

TPO ought to have first analysed internal comparable before external one for making TP adjustment

Summary – The Mumbai ITAT in a recent case of Asian Paints Ltd., (the Assessee) held that where TPO held that guarantee commission paid by AEs to assessee had to be benchmarked with external comparables, in view of fact that, internal CUP was available in case of assessee itself in form of guarantee charges, charged by bank from assessee, same ought to had been first analyzed and examined.

Facts

- The assessee had given guarantee to various banks on behalf of its subsidiary on the loans taken by them from overseas banks for which the assessee had charged 0.20 per cent of the guarantee amount as commission to the Associated Enterprise (AE).
- The TPO held that payment of guarantee commission by the AEs to the assessee was an international transaction which had to be benchmarked with external comparables. He noted that guarantee commission is being charged in the case of HSBC @ 0.15 per cent to 3 per cent and by Allahabad Bank at the rate of 3 per cent per annum. Accordingly, he bench-marked the ALP for the guarantee at the rate of 3 per cent per annum of the amount of the guarantee and made upward adjustment of Rs. 2.42 crores.
- The DRP also confirmed the action of the TPO.
- On appeal before the Tribunal, the assessee submitted that banks in case of assessee itself charged guarantee commission at the rate of 0.25 per cent to 0.35 per cent or nil and the Tribunal in assessee's own case for the assessment year 2005-06 had deleted the earlier addition made by the TPO on account of similar adjustment made in guarantee commission.

Held

- It is noticed that the HSBC bank has given the information that it has been charging 0.15 per cent to 3 per cent of the guarantee commission whereas, in case of Allahabad Bank, the TPO has noted the blanket quote from the website, which gives the guarantee commission rate of 3 per cent. However, the TPO has not brought any data on record, firstly for which financial year these data belong to; and secondly, under which terms & conditions and circumstances, the banks have been charging guarantee commission @ 3 per cent. Even the evaluation of the risk undertaken by him by comparing the company F.Ds and the bank F.Ds, it is not clear as to how such a risk can be evaluated on the term of corporate guarantee. Charging of guarantee commission depends upon the transaction to transaction and mutual understanding between the bank and the parties. There could be instances, where on the evaluation of various parameters, of financial credibility and stakes of the client, the bank may not charge any guarantee commission which completely depends upon its evaluation, of a particular client. This is also evident from the fact that, in some of the years, in

assessee's own case, no charges have been paid on account of guarantee commission as has been submitted by the assessee. Simply relying upon certain data from the market without carrying out any comparability analysis of the actual transactions undertaken, such an application of guarantee commission rate cannot be applied in a blanket manner in all the cases.

- In the instant case, when there was an internal CUP in the form of bank guarantee charges, charged by the bank from the assessee, the same ought to have been first analysed and examined wherein the guarantee commission charged ranged between 0.25 per cent to 0.35 per cent. It is also an undisputed fact, that in the earlier years, the Tribunal has deleted the similar addition and no question of law on this score has been raised by the Department. Thus, under these facts and circumstances, it is held that no upward adjustment in the ALP in relation to charging of guarantee commission over and above 0.20 per cent can be made and, accordingly, the adjustment so made by the TPO/Assessing Officer is hereby deleted.