

Transfer Pricing

INDEX

<u>Particulars</u>	<u>Page No</u>
Tribunal deletes TP adjustment qua interest on outstanding receivable from the AEs in case of assessee being debt free	2
Tribunal rejects the assessee's argument of base erosion, mirror ALP and confirms TP adjustment in the hands of foreign company	2
Indian PE of the foreign company would be a separate enterprise and any transaction between the foreign company and Indian PE of the foreign company would be 'international transaction' required to be benchmarked at ALP	3

Judicial Decision

Tribunal deletes TP adjustment qua interest on outstanding receivable from the AEs in case of assessee being debt free

Ramboll India Pvt. Ltd vs. ACIT [TS-542-ITAT-2024(DEL)-TP]

In favour of Assessee

Brief Facts

The assessee was engaged in business of rendering design engineering services to Associated Enterprises (AEs) as well as unrelated third parties. The Transfer Pricing Officer (‘TPO’) observed that credit period allowed to foreign AEs was more than what was allowed to non-AEs. The TPO therefore made an upward adjustment relating to interest on outstanding receivables amounting to Rs. 16,24,690/- using interest rate of LIBOR plus 400 basis point for the period of receivables outstanding beyond credit period of 30 days. The Dispute Resolution Panel (‘DRP’) directed the TPO to calculate interest on outstanding receivables for delays beyond 60 days as well as grant working capital adjustment in provision of services.

The Tribunal took note of the fact that the assessee was a debt free company and there was no interest expenditure expended by the assessee. The Tribunal accepted reliance placed by the assessee on the decision of the Delhi High Court in the case of PCIT vs Boeing India Pvt. Ltd. (457 ITR 84), wherein adjustment made in hands of assessee-company on account of interest on outstanding receivables was deleted since assessee-company was a debt free company and no interest was paid to creditor/supplier, nor any interest was earned from unrelated party. It was accordingly held that receiving any interest on receivables does not arise.

Held

The TPO was directed to delete TP adjustment on account of imputed interest on outstanding receivables

on the ground that once the working capital adjustment as directed by the DRP was granted, there was no need to separately impute interest on outstanding receivables as it would get subsumed in the working capital adjustment itself.

Tribunal rejects the assessee’s argument of base erosion, mirror ALP and confirms TP adjustment in the hands of foreign company

Shell Global Solutions International BV vs. ACIT [TS-528-ITAT-2024(Ahd)-TP]

In favour of Revenue

Brief Facts

The assessee, a foreign company was engaged in providing research & technical services and manpower supply services. The assessee had rendered both the services to unrelated third party as well as AEs in India. The TPO observed that the average hourly rate charged by the assessee from its AEs were less than what was charged to unrelated third party in India. The TPO applied comparable uncontrolled price (‘CUP’) method as most appropriate method (‘MAM’) and made upward transfer pricing adjustments in the hands of the assessee. Both the Indian companies had earned taxable income during the year.

Argument of the assessee before the Tribunal:

Income of the assessee, being a foreign company would get taxed at 10%, whereas the Indian company would get deduction of the said expenditure at 33% plus applicable surcharge and education cess. There was no base erosion where the foreign company has charged lesser amount to the Indian company and therefore, Transfer Pricing provisions would not be applicable in such case. On the contrary, an upward Arm’s Length Price (‘ALP’) adjustment in the hands of the assessee would result in base erosion, since the adjustment would result in lesser taxes being collected on the impugned transaction, collectively both from the foreign entity and its Indian AE.

ALP in case of both the Indian AEs was accepted and therefore, the ALP adjustment in the hands of the assessee to be deleted applying the principle of mirror ALP. As per the principle of mirror ALP, if the ALP of a transaction with one of the AEs to an international transaction is determined, the same ALP is to be applied with respect to other AE also.

Held

Any upward adjustment to the ALP of the international transaction of a foreign entity did not warrant an adjustment in ALP of its Indian AE. Accordingly, there is no base erosion by ALP adjustment in the income of the non-resident in respect of its transactions with the Indian AEs.

The Tribunal took note of the decision of the Bangalore Tribunal in the case of *Filtrex Technologies P. Ltd. vs. ACIT* (93 taxmann.com 301), where it was categorically held that in terms of Indian Transfer Pricing Regulation, there could not be any case of mirror ALP at all. Relying on the said decision, it was held the TPO can opt to determine total income on the basis of ALP determined in accordance with section 92(1) of the Act in the hands of one party to the said transaction, at the same time desist from doing corresponding adjustment in the assessment of the other party to the said transaction. The Mirror ALP argument of the assessee was accordingly rejected, following the above decision.

