

## Issue of shares by assessee at premium to its Mauritius AE did not give rise to income from an international transaction

**Summary – The Mumbai ITAT in a recent case of ATC Telecom Tower Corporation (P.) Ltd., (the Assessee) held that Issue of shares at a premium by assessee to its AE at Mauritius did not give rise to any income from an international transaction**

### Facts

- The assessee-company rendered infrastructure service to cellular mobile telephony operators. The assessee issued 555 lakhs equity shares each at Rs.100 per share.
- The TPO opined that fair market value Rs. 756 was higher and adopted the value of each equity share at Rs. 756 per share. On account of the difference between the price adopted by the assessee and the TPO, the T.P. adjustment was worked out and adjustment made.
- The DRP observed that the TPO had made a clear finding that the AE was based in Mauritius and had no operational activity and had no credit rating of its own. Hence, in addition to the cost of funds to the assessee itself, in an arm's length scenario, any party would charge additional interest for the risk taken such as currency risk, entity risk and country specific risks and he computed rate per share at Rs. 784.
- On appeal:

### Held

- The Bombay High Court in *Vodafone India Services (P.) Ltd. v. Union of India* [\[2014\] 368 ITR 1/50 taxmann.com 300/\[2015\] 228 Taxman 25](#) considered the issue at great length and observed that tax is charged on the resident only in respect of profits earned and not in respect of profits which he would have normally made but not made because of a business association with a non-resident. It was further observed that tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of ALP to transactional value/consideration itself does not arise and also clarified that the revenue seems to be confusing the measure to a charge and calling the measure a notional income; in the absence of any charge in the Act the issue of shares at a premium cannot be worked out. It also held that the Court also took notice of the definition of 'income' under section 2(24)(xvi) and section 56(2)(vii-b) to indicate that the intention of the Parliament was to tax issue of shares to a resident when the issue price is above its fair market value and not when it is below the fair market value; Parliament has consciously not brought to tax the amounts received from a non-resident for issue of shares, as it would discourage capital inflow from abroad. In the absence of a charging section in Chapter X, it is not possible to read a charging

provision into Chapter X. It thus, concluded that in the absence of charging provision to tax issue of shares at premium to a non-resident, the occasion to invoke computation provision does not arise.

- Having regard to the circumstances of the case and in the light of the binding decisions of the Bombay High Court, the Assessing Officer erred in making addition referable to the price of shares and of interest on deemed loan to the holding company.