

## TRANSFER PRICING

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### Parle Biscuits Pvt. Ltd. TS-423-ITAT-2023(Mum)-TP

The assessee Parle Biscuits Pvt Ltd was into manufacturing wide range of biscuits, confectionary, snacks and bakery products and this case pertained to AY 2018-19. The case related to interest on delayed receivables and interest on outstanding interest receivable in case of assessee.

TPO excluded receivables outstanding for less than 90 days, but while calculating interest for receivables outstanding for more than 90 days, TPO did not allow any credit period. The ITAT accepted assessee's submission that there should be uniformity in TPO's stand, directs AO/TPO to revise interest working after taking into consideration credit period of 90 days as allowed in case of invoices outstanding for less than 90 days.

ITAT also notes that assessee had advanced loans to AEs with interest @ 5.5%, but the interest receivable was outstanding for a long time (more than 14 years in some cases). AO/TPO treated outstanding interest receivable as separate international transaction and charged interest thereon. ITAT noted that loss incurred by AE was cited as the main reason for delay in payment of interest, but assessee did not provide any details before lower authorities to substantiate submissions regarding AE's financial position. Assessee also did not provide any evidence to show efforts made towards recovery of interest amount. ITAT sees merit in Revenue's argument that *"assessee has not properly substantiated the reasons for delay in interest receivables which has resulted in improving the liquidity position of the AE and that the assessee needs to be compensated accordingly"*; Rejects assessee's submission that as per loan agreement there are only interest terms agreed with AEs and there is no provision to charge interest on interest.

The ITAT held, *"in a transfer pricing transaction what needs to be looked into is that in an uncontrolled similar transaction whether the third party would charge such interest or not. The interest on a loan is a compensation received towards the utilisation of funds given by the assessee to its AE and the interest element on the said loan if not paid improves the liquidity position of the AEs and become part and parcel of the said loan transaction. Therefore, we see no infirmity in the action of the TPO in treating the interest receivable as a loan outstanding and charging interest on the same accordingly"*

### Crayon Group AS [TS-417-ITAT-2023(Mum)-TP]

Mumbai ITAT rules on TP adjustment made in relation to interest income on compulsorily convertible debentures (CCDs) and corporate guarantee commission fee for Norway based assessee (engaged in distribution of software licenses across various types of licensing programs offered by the vendors as well as offering training, deployment and associated consulting services including software asset management services) for AY 2017-18.

With respect to TP adjustment qua interest income on CCDs, ITAT notes that assessee issued CCDs at 6.5% to its Indian AEs and adopted CUP as MAM; Considers assessee's claim that its Indian AEs paid 11% interest to Tata Capital, that TPO accepted the said international transaction to be at ALP in the TP order of Indian AEs; Rejects assessee's argument observing that interest paid by Indian AEs to assessee was lower than comparable interest payable to third party thus, no adjustment was made in the hands of Indian AE and states that *"assessee cannot take shelter under the transfer pricing assessment in case of Indian AE"*; ITAT states that there cannot be any tested party in CUP method (adopted by assessee) by opining that tested party is the first step of ALP determination only in margin based methods and not in price based methods such as CUP; Additionally, ITAT rejects AO's adoption of SBI PLR at the rate of 11% as ALP, clarifies that *"There is a basic difference between financial instrument of compulsorily convertible debentures and bank lending rates. Financing under channel financing scheme by NBFC i.e. TATA Capital cannot be compared with the subscription of CCD in an AE"*; Thus, finding both assessee's as well as TPO/DRP's approach of ALP determination as incorrect ITAT remits the said issue back to AO/TPO with a direction to assessee to benchmark the said international transaction by adopting MAM based on the FAR involved in the transaction and thereby TPO to examine the same and decide the issue afresh.

With respect to corporate guarantee given by assessee to Tata Capital for a channel finance credit facility availed by the Indian AE, ITAT rejects assessee's plea and holds corporate guarantee as international transaction vide introduction of explanation u/s.92B with retrospective effect from 1/4/2002 by the Finance Act 2012; Further, ITAT states that ALP cannot be decided on basis of judicial precedents rendered in case of other parties as argued by assessee since *"economic factors, Timing factors and commercial consideration differs"*;

Rejects AO/DRP's ALP determination at 1% basis bank guarantee rates stating *"the bank guarantee rates cannot be considered for benchmarking corporate guarantee fee"*; Clarifies that *"It depends on the creditworthiness of the parties and the benefit arising out of the same in the hands of parties to the transaction. The benefit is also required to be distributed between the issuer of guarantee and in whose favour such guarantee is issued"*; Considering absent any of the factors required to be considered for benchmarking as per mandate of Sec.92CA(3) by assessee as well as TPO/DRP, ITAT remits the said issue back to AO with a direction to the assessee to show benchmarking of corporate guarantee fee by either adopting interest saving approach, comparable corporate guarantee fee rates, cost of providing the guarantee and any other approach

