

TRANSFER PRICING CA. Bhavya Bansal, CA. Bhavesh Dedhia, CA. Shazia Khatri	
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Sikka Ports & Terminals Ltd {ITA No 2139/Mum/2021}

Background

Sikka Ports & Terminals Ltd ("the assessee") is engaged in the business of port infrastructure facilities and engineering, construction and consultancy services etc. For AY 2013-14, the assessee gave certain corporate guarantees to third parties, undertaking the contractual and other obligations of its AEs. The assessee adopted 'yield spread approach' to benchmark the guarantee commission. The yield spread analysis is based on calculating the difference in the current market interests for the guarantor and the guarantee recipient and dividing it between the guarantor and the beneficiary. On the basis of quote obtained from the Royal Bank of Scotland (RBS), 70 bps was computed as yield spread and, accordingly, 0.35% computed as arm's length price of the corporate guarantee benefit.

However, TPO was of the opinion that the quote from Royal Bank of Scotland could not be a sound basis for computing the interest differential, as it was dated 01.04.2013 i.e. after the end of the relevant previous year, and came with a rider that such quote was only indicative and did not constitute any commitment or offer, and that the bank had the right to change the indicative terms and withdraw from further negotiations. TPO then proceeded to ascertain ALP of corporate guarantee at 1.5% based on relevant information requisitioned from HDFC Bank and State Bank of India, which had quoted 1.80% and 1.08% to 2.1% for "all types of guarantees."

On appeal, CIT(A) restricted the ALP adjustment to 0.5%, following Bombay HC ruling in Everest Kanto Cylinder.

ITAT Ruling

Mumbai ITAT observed that while adopting the yield spread approach, it is not necessary that the quotes for the interest rates, with guarantee and without guarantee, strictly be as on the date of entering into transaction. This is because the material factor is the difference between these rates and not the quantum of these rates; every variation in such rates need not necessarily affect the variation between with guarantee and without guarantee interest rates. At the end of the day, the rate differential is an approximation - no matter how scientific or reasonable it is. ITAT further observed that if the rate differential between these two rates of interest is 70 bps at the end of the relevant previous year, it is reasonable to proceed on the basis that such a differential would also prevail during the relevant previous year. With respect to the rider that came with the RBS' quote, ITAT held that these are normal features of legally guarded business quotations, and the presence of such rider does not vitiate the nature of quotation for indicating approximate prevailing rates. Nothing, therefore, turns on this cautious language which is quite common in the commercial documents anyway.

ITAT thus held that the objections taken by the revenue authorities to the adoption of yield spread approach were not legally sustainable. ITAT further held that also held that the quotations obtained from HDFC Bank and State Bank of India were for the bank guarantees simplicitor and not corporate guarantees. These two kinds of guarantees are materially different, as has been held by a series of co-ordinate bench decisions.

The ITAT allowed the assessee's appeal (and dismissed the AO's appeal as infructuous), concluding that the benchmarking of corporate guarantee, on the peculiar facts of this case and in the light of yield spread method adopted by the assessee – which has not been faulted by the authorities below for any legally sustainable reasons - is upheld at 0.35%.

Quashes TP Order for AYs 2010-11 and 2011-12 being Time Barred - Time limit for passing TP order under Section 92CA(3A) 153 mandatory - Sigma Aldrich Chemicals Pvt Ltd [TS-426-ITAT-2022(Bang)-TP]

The Assessee contended that the order passed by the TPO for AYs 2010-11 and 2011-12 is barred by limitation as the order was passed on 30 January 2014 and 30 January 2015, respectively despite date of limitation expiring on 29 January 2014 and 29 January 2015, respectively.

Answering the questions of law in favour of the Assessee and against the Revenue Department, held as under:

- The use of the word 'may' in sub-section (3A) of section 92CA is to be construed as 'shall';
- The time limit to pass the order as per sub-section (3A) of section 92CA is mandatory and not directory in nature;
- The TPO is bound by such limitation and any defect shall not be considered as curable;
- Such action / defect cannot be considered as an irregularity to get any protection under Section 292BB of the Act;

Deletes TP addition as Reference to TPO contrary to Instruction No.3/2016 - Rittal India Pvt Ltd [TS-395-ITAT-2022(Bang)-TP]

Facts:

- In the assessment order for AY 2014-15, the AO has observed that an international transaction exceeding INR 15 crores was entered into by the Assessee with its AE and therefore a reference was being made to the TPO.
- It was the contention of the Assessee that as per the instruction No.3 of 2016 dated 20/5/2003 all AOs were mandatorily instructed that they can refer the case to the TPO for determination of ALP only under certain specific circumstances.
- In this case the reasons for selection of Assessee's case for scrutiny is not on the basis of transfer pricing risk parameters. Further, selection criteria in case of non-TP risk parameter does not apply to the facts of the instant case.

Tribunal's Ruling

Ruling in favour of the Assessee, Hon'ble Tribunal noted as under:

- The AO sought approval of the Pr. CIT vide his letter dated 25.7.2016 which was granted vide letter dated 26.7.2016. Thereafter, a reference was made to the TPO vide letter dated 28.7.2016. Thus, it is clear that the AO made a reference to the TPO after Instruction No.3/2016 had kicked in on 10-03-2016.
- As per JCIT's letter to DR dt 18.03.2022, there were no TP risk parameters as per CASS and reference was made with the remark "TP adjustment for AY 2011-12 is above Rs. 10 crore". However, observes, as per final assessment order and ITAT order for AY 2011-12 TP adjustment made during said AY was only of INR1.23 crores.
- Concludes that the parameters laid down in para 3.3(b) of the CBDT Instruction, being the basis for making reference to TPO, are not satisfied in the present case and hence such reference is invalid.
- Holds, "addition made on the basis an order passed by the TPO on an invalid reference by the AO is a nullity and the addition made consequent to such illegal order is liable to be deleted in this short ground."

Quashes assessment - Holds draft assessment-order passed along with demand and penalty notice as null & void - Aker Powergas Pvt Ltd [TS-384-ITAT-2022(Mum)-TP]

Facts:

- Adjustment was made towards arms' length price of international transactions by the TPO.
- Assessing officer passed a draft assessment order along with Notice of Demand and penalty notice under Section 274 read with Section 271(1)(c) of the Act.
- Assessee preferred objections before DRP wherein DRP confirmed the draft assessment order.

- At the time of Tribunal hearing the Assessee moved an application for admission of additional ground by which it has challenged the validity of order.

Tribunal's Ruling

Ruling in favour of the Assessee, Hon'ble Tribunal noted as under:

- Assessee can raise legal ground at any time during the pendency of appeal, also notes that in grounds raised, no fresh facts are required to be investigated and further it goes to the root of the matter as it is a jurisdictional ground – Admits additional ground.
- Replying on Hon'ble Pune Tribunal in *Atlas Copco India Ltd versus DCIT (ITA number 649/PU 1/2013 and 1726/UN/2014)* holds that "the present assessment order passed is null and void. Thus, the income offered in the return becomes total income of the assessee",