

CIT(A) had to continue adjudication of TP adjustment not related with MAP proceeding initiated with US authorities

Summary – The Hyderabad ITAT in a recent case of Virtusa (India) (P.) Ltd., (the Assessee) held that where assessee had withdrawn TP adjustment relating to international transactions with V, USA, taking recourse to MAP under article 27 of Indo US DTAA, and since balance TP adjustment relating to international transactions with other entities was not withdrawn, Commissioner(Appeals) was to be directed to re-adjudicate TP adjustment on transactions not covered under MAP

Facts

- Assessee was a wholly owned subsidiary of 'V' corporation, USA.
- It provided software development services to its group companies.
- During scrutiny assessment proceeding, the Assessing Officer noticing that international transactions entered into by assessee during the year had exceeded more than Rs. 5 crore, made a reference to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP).
- In transfer pricing proceedings, assessee adopted TNMM for determining ALP and thereby selected 45 comparables with average margin of 9.97 per cent as against assessee's margin of 13.34 per cent thereby treating price charged to be within arm's length.
- TPO, however, pointing out various defects and deficiencies in the TP document of the assessee, rejected the same though he accepted TNMM as the most appropriate method. The TPO then himself undertook a search in the data bases, by applying some of the filters selected by the assessee as well applying certain additional filters which resulted in selection of 17 comparables with arithmetic mean PLI of 26.59 per cent. Accordingly, certain addition was proposed to assessee's ALP. Apart from the addition made on account of TP adjustment, Assessing Officer also restricted the claim under section 10A, thereby disallowing a certain sum which resulted in excess demand.
- Being aggrieved of the assessment order so passed assessee preferred appeal before the Commissioner (Appeals).
- During the pendency of the proceeding before the Commissioner (Appeals), assessee initiated mutual agreement procedure (MAP) under article 27 of the Indo-US Double Taxation Avoidance Agreement (DTAA) and accordingly requested the Commissioner (Appeals) to keep proceedings in abeyance till the completion of MAP proceedings.
- Thereafter, since assessee wanted to withdraw their ground on TP adjustment and wanted to pursue the appeal on other issues only, the Commissioner (Appeals) dismissed the ground relating to the addition made on account of TP adjustment.
- On appeal to Tribunal against dismissal of its ground on TP adjustment

Assessee's submissions

- The assessee submitted that he had only withdrawn ground relating to the additions in respect of transactions with V, USA, which was subject-matter of MAP, whereas the balance TP adjustment relating to international transactions with V, UK was not withdrawn by the assessee.
- Further, assessee challenging the TP adjustment in respect of ALP of the international transaction with V, UK submitted that the TPO after rejecting the TP documentation of the assessee has undertaken search process and selected 17 comparables for analyzing the arm's length margin. It was submitted that out of 17 comparables, though 10 are acceptable to the assessee, but, seven companies selected by the TPO are not comparable to the assessee under any circumstances.

Revenue's submissions

- On the other hand the revenue submitted that the ground relating to TP adjustment having been withdrawn by the assessee before the Commissioner (Appeals), the issue could not be revived again.
- Further, as regards assessee's objection to selection of certain comparables, the TPO having undertaken an objective analysis before selecting the comparables, his decision could not be challenged.

Held

- Undisputedly, during pendency of the appeal before the Commissioner (Appeals), assessee, for resolving dispute relating to determination of ALP in respect of international transactions with V, USA took recourse to MAP under article 27 of the Indo US DTAA. Subsequently, the competent authorities under the Indo US DTAA passed a resolution on 12-8-2010. When Assessing Officer called upon the assessee seeking its acceptance of the MAP order, assessee vide a letter dated 9-11-2010, submitted before the Assessing Officer that they wished to withdraw their appeal, on the transfer pricing issue as the company was in agreement with the resolution reached between the US and Indian Competent Authorities.
- In terms with the aforesaid letter submitted before the Assessing Officer, assessee also submitted a letter before the Commissioner (Appeals) withdrawing its ground on TP adjustment. As can be seen from the contents of the aforesaid letter, assessee categorically stated that it is withdrawing its appeal in respect of TP adjustment of Rs. 8.95 crore. In view of the aforesaid categorical and voluntary statement by assessee in withdrawing its appeal relating to entire TP adjustment of Rs. 8.95 crore, Commissioner (Appeals) cannot be blamed for having dismissed assessee's ground on TP adjustment. However, from the facts and materials on record, viz., MAP order, MAP resolution, it appears that the MAP resolution, which is under the Indo-US DTAA is in respect of international transactions with V, USA involving operation cost attributable to US entity of Rs. 78.30 crore out of the total operating cost of Rs. 84.32 crore which works out to 92.86 per cent. From the aforesaid facts, it appears that MAP resolution is in respect of 92.86 per cent of the operating cost which relate to transactions with V, USA, thereby giving credence to the fact that balance 7.14 per cent of the operating cost relates to international transaction with other entities i.e. V, UK. However, since the Commissioner (Appeals) by taking into cognizance assessee's letter, dismissed the ground relating to TP adjustment, these facts were not at all examined. Further, assessee also filed a

petition under section 154 before the Commissioner (Appeals) seeking rectification of the order which is still pending.

- In the aforesaid circumstances, the matter needs to be examined by Commissioner (Appeals) on the issue of TP adjustment of Rs. 63.92 lakh which as claimed by assessee, relates to transactions with V, UK. Accordingly, the issue is remitted back to the file of the Commissioner (Appeals) for deciding afresh after considering all facts and materials to be submitted by assessee as well as available on record and after due opportunity of being heard to the assessee. While doing so, the Commissioner (Appeals) must also consider assessee's submissions in respect of selection of seven comparables, specifically objected to by the assessee, keeping in view decisions of the Tribunal on the issue which assessee will rely upon. The aforesaid direction is only in respect of TP adjustment of 63.92 lakh claimed to be relating to V, UK.
- In the result, assessee's appeal is considered to be partly allowed for statistical purposes.