

## Non-voice based BPO can't be compared with voice based BPO for purpose of TP study

**Summary – The Kolkata Acclaris Business Solutions (P.) Ltd ITAT in a recent case of Raj Jain., (the Assessee) held that where TPO made addition to assessee's ALP for rendering non-voice based BPO services to its AE, in view of fact that comparables selected by TPO were improper as one comparable was rendering voice based BPO services whereas another was rendering software development services, impugned addition was to be set aside**

### Facts

- The assessee was a subsidiary of 'A' Inc. It provided Back Office Processing services (BPO) to Acclaris Inc., as a captive service provider.
- The BPO services included various types of services including recruitment services, financial services and routine back office services like indexing and enrollment for clients.
- In the TP study the assessee selected itself as a tested party and its profitability (operating profit/total cost) was benchmarked by Transactional Net Margin Method (TNMM). According to the assessee, it had earned a profit of 15.02 per cent and as per the 14 comparables selected by the assessee with TP study, the average margin determined was 11.28 per cent. Therefore, it was the case of the assessee that international transactions entered into by the assessee with its AE were at arms' length.
- In transfer pricing proceedings, some of the comparables having related party transactions as a percentage of sales of more than 10 per cent were rejected. Thereafter the TPO chose a band of Profit Level Indicator (PLI) with the range of 10-50 per cent to be applicable to the business of the assessee and finally proceeded to benchmark the international transaction by selecting five comparables having average operating profit to total cost ratio of 29.12 per cent.
- The TPO thus made certain addition to assessee's ALP.
- The DRP confirmed said addition.
- The assessee thus filed instant appeal raising objections to selection of four comparables by TPO.

### Held

- Firstly as regards the functional comparability of one of the comparables, *i.e.*, Maple E-solutions Ltd., the assessee submitted that the TPO did not differentiate between voice-based and non-voice based BPO units. The case of the assessee is that the assessee being a non-voice based BPO company cannot be compared to voice based companies while applying the TNM method.
- The assessee rightly submitted that the aforesaid comparable, *i.e.*, Maple E-solutions Ltd. cannot be selected for the purpose of benchmarking in the case of the assessee while applying TNM method. The TPO failed to appreciate that the aforesaid comparable company and the assessee are engaged in different businesses altogether. As the business model of voice based companies is of totally

different nature than that of non-voice based companies, the comparable Maple E-solutions Ltd. has to be excluded for the purpose of benchmarking. It is pertinent to mention here that the aforesaid comparable company was also involved in fraud and the business reputation came under serious indictment. For this reason also the comparable must be excluded.

- As regards Indusind Information Technological Ltd., it is the case of the assessee that the business model of the comparable chosen by the TPO is that of software development unlike that of the assessee-company which is engaged in the business of BPO services.
- The averments made by the assessee are correct that the aforesaid comparable may be excluded for the purpose of benchmarking the arm's length price of the international transactions entered into by the assessee. The software development company has a completely different functional profile as compared to a company engaged in BPO services. The risk undertaken and the assets employed by a software development company cannot be compared to a BPO company.
- In view thereof, the aforesaid comparable, *i.e.*, Indusind Information Technology is excluded for the purpose of benchmarking the international transactions of the assessee.
- The assessee further contended that the two comparables out of the five comparables chosen namely Galaxy Commercial Ltd. and ICRA online Ltd. are of high profit margin (OP/TC) and therefore should be excluded from the list of comparables. The profit margin declared by the assessee in its TP study is 15.2 per cent and these two comparables objected to by the assessee have a profitability of 23.53 per cent and 30.35 per cent respectively.
- Before advertizing to decide the aforesaid issue raised by the assessee, it is pertinent to refer to rule 10B(2) of IT Rules, 1962 which provides for parameter for comparing international transactions with uncontrolled transactions.
- A bare perusal of the aforesaid rule goes to show that there is no prohibition in considering companies with high profit or high losses as comparables for benchmarking international transactions to the arm length price. However, if there are specific and particular reasons evidencing abnormal profits or losses margin of the comparable, only then the comparable can be excluded. The burden to demonstrate the same is on the assessee. In the present case, no such particular facts have been brought on record to substantiate the reasons for high profitability of these comparables. In any case, comparables cannot be excluded for the sole reason that they are of high profitability margin. Such cases of high profitability or losses only invite further scrutiny as to the specific and particular reasons demonstrating abnormal profits/losses.
- Even otherwise, the Indian Transfer Pricing Regulations differ from OECD Guidelines and US Transfer Pricing Regulations in this respect. The Indian Transfer Pricing Regulations provide for arithmetic mean of the comparables for determining ALP of international transactions. The OECD guidelines, on the other hand, have enunciated the principle of quartile method for calculation of ALP, wherein the comparables that fall in the extreme quartiles get excluded and the middle quartiles are considered for benchmarking the transactions.

- The approach of the TPO by selecting the band of PLI between 10 per cent and 50 per cent is completely arbitrary and has no basis for reasons stated above. The selection of comparables by the TPO had led to arbitrariness wherein the loss making companies were excluded and comparables only in the range of having PLI of 10 per cent to 50 per cent were selected. The benchmarking made by the TPO is not as per the principles governing Indian Transfer Pricing guidelines regulations or even the OECD guidelines.
- In view thereof the matter is restored to the file of the Assessing Officer for making fresh search of comparables in view of the position of law enunciated in the present decision. Accordingly, assessee grounds are allowed for statistical purposes.