

ALP of advertisement exp. reimbursed to foreign AE couldn't be taken at nil if it was incurred for Indian affiliate

Summary – The Delhi ITAT in a recent case of Apollo International Ltd., (the Assessee) held that where expenses are incurred by AE under instructions from and on behalf of assessee, even though said expenses are reimbursed to AE without any mark up, yet arm's length price of transaction in question cannot be taken at zero

Facts

- The assessee was engaged in international trading of tyres, tubes and flaps through 'tyretech global division'.
- In transfer pricing proceedings, the TPO noticed that the assessee had reimbursed its AE, sales promotion expenses without any mark up.
- The TPO was of the view that the assessee was not under any contractual obligation to perform marketing function and, as such, no such reimbursement would have been made in arm's length situation.
- While TPO did not dispute that the assessee may have benefited from said exercise, he was of the view that such a benefit was only incidental and such incidental benefits cannot be regarded as giving rise to an arm's length transaction. He thus proceeded to hold that this payment was not for intra group services, was purely for an incidental benefit and its arm's length price to the assessee was zero. Accordingly, an ALP adjustment of Rs 44.28 lakhs was proposed by the TPO.
- The DRP rejected objection raised by the assessee.
- On appeal:

Held

- The TPO has accepted profitability of the transaction on the basis of TNMM and yet picked up this reimbursement, which constitutes a charge on such profitability, for rejection. This is essentially a reimbursement of expenditure, without any mark up to the AE. When an AE is acting only as an intermediary in the provision of services and incur costs on behalf of the assessee, which the assessee would have incurred directly, it may well be appropriate for the AE to pass on these costs without a mark-up.
- It is not in dispute that the costs were actually incurred by the AE under instructions from the assessee and it is also not in dispute that the assessee has reimbursed these costs, without any mark-up, to the AE. It is not even the case of the TPO that this reimbursement was reimbursement of normal business expenditure of the AE, and, therefore, it cannot amount to any advantage to the AE that these expenses are reimbursed by the assessee.

- As long as expenses are incurred under instructions from, and on behalf of, the assessee, as is the uncontroverted position, the arm's length price of the same cannot be taken at zero. Whether the assessee was under an obligation to make this reimbursement or not could be relevant only when the expenses were normal business expenses of the AE and yet the assessee decides to bear the same. There is nothing to indicate that the reimbursement is for expenses already incurred by the AE in its normal course of business. It is specifically stated that these expenses were incurred on behalf of the assessee, and this position remains uncontroverted. Whether the assessee was under an obligation to incur these expenses or not is, therefore, not really relevant.
- The question of incidental benefit to the assessee, for expenses incurred by the AE, would arise only when the expenses are incurred by the AE in its own right though for the common benefit of group as a whole. The impugned ALP adjustment is, therefore, devoid of legally sustainable basis on the facts of this case. Accordingly, the Assessing Officer is directed to delete the same.