Indian PE of the foreign company would be a separate enterprise and any transaction between the foreign company and Indian PE of the foreign company would be 'international transaction' required to be benchmarked at ALP

**TBEA Shenyang Transformer Group Company Ltd. [169 taxmann.com 145 (Ahmedabad - Trib.) (SB)]
In favour of Revenue**

Brief Facts

The assessee was a Project Office ('PO') in India of a foreign company incorporated in China. The foreign

company was awarded a contract from Indian company to build sub-stations in India, comprising of off-shore supply, on-shore supply, and on-shore services, governed by separate agreements. In order to provide these services, the foreign company had set up a PO in India to provide the onshore services. The Head Office ('HO') in China had made/ received certain payments on behalf of the PO as the PO did not have a bank account in India at the relevant time. The Assessing Officer ('AO') regarded said payments as "reimbursement" and termed them as "international transaction" for the purpose of reference to TPO. The TPO observed that the per unit civil work rate received from the Indian company was lower than the rate paid to sub-contractor and therefore, the PO was not adequately compensated for the onshore activity and had incurred losses. The TPO held that therefore the TP provisions were applicable to transactions between PO and its HO in China.

The question before the Special Bench was: whether or not the transactions between a foreign enterprise outside India and its Indian permanent establishment ('PE') can be considered international transactions for the purpose of section 92B and, accordingly, can be subjected to the "arm's length price" adjustment?

The Transfer Pricing provisions need to be interpreted keeping in mind the above objective of fair and equitable tax allocation. In the instant case, the PO has undertaken onshore services on behalf of HO and incurred substantial losses in executing such services. The crux of the matter is whether unrelated party would have taken up the obligation of rendering onshore services, which at the threshold itself result in loss.

Whether PE is a Separate Enterprise

The assessee contended that Chapter X is not applicable in absence of any income. It is contended that transaction with self or between two branches of the same person cannot trigger any income, which is taxable in India. It is further argued that the HO is the taxpayer who gets assessed as a whole and intra-company transactions are not covered by Chapter X. PE is only a subset of foreign company and it does not

stand separated from foreign company and thus, under normal parlance it can never be considered or assumed to be a separate person.

The Revenue contended that as per section 92F of the Act, an enterprise has been defined as a person (including a PE of such person). PE of a person has also been recognized as an 'enterprise'. This is a deeming provision by which PE of an enterprise has been deemed to be an enterprise, even though it may not have separate existence. Therefore, the PE and the HO are to be treated as separate entities for the purpose of determination of ALP under TP regulations.

Held

In the context of a PE of a foreign enterprise in India, Article 7(2) provides that profits that will be attributed to PE shall be profits which the PE might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE. The transaction between foreign enterprise and its PE in India would be considered as an 'international transaction' and be subject to ALP adjustment.



Disclaimer and Statutory Notice

This e-publication is published by C N K & Associates, LLP Chartered Accountants, India, solely for the purposes of providing necessary information to employees, clients and other business associates. This publication summarizes the important statutory and regulatory developments. Whilst every care has been taken in the preparation of this publication, it may contain inadvertent errors for which we shall not be held responsible. The information given in this publication provides a bird's eye view on the recent important select developments and should not be relied solely for the purpose of economic or financial decision. Each such decision would call for specific reference of the relevant statutes and consultation of an expert. This document is a proprietary material created and compiled by C N K & Associates LLP. All rights reserved. This newsletter or any portion thereof may not be reproduced or sold in any manner whatsoever without the consent of the publisher.

This publication is not intended for advertisement and/or for solicitation of work.

www.cnkindia.com

CNK & Associates LLP
Chartered Accountants

Mumbai

3rd Floor, Mistry Bhavan, Dinshaw Vachha
Road, Churchgate, Mumbai 400 020.

Tel: +91 22 6623 0600

501/502, Narain Chambers, M.G Road,
Vile Parle (East), Mumbai 400 057.

Tel: +91 22 6250 7600

Chennai: +91 44 4384 9695

GIFT City: +91 79 2630 6530

Pune: +91 20 2998 0865

Vadodara: +91 265 234 3483

Bengaluru: +91 91 4110 7765

Dubai: +971 4355 9533

Ahmedabad: +91 79 2630 6530

Delhi: +91 11 2735 7350

Abu Dhabi: +971 4355 9544