

## **No concealment penalty on mere TP adjustment if such issue was of debatable nature**

**Summary – The Hyderabad ITAT in a recent case of ADP (P) Ltd., (the Assessee) held that where TPO determined ALP of international transaction at a higher amount as against disclosed by assessee and thereupon Assessing Officer made addition in income of assessee and also imposed penalty under section 271(1)(c) on basis of impugned addition, since issues on basis of which ALP shown by assessee had been rejected were debatable, they could not be said to be leading to concealment of income.**

### **Facts**

- During the year, the assessee-company had entered into international transaction with its associate enterprise [AE].
- The Assessing Officer referred the matter to the Transfer Pricing Officer [TPO] for determining the arm's length price [ALP] of international transaction. The TPO while determining the ALP of international transaction rejected the TP study report of the assessee basically on the ground that it had used multiple year data instead of using the current year data. Further out of 14 companies selected as comparable by the assessee in his TP study report, the TPO accepted only four companies and rejected the balance 10 companies. He, therefore, determined the ALP of the international transaction at an higher amount as against disclosed by the assessee. Thereupon the Assessing Officer on the basis of the ALP determined by the TPO made addition in the income of the assessee being the transfer pricing adjustment on account of difference in ALP determined by the TPO.
- On appeal, the Commissioner (Appeals) while upholding the finding of the TPO with regard to the use of current year data and rejection of comparable allowed marginal relief by allowing +/- 5 per cent deduction under section 92CA(2).
- On second appeal, the Tribunal held that the Commissioner (Appeals) was not correct in allowing +/- 5 per cent deduction from the ALP determined by the TPO. Thus, it confirmed the addition made by the Assessing Officer.
- In the meantime, the Assessing Officer also imposed the penalty under section 271(1)(c) upon the assessee on the basis of aforesaid addition made in its income.
- On appeal, the Commissioner (Appeals) held that there was no case for imposition of penalty under section 271(1)(c), as neither there was any concealment of income or furnishing of inaccurate particulars of income by the assessee. So far as methodology adopted by the assessee for determining the ALP of international transaction was concerned, the same had been accepted by the TPO. The TPO had only not accepted certain variables due to application of different filters which resulted in re-working of the ALP. The determination of the ALP had been arrived at on the basis of estimation by the assessee as well as the TPO which might be due to a difference of opinion. When there was difference of opinion in respect of interpretation of statutory provisions, there could not be concealment of income. He, therefore, deleted the penalty imposed upon the assessee.

- On second appeal.

**Held**

- It is an admitted fact that the penalty under section 271(1)(c) has been sought to be imposed on the basis of addition made on account of difference between the ALP determined by the TPO and shown by the assessee.
- The TPO has not rejected the methodology adopted in the TP report submitted by the assessee obtained from an external expert. The difference in ALP arose only on account of difference of opinion between the assessee and TPO with regard to the use of multiple year data and selection of certain companies as comparable. Therefore, the Commissioner (Appeals) is correct in holding that the difference in the value of ALP was due to difference of opinion with regard to certain issues in the context of interpretation of statutory provisions and not due to lack of good faith and due diligence. The issues on the basis of which the ALP shown by the assessee has been rejected are debatable. Hence, they cannot be said to be leading to concealment of income or furnishing inaccurate particulars of income when the assessee has obtained the TP report from an external expert. In these circumstances, the Commissioner (Appeals) was justified in deleting the penalty imposed upon the assessee under section 271(1)(c).