016-17. The assessee used CUP relying upon the rates offered by authenticated independent market report/ third party broker quote. The TPO during the assessment proceedings however, adopted customs data as CUP.

ITAT notes that Revenue had the benefit of customs data only in the impugned AY; States that customs data serves as a more reliable CUP as it compares value of identical or similar goods imported/ exported at or around the same time; Further, enunciates that the OECD Commentary on TP guidelines also allow for the adoption of a price-setting date which is different from the stated contract date.

The ITAT further observed that customs data at the port of shipment / delivery would better reflect the price of the commodity as it is inclusive of interest, insurance, freight costs, etc., and would be a more reliable indicator of the uncontrolled arm's length transaction value. With regard to assessee's contention that the data shared by the Customs Department does not specify the quality and price variations of the commodities, refers to the OECD Commentary on TP guidelines wherein impact of such variables on price determined under CUP is recognised. Further the ITAT disregarded assessee's contention that as tariff rates were not notified by CBIC for AY 2016-17 (except for import of oil), the customs data pertained to invoice values as declared by various taxpayers. Apprises that "even where no tariff rate is notified as in the case of sugar, cotton, meals and grains, the transaction values of customs data can be relied upon as it is based on transaction of similar nature and items on the same date at the same port… the customs data being Govt. notified would provide a reasonable basis for arriving at the uncontrolled transaction price."

The coordinate bench ruling in Sinosteel India Pvt. Ltd. was referred to wherein it was held that bare quotation price cannot be accepted under CUP method for benchmarking purposes under Rule 1QBA(l)(a) of the IT Rules, 1962. The ITAT also, referred to various rulings (in case of Coastal Energy Pvt. Ltd., Rohm And Haas India (P) Ltd. and Tilda Riceland Pvt. Ltd) wherein reliability of customs data being Govt. notified as CUP has been upheld.

In conclusion the ITAT held that DRP has rightly rejected assessee's objection against the use of customs data under CUP.

- **Upholds the application of transfer pricing provisions to transactions between unrelated enterprises and the DCF Method to benchmark the transfer of listed equity shares with controlling interest - Palmer Investment Group Ltd [TS-117-ITAT-2023(Bang)-TP]**

Facts:

- The Assessee is a wholly owned subsidiary of United Spirits Limited ('USL'). The Assessee held 3.35 percent shares of USL as part of its investment.

- The Assessee along with other group entities of USL had entered into Share Purchase Agreement ('SPA') with Relay BV (an independent party) to sell the above stake at INR 1,440 per share. At the same time open offer was made by Relay BV from public at the same price. Further, preferential allotment of USL shares were made to Relay BV. As a result, Relay's BV's equity stake in USL exceeded 26 percent during the relevant financial year.
- The TPO held that the transaction of transfer of USL shares by the Assessee (along with group entities) to Relay BV was not a simpliciter transaction of transfer of shares, but it involved the transfer of controlling interest to Relay BV. Thus, the stock exchange price or the open offer price of the USL shares cannot be considered a valid comparison. Asserting that the determination of transfer price should be based on the valuation of USL as an entity, the TPO conducted an independent valuation of USL shares by applying the DCF method and arrived at an arm's length price (ALP) of INR 2,038.79 per share.
- The Dispute Resolution Panel (DRP) principally confirmed the view of the TPO but directed to consider cash flow projections as on the date of the SPA/valuation.

Hon'ble Tribunal's Order

Application of transfer pricing provisions to transactions between unrelated enterprises

- The Tribunal observed that Section 92A(2) states that two enterprises shall be deemed to be AEs if, at any time during the previous year one enterprise holds, directly or indirectly, shares carrying not less than 26% of the voting power in the other enterprise. In light of the clear provisions of Section 92A(2), which uses the expression "if at any time during the previous year", the Tribunal that the transaction was rightly put through the test of benchmarking by the TPO.

DCF Method upheld for valuation of listed equity shares with controlling interest

- The Hon'ble Tribunal referred to the Supreme Court ruling in case of Vodafone International Holdings B.V. vs. Union of India (2012) 341 ITR 1 (SC) wherein it was held that the controlling interest is an inalienable part of the share itself and the nature of the transaction has to be ascertained from the terms of the contract and the surrounding circumstances. Thus, the Tribunal analyzed the terms of the SPA and concluded that a lot of clauses as included in the SPA would not have been required if it was a mere acquisition of equity shares in a company. Relay BV had intended to acquire a controlling interest in USL through the SPA. The Assessee had contributed and assisted Relay BV in acquiring a controlling interest in USL along with other associates.
- The Tribunal also noted that if non-AEs had entered into a similar agreement, they would not have agreed to the transfer of shares at the stock exchange price as it involves a transfer of control. Therefore, the Tribunal held that the transfer of shares in the stock exchange cannot be equated with the transfer of shares involving transfer of control and accordingly upheld the determination of price by the TPO.

- **Deletes penalty under Section 271(1)(c) of the Act - Holds Change in filters / comparable companies not concealment of income - AON Services India Pvt Ltd [TS-127-ITAT-2023(DEL)-TP]**

Facts

- The TPO made TP adjustment w.r.t Assessee's transactions with the AE.
- Partial TP adjustment relating to US transactions was proposed to be settled under Mutual Agreement Procedure ('MAP') and that TP adjustment for non US transactions was largely deleted by Tribunal in merit proceedings.
- Disregarding these, the AO alleged that the Assessee furnished inaccurate particulars of income, concealed income and imposed a penalty under Section 271(1)(c) of the Act on TP adjustment originally suggested by TPO.
- CIT(A) deleted the said penalty.

