

## TRANSFER PRICING

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### Cummins India Limited [TS-489-HC-2023(BOM)-TP]

- Assessee is engaged in the business of manufacture and sale of internal combustion engines, spares, etc;
- Assessee paid royalty to its AE for providing technical know-how and technical knowledge for manufacturing of engine;
- Benchmarked it under the combined transaction approach under manufacturing segment using TNMM as MAM;
- TPO separated royalty from the manufacturing segment and sought to benchmark it using CUP
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#### High Court held that:

- ITAT should have followed the order of the coordinate bench rendered under identical facts and same agreement;
- In absence of any adverse inference drawn by TPO that 'the transaction of payment of royalty for use of technology was inextricably linked with manufacturing activity and should be aggregated with other international transactions in the manufacturing segment for the purposes of benchmarking the same'.

Hence, HC held that the approach followed by assessee of combined transaction approach to benchmark royalty under the manufacturing segment was correct.

### Schott Glass India Pvt Ltd [TS-462-HC-2023(BOM)-TP]

- The assessee is engaged in the business of trading and manufacturing of glass
- ITAT order upheld DRP's order to exclude assessee's Solar Test (ST) activity costs from computation of PLI;
  - o Costs considered as extraordinary in nature, for manufacturing segment of assessee
- Bombay HC dismissed Revenue's appeal against ITAT order;  
HC held that the solar test trials, carried out by assessee were an exception to its regular business of producing tubes for pharmaceutical packaging, hence extraordinary in nature

### Springer India Pvt Ltd [TS-403-HC-2023(DEL)-TP]

- ITAT remitted matter to consider subsequent year APA on the issue related to Most appropriate method selection;
- Revenue filed an appeal to High Court;
- This case relates to AY 2012-13; the ITAT remitted issue of MAM selection noting that assessee entered into an APA with CBDT on 06.08.2019 which covered period spanning between 2013-14 and 2021-22
- HC notes that the APA covers 18 transactions out of which it was agreed that 16 transactions will be benchmarked by using the 'other method' while remaining 2 transactions will be benchmarked by using TNMM and RPM;
- HC notes Revenue's contention that Tribunal erred in directing that APA should form the basis for benchmarking, having regard to the fact that APA was brought in the statute only in AY 2013-14

#### High Court Decision

- Tribunal adopted a wholesome approach;

- HC holds that “having regard to this limiting factor and given the complexity of the transaction which the respondent/assessee is involved in, the Tribunal thought it fit that the APA could be used to benchmark the transactions even for the AY in issue”;
- Takes into account assessee’s submission that the aforesaid direction is “ring-fenced with the caveat that the TPO will have to determine as to whether the FAR in the given AY is the same as those which are covered in the APA”;
- Also considering Tribunal’s reliance on various rulings, HC finds no error been committed by the Tribunal, either in the application of law or on facts,

High Court held that no error been committed by the ITAT, either in the application of law or on facts.

**- The time limit for completion of assessment under Section 153 is applicable to assessments routed through DRP mechanism – Shelf Drilling Ron Tappmeyer Limited TS-485-HC-2023BOM-TP**

The Hon’ble Bombay High Court held that the time limit prescribed under Section 153 of Act will prevail over and above the time limit prescribed under Section 144C of the Act. The AO may follow the procedure prescribed under Section 144C of the Act, but the entire procedure has to be commenced and concluded within the time period provided under Section 153(3) of the Act. Some of the key observations of the Hon’ble High Court are as under:

- Section 144C is a self-contained code of assessment and time limits are inbuilt at each stage of the procedure of assessment. The purpose is to fast-track a special type of assessment. Thus, it cannot be considered to mean that overall time limits prescribed have been given a go by in the process.
- Wherever the legislature intended extra time to be provided, it is expressly provided in Section 153. Further, Explanation 1 to Section 153 provides for cases where time taken for certain activities have to be excluded while computing the time period of limitation. The Explanation does not cover Section 144C.
- If the tax department’s contention is accepted that when there is a remand as in this case, the AO is unfettered by limitation, it would run counter to the object of the provisions of Section 144C. Considering the language of Section 144C and 153, it cannot be accepted that the provisions of Section 153 are excluded to the operation of Section 144C.
- The time limit prescribed under Section 153 will prevail over and above the assessment time limit prescribed under Section 144C. The AO may follow the procedure prescribed under Section 144C, but the entire procedure has to be commenced and concluded within the period provided under Section 153(3) of the Act.
- The assessment has to be concluded within twelve months as provided in Section 153(3) when the matter has been remanded to the AO by the Tribunal under Section 254. Thus, in the instant case, the AO had to ensure that the entire procedure prescribed under Section 144C is completed with a final order.
- The exclusion of applicability of Section 153, in so far as non-obstante clause in Section 144C(13) is concerned, it is for limited purpose to ensure that dehors larger time available, an order based on the directions of the DRP has to be passed within 30 days.
- This ratio is applicable in similar type of cases where the original order of assessment was required to be passed within the period of limitation set out in Section 153

**- Valuation of shares - Projections cannot be substituted by actual - WNS Global Services Pvt Ltd [TS-464-ITAT-2023Mum-TP]**

**Facts:**

- The Assessee acquired 1,32,500 shares of WNS Global Services UK Ltd from its AE - WNS Holdings Ltd. at Rs.32,741 per share.
- The Assessee placed reliance on the decision of the Bombay High Court in the case of Vodafone Services (P) Ltd vs UOI (WP No.871 of 2014) and Shell India Market Pvt Ltd vs ACIT (WP No.1205 of 2013) wherein the Hon’ble High Court has held that in the absence of income from admitted international transaction, the Indian Transfer Pricing provisions are not applicable.
- The Assessee without prejudice, as a matter of abundant caution, has disclosed the above international transaction by adopting (other method). For the purpose of valuation of shares, the Assessee adopted the weighted average of two methods, namely, markets multiple method (MMM) and discounted cash flow method (DCF).

