A company failing parameter of employee cost to sales ratio couldn't be chosen as comparable for TP study

Summary – The Mumbai ITAT in a recent case of Goldman Sachs Services (P.) Ltd., (the Assessee) held that where a company has failed in employee cost to sales ratio it could not be taken as comparable

Facts

- The assessee was in the business of Information Technology support operations and back end operations. During the scrutiny proceedings, the Assessing Officer noticed that the assessee had entered into some international transactions and, accordingly, he referred the matter to the Transfer Pricing Officer (TPO) for determination of ALP.
- The assessee had computed its ALP by using TNMM with operating profit to total cost as profit level indicator. The assessee had used 14 comparables to justify its ALP and it was claimed by the assessee that its international transactions with its AE were at ALP.
- The TPO conducted its own search and found a set of 24 comparables and finally after considering the objections of the assessee determined the final set of 21 comparables.
- The DRP concurred with the views of the TPO.
- On appeal to Tribunal the main proposition of the assessee was that Excel Infoways Ltd. had shown a super normal profit with a huge margin and if margin of this company was excluded, it would come within ±5 per cent range and no transfer pricing adjustment would be required to be made.

Held

- Perusal of the profit and loss account of Excel Infoways Ltd. for the Financial Year 2008-09 shows that the total receipts from the BPO/ITS is at Rs.18.60 crores, the employees costs is shown at Rs.16.04 crores which makes the employees costs to sales ratio at 8.81 per cent. In this line of business the employees costs form major costs basis. The low ratio of comparable of employees cost would mean that it would not be providing services by employees of its own sources. Industries average is considered to be in the range of 30 to 40 per cent, whereas the company has shown meager 8.81 per cent. The company having low employees ratio to sales have been rejected by the Hyderabad Bench of the Tribunal in the case of *Brigade Global Services (P.) Ltd*. v. *ITO* [2013] 143 ITD 59/33 taxmann.com 618 (Hyd. - Trib.) and the Mumbai Bench of the Tribunal in the case of *Dy. CIT* v. *Willis Processing Services India (P)Ltd.* [2014] 51 taxmann.com 459, *Avaya India (P.) Ltd.* v. *Asstt. CIT* [2013] 33 taxmann.com 569 (Delhi - Trib.) and in the case of *Google India (P.) Ltd.* v. *Dy. CIT* [2013] 55 SOT 489/29 taxmann.com 412 (Bang. - Trib.), most of the companies selected as comparables by the TPO himself for employee costs to sales ratio between 30 to 60 per cent. Even if, the super normal profit margin of this company is ignored, still this company fails in employee cost to sales ratio. Therefore, Excel Infoways Ltd. does not deserve to be included in the final list of comparable.

Accordingly, exclusion of this company from the final list of comparable was directed. Therefore, the average of the comparables of the remaining companies as per TPO being at 20.97 per cent as compared to that of the assessee at 17.11 per cent is within ±5 per cent range as per the provisions of law. The international transactions made by the assessee is directed to be treated as at ALP.