

## **Full risk bearing Companies not comparable with an entity bearing limited risk - comparables rejected**

**Summary – The Delhi ITAT in a recent case of Agnity India Technologies (P.) Ltd., (the Assessee) held that where assessee was a limited risk bearing captive software service provider, while analysing arm's length nature of transfer price companies engaged in software product, functionally dissimilar and full-fledged risk bearing entrepreneur companies were to be excluded as a comparable.**

### **Facts**

- The assessee was a wholly owned subsidiary of Bay Packets Inc., USA providing software development services to its overseas associated enterprises ('AEs'). It was primarily involved in the last three stages of the software development life cycle i.e. coding, testing and post-production support.
- The TPO had adopted a set of 19 comparables with a working capital adjusted average OP/TC margin of 29.38 per cent and made an adjustment of Rs. 2.21 crore. The Assessing Officer upheld the adjustment made by the TPO and issued the draft assessment order under section 144C(1).
- The DRP issued certain directions in relation to the TP adjustment. However, the TPO gave partial effect to these directions and made an adjustment of Rs. 1.58 crore which was upheld by the Assessing Officer in the final order.
- On appeal before the Tribunal, the assessee submitted that certain companies were not comparable in terms of functions performed, assets employed and risks assumed and that Tribunal in assessee's own case dated 4-11-2010 in IT Appeal No. 3856 (Delhi) of 2010 for the assessment year 2006-07 has excluded software product, functionally dissimilar and full-fledged risk bearing entrepreneur company as a comparable, in analysing the arm's length price, which was upheld by the Delhi High Court.

### **Held**

- The issue about exclusion of above list of comparables while making the TP adjustments in assessee's case has been settled by Hon'ble Delhi High Court. It has been unequivocally held that those companies (like Infosys and others) are full-fledged risk bearing companies and are functionally dissimilar as a comparable to assessee who is a captive software service provider.
- Thus while analysing the arm's length nature of the transfer price of a captive software service provider i.e. the appellant, the objected comparables are to be excluded.
- Respectfully following the Hon'ble Delhi High Court judgment the plea of the assessee to exclude such comparables is upheld and this ground of the assessee is allowed. TPO/Assessing Officer will accordingly work out the TP adjustment in conformity of the Delhi High Court order.