- The TPO did not accept this contention of the Assessee with respect to non-applicability of transfer pricing provisions. With regard to the valuation method adopted by the Assessee the TPO was of the view that shares of a going concern should be valued using DCF method only and rejected the benchmarking done by the Assessee.
- The TPO re-worked the valuation as per DCF by replacing the projections with the actual for the reason that there is huge difference in the figures adopted for valuation and accordingly arrived at value of Rs.19,612/- per share.
- The TPO proceeded to treat the excess amount on account of share transfer, i.e., the difference between Rs.32,741 and Rs.19,612 as loan during the year under consideration and imputed interest by applying the rate at 2.74%.

#### **Hon'ble Tribunal**

- Hon'ble Tribunal referred to earlier year's decision in Assessee's own case for AY 2016-17 wherein following has been held:
- Projections cannot be substituted by actual, and hindsight ought not to affect a valuation report, without prejudice to this even if it is assumed otherwise for the time being in force, if projections are to be relied upon, all events that have occurred till that date should be considered.
- Reference to TPO on this issue is un-warranted hence, bad in law. As transaction of purchase of equity shares is a capital transaction and the same is not falling in the category of International Transaction as defined in section 92 of the Act, as there is no income arising on account of such transactions.
- Hon'ble Tribunal noted that decision of coordinate bench in Assessee's own case for AY 2016-17 is applicable for the year under consideration also. Therefore, respectfully following the said decision, Hon'ble Tribunal allowed the ground in favour of the Assessee.
- **Preference shares cannot be recharacterized as interest-free loan. Deletes TP adjustment - Aegis Limited [TS-463-ITAT-2023(Mum)-TP]**

#### **Facts:**

- The Assessee had an outstanding balance of investment in redeemable preference shares of its AE, Essar Services Mauritius.
- The TPO held that outstanding balance of preference shares should be considered as outstanding loan, upon which notional interest is to be imputed and charged. This approach of the TPO was consistent with earlier year in which the Assessee had made subscription.
- The DRP agreed with the TPO's approach of recharacterization of preference shares into loan and charging interest thereon.

#### **Hon'ble Tribunal**

Hon'ble Tribunal referred to earlier year's decision and confirmed that following:

- The TPO /Assessing Officer cannot disregard any apparent transaction and substitute it without any material of exception circumstance highlighting that Assessee has tried to conceal the real transaction or some sham transaction has been unearthed.
- The TPO cannot question the commercial expediency of the transaction entered into by the Assessee unless there are evidence and circumstances to doubt.
- Whether in a third-party scenario, an independent enterprise subscribes to a share, can it be characterized as loan. If not, then this transaction also cannot be inferred as loan.
- The Co-ordinate Benches of the Tribunal have been consistently holding that subscription of shares cannot be characterizes as loan and therefore no interest should be imputed by treating it as a loan.
- Referred to Hon'ble Bombay High Court decision in case of the Assessee wherein Hon'ble High Court observed "The facts on record would suggest that the assessee had entered into a transaction of purchase and sale of shares of an AE. Nothing is brought on record by the Revenue to suggest that the transaction was sham. In absence of any material on record, the TPO could not have treated such transaction as a loan and charged interest thereon on notional basis. No question of law arises."
- Accordingly, the Hon'ble Tribunal deleted the adjustment.
- **Mere pendency of Revenue's appeal against earlier orders no ground to invoke Sec.263 – Carraro India Private Limited [TS-482-ITAT-2023(PUN)-TP]**

#### **Facts:**

- The Principal CIT has invoked jurisdiction under section 263 of the Act on the ground that the Assessing Officer ('AO') has erred in not verifying the legal and professional fees paid and the claim for royalty expenses.
- Accordingly, the Principal CIT opined that assessment order dated 22.04.2021 passed under section 143(3) r.w.s 144C was erroneous and prejudicial to the interest of the Revenue.

#### **Hon'ble Tribunal**

- Hon'ble Tribunal noted that Principal CIT in the order under Section 263 has categorically stated that though both the issues i.e., royalty and legal & professional fees have ruled in favour of the Assessee by the Tribunal, the Department has filed an appeal to High Court.
- Relying on various judicial precedence, the Hon'ble observed that when two views are legally possible, and AO adopts one view the Assessment Order cannot be said to be erroneous for the Pr.CIT to invoke jurisdiction u/s 263. In this case the AO has taken one of the possible Legal View. Hence, the Assessment Order is not erroneous and prejudicial to the interest of the revenue.
- Setting aside Section 263 order, Hon'ble Tribunal concluded – "In this case, the Id.Pr.CIT though has discussed in the order u/s.263 of the Act, the Order of the ITAT for earlier years in the case of the assessee on the impugned issues, erred in taking a divergent view. The Id.Pr.CIT is a quasi- judicial authority, and hence the Id.Pr.CIT is duty bound to follow the Judicial Precedence. Merely, because the Department has filed an appeal before the Hon'ble High Court does not give an authority to the Id.Pr.CIT to take a divergent view."