Hon'ble Tribunal's Order

Upholding the order of CIT(A), Hon'ble Tribunal noted as under:

"... as could be seen from the facts on record, the adjustment of Rs.24,23,62,055 originally suggested by the TPO, ultimately, got reduced to Rs.1,48,20,847 only, that too, under MAP resolution. Whereas, for the purpose of imposing penalty under Section 271(1)(c) of the Act, the Assessing Officer has considered the entire adjustment of Rs.24,23,62,055 made by the TPO. In any case of the matter, as rightly observed by learned Commissioner (Appeals), the entire TP adjustment was due to change in filter and comparables by the TPO. There cannot be any doubt that application of filters and selection of comparables are highly debatable issues. Therefore, in respect of additions made on such

issues, the Assessee cannot be accused of furnishing inaccurate particulars of income or concealing income. Therefore, in our view, learned Commissioner (Appeals) was justified in deleting the penalty imposed in respect of addition made on account of TP adjustment."

- **When AE-relationship established due to existence of services, ALP of service fee payment cannot be determined as NIL - WeWork India Management P Ltd [TS-121-ITAT-2023(Bang)-TP]**

Facts:

- The Assessee commenced its operations during the impugned assessment year, by executing Operations and Management Agreement (OMA) with WeWork, Netherlands (rights subsequently assigned to WeWork, UK).
- In consideration of the above, the Assessee is required to pay "management fee" as per the terms agreed upon in the OMA. During the impugned assessment year the Assessee paid management fee under the OMA at an effective rate of 12.50 percent of gross revenue amounting to Rs.7.09 crores.
- The Assessee reported WeWork entities as Associated Enterprises by virtue of clause (g) of subsection (2) of Section 92A of the Act and using CUP Method, the Assessee concluded the transaction to be at arm's length price.
- The TPO, however, held that the ALP of the said transaction of payment of management fee was to be taken at 'NIL'. DRP upheld the order of the TPO.

Hon'ble Tribunal's Order

Deleting the TP Adjustment, Hon'ble Tribunal noted as under:

- The nature of services and the related benefits, the test of determination of management fee along with relevant agreement are placed on record which depicts the entire business model of the Assessee is dependent on foreign AE, which has provided the concept, support, the acquisition and design of property, trademark and trade name, proprietary and third party software for the day to day operations of the Assessee in India.
- WeWork does not hold any share in Assessee. The Assessee and WeWork has been treated as deemed AEs by virtue of Section 92A(2)(g) of the Act. A reading of the above provision makes it clear that the said section get attracted only when one AE provides service to the other AE by allowing the AE to use the know-how, patents, trademark, franchise, etc. and the business of the Assessee is wholly dependent on such IP/franchise. Once the foundational condition is receipt of IP/franchise of which the Assessee's business is wholly dependent and only on that basis, the AE relationship was established, consequently TP provisions were applicable, it is unsustainable then to turn around and hold that the Assessee did not receive the IP/franchise from its deemed AE.
- When the TPO alleges that the Assessee has not received any of the above services, it would indicate that the very relationship based on which the Assessee and WeWork have been established as AE would be nonexistent.
- In view of the above, the ALP of the management fee cannot be determined as NIL.

- **Sales to local vendors uninfluenced by AE, not deemed international transactions for computing TP-adjustment - Comer Industries India Private Limited [TS-132-ITAT-2023(Bang)-TP]**

Facts:

- The Assessee sold a substantial portion of its product to only one company namely Ajax Fiori India Private Limited which is a resident in India. Further, the Assessee had also purchased from a number of resident suppliers who have no connection whatsoever with the Assessee in terms of control and ownership. However, in the Form No. 3CEB, the transactions with Ajax Fiori and such suppliers have been treated as Deemed International Transaction by the Accountant Firm.
- The same has been retained by the TPO in his order under Section 92CA of the Act as Deemed International Transaction. He has proceeded to make adjustments on the entity level margin.
- DRP upheld the approach of the TPO.

Hon'ble Tribunal's Order

Deleting the TP Adjustment, Hon'ble Tribunal noted as under:

"The contention of the revenue is that the terms of transaction between the Assessee and the other person is influenced by the AE and accordingly the transactions with local vendors is a deemed international transaction. The TPO has in the order u/s.92CA has stated that the transaction of purchase of raw material and components from local vendors in India and the terms of such purchases are determined under

the overall supervision of Comer SpA. However we notice that this finding of the TPO is not supported by any evidences in terms of whether the terms of purchases from the local vendor is influenced by the AE and nothing has been brought on record by the revenue in this regard…. We also see merit in the submission of the ld AR that the report of the auditor cannot be the sole basis on which the impugned adjustment is made and that there is no estoppels against contesting the deemed international transaction as reported in form 3CEB…. In view of this discussion and considering the materials presented for our perusal we hold that the transactions with the local vendors the terms of which are not influenced by Comer SpA cannot be treated as deemed international transaction and accordingly cannot be included for the purpose of ALP adjustment."