

ITAT directs TPO to make TP adjustment by excluding comparables with related party transaction exceeding 25%

Summary – The Mumbai ITAT in a recent case of Zee Entertainment Enterprises Ltd., (the Assessee) held that while making computation of ALP under section 92C bench mark of related party transactions is to be adopted at 25 per cent.

Facts

- The assessee was engaged in purchasing television programs and thereupon selling those programs to its broadcasters overseas at a pre-determined price.
- While determining the ALPs of the said transaction the assessee adopted TNM method and Profit Level Indicator (PLI) was the operating profit to sales. The assessee was the tested party and 12 companies were identified as comparables by the assessee. The arithmetical mean of 12 comparables were computed at 31.31 per cent as against PLI of the assessee at 32.25 per cent and thus, the transaction was shown at arm's length.
- In transfer pricing proceedings, the TPO excluded some comparables selected by assessee having related party transactions in excess of 15 per cent.
- Finally, TPO took the final set of five comparables and computed their arithmetical mean at 51.30 per cent. Accordingly, certain addition was made to assessee's ALP.
- The DRP granted partial relief to assessee.
- On cross appeals:

Held

- It is the main arguments of assessee that UTV Software Communications having RPT transaction of 18.19 per cent should be included in the list of comparable. This argument of assessee is based on decisions of ITAT in the case of *Actis Advisory (P.) Ltd. v. Dy. CIT* [IT Appeal No. 958 (Delhi) of 2012, dated 12-10-2012] *DSM Anti Infectives India Ltd. v. Dy. CIT* [[2013\] 145 ITD 154/37 taxmann.com 409 \(CHD.-Trib\)](#) and *Global Logic India (P.) Ltd. v. Dy. CIT* [[2013\] 56 SOT 373/31 taxmann.com 81 \(Delhi - Trib.\)](#). The main case of the TPO applying bench mark of 15 per cent of RPT is based on the decision in the case of *Sony India (P.) Ltd. v. Dy. CIT* [[2008\] 114 ITD 448 \(Delhi\)](#).
- In all the above three decisions, the Tribunal has later on considered this proposition and even after considering the decision in the case of *Sony India (P.) Ltd. (supra)* it has come to a conclusion that bench mark of RPT transaction should be at 25 per cent. No contrary decision was brought on record. In this view of the situation, it is opined that UTV Software Communication should be included in the list of comparables.

- The issue is thus restored to the file of TPO with a direction that if after including UTV Software Communication in the list of comparables and after adjustment on account of depreciation, difference between the PLI of the assessee and arithmetic mean of the comparable parties is within the safe harbour of +/- 5 per cent, then on addition on account of TP adjustment should be made.
- So far as it relates to contention of the revenue that rule 10B(1)(e)(iii) supports the contention of the TPO that adjustment on account of depreciation has to be done, it is opined that such contention of revenue has a force.
- The Commissioner (Appeals) while deciding the issue in favour of assessee has observed that such adjustment can be made only in a case where such adjustment materially affect the amount of net profit margin in the open market. Adjustment of depreciation if taken as per straight line method and as per Income tax Rules would make material impact on the net profit margin of the concern. The TPO in his remand report has clearly brought the case of the assessee as well as comparables at par so far as it relates to claim of depreciation. There has to be similarly in respect of depreciation claim while computing the profit margin of the comparables as well as tested party. Therefore, that Commissioner (Appeals) has committed an error in admitting such claim of the assessee.
- In view of the above discussion, the TPO is directed to adopt the adjusted profit margin of the comparables as well as assessee after bringing at par the treatment of the claim of depreciation. This exercise has been done by TPO in the remand proceedings and those figures should be adopted for the purpose of computing arithmetic mean of the margin of the comparables and the profit margin of the assessee.
- Coming to the issue regarding grievance of the revenue for admission of additional evidences, it was found that the additional evidences which have been filed by the assessee is in the shape of audited accounts as per which correct calculations of PLI was made. The TPO has never objected to such evidence filed by the assessee and has even recomputed the margins according to the said evidences. Those audited accounts were not available earlier and they were produced by the assessee before Commissioner (Appeals) and those were also remanded to the TPO. Therefore, there is no error in the order of Commissioner (Appeals) vide which these evidences have been admitted. Therefore, revenue's appeal objecting the admission of additional evidence are dismissed.
- The next objection raised by the revenue is that sundry balances written back cannot be considered as operating revenue excess provision written back also cannot be said to be operating revenue and similarly gain on foreign exchange fluctuation cannot be considered as operating revenue.
- A uniform approach has been adopted by the TPO in respect of communication of PLI in the case of assessee as well as in the case of comparables. If the uniform approach is adopted, unless any contrary material has been brought on record, there is no infirmity in such basis of the calculation. Therefore, there is no need to interfere in the calculation made by TPO regarding computation of PLI in respect of the factors pointed out above. Therefore, there is no merit in the case of revenue and this ground of revenue's appeal is dismissed.

- In view of aforesaid and since it was the case of assessee that if UTV Software communication is included in the list of comparables then no other grievance of the assessee will remain effective for the reason that the difference between the profit margin of the assessee and arithmetic mean of comparables will fall within the safe harbour of +/- 5 per cent, it has been already held that UTV Software Communication is required to be included in the list of comparables, there was no need to go into other issues raised in the grounds of appeal filed by the assessee. Therefore, the other grievances of the assessee relating to TP adjustment have become academic and are treated as infructuous.