**- Lower Commission rate charged to group entity justified, basis commercial expediency - Jetair Private Limited [TS-456-ITAT-2023(Mum)-TP]**

**Facts:**

- The Assessee is engaged in business as General Sales Agent for international and domestic airlines offering marketing, sales and accounting services.
- The Assessee charges commission in respect of Online Reservation for passenger at rate of 0.2% to 0.99% for the related party Jet Airways / Jet Air averaging about 0.6%.
- The AO noted that for other unrelated airlines, the Assessee charges commission which averages to around 2.5%. Accordingly, the AO deduced that since both Jet Airways (India) Ltd. and Jetair Pvt. Ltd. are related parties, charging of lower rate of commission indicates a mechanism deliberately employed to lower the payment of commission without any ostensible reasons which is in violation of arm's length principle.
- Accordingly, the AO proposed an adjustment of INR 141 crs.
- The CIT(A) considering facts and agreements with various airlines deleted the adjustment. Revenue preferred an appeal before the Hon'ble Tribunal.

**Hon'ble Tribunal**

Drawing reference from Hon'ble Bombay High Court Decision in the Assessee's own case in the context of reassessment proceedings, Hon'ble Tribunal observed as under:

- The Assessee was right in charging lower commission rates to its sister concern/related party jet airways India Limited on account of it being a sole selling agent as well as client giving more than 98% of its total turnover.
- It is purely a business decision and not colourable device as contended by the Revenue.
- It is neither the international transaction nor a specified domestic transaction therefore, transfer pricing provisions do not apply.
- CIT (A) has analyzed each and every GSA agreement with unrelated entities as well as with the Jet Airways India Ltd and categorically recorded finding that despite nature of services were similar but other condition such as territorial operations within India, provision of the bank guarantee, method of computation of commission etc. varied from airlines to airlines within the territory jurisdiction of India.
- When Assessee is receiving a huge volume of business from one particular entity and that to be for domestic airlines, then we do not find any reason as to why such a comparison should be made with other airlines operating on international flight with a less volume.
- What is to be seen is the business prudence and commercial expediency and if Assessee has got more financial benefits and more business from a particular entity or a party and there is nothing on record which has come that it has some kind of a 'make belief arrangement', then Id. AO cannot question as to how much commission should have been charged.
- Accordingly, we hold that addition has rightly been deleted and the order of the Id. CIT (A) is confirmed, and grounds taken by the Revenue are dismissed.

**- Upholds TNMM as against CUP as most appropriate method to benchmark royalty / Fees for Technical Services - Gruner India Private Limited [TS-440-ITAT-2023(DEL)-TP]**

**Facts:**

- The Assessee enjoys the exclusive rights to manufacture the relays, actuators and solenoids in India.

- The Assessee applied aggregation approach under TNMM on entity level to justify the ALP of all the transactions including payment of Royalty/FTS along with the other transactions.
- In the remand from the Tribunal, the DRP rejected TNMM and held CUP as the most appropriate method. They determined royalty rate of 3 percent as the arm's length rate and proposed an adjustment to the value of international transaction.

### **Hon'ble Tribunal**

Upholding TNMM as most appropriate method, Hon'ble Tribunal observed as under:

*"13. Having gone through the entire facts and circumstances of the case, we find that the arbitrary selection of royalty rate of 3% by the ld. DRP is without bringing any correct comparables on record. With regard to payment of FTS in A.Y. 2012-13, the ld. DRP agreed that the TPO failed to apply CUP correctly and is determination of ALP at Nil is incorrect. The Hon'ble High Court of Delhi in Magneti Marelli held that if segregation approach is permissible, TNMM shall apply.*

*14. Owing to these facts, the appeal of the assessee is hereby allowed."*

### **- Draft Assessment Order and Procedure under Section 144C of the Act mandatory even if Tribunal remands the matter partially – Kennametal India Ltd [TS-465-HC-2023(KAR)-TP]**

Quashing the Assessment Order, Hon'ble High Court opined as under:

*"6. It is clear that only a portion of the order of assessment is set aside insofar as the fixation of Arms Length Price of the international transaction undertaken by the assessee. No doubt, it is only a portion of the assessment order, which has been set aside, however, if the aspect of Arms Length Price of the international transaction is to be re-looked into after report of the TPO, procedure to be followed as provided under Section 144C of the Act is required to be extended for completion of the assessment proceedings. The procedure under Section 144C of the Act would have to be made available or followed even where assessment proceedings are sought to be concluded only on certain aspect of the matter afresh upon remand. That would be the only manner of construing the mandate under Section 144C of the Act, which confers right on the assessee to receive a draft of the proposed order of assessment.*

*7. Accordingly, assessment order at Annexure-H is set aside; the matter is restored to the stage of post report of the TPO and the assessment proceedings to be concluded by following the procedure under Section 144C of the Act and draft of the proposed order of assessment is required to be forwarded to the assessee, if the Assessing Officer proposes to make any variation prejudicial to the interest of such assessee."*