

Resale Price Method can't be applied to benchmark export of goods to AE, rules Lucknow ITAT

Summary – The Lucknow ITAT in a recent case of Super House Leather Ltd., (the Assessee) held that Resale price method is applicable where there is purchase of property or service from associated enterprise and not in respect of exports

Facts

- The assessee, company had exported goods to its AE. It applied Cost Plus Method to justify that its transaction was at arms length price.
- However, TPO applied Resale Price Method and computed TP adjustment.
- The Commissioner (Appeals) deleted the said disallowance.
- On appeal:

Held

- The Commissioner (Appeals) has deleted this disallowance mainly on two basis. One basis is that the principle of *res judicata* was not applicable in income-tax proceedings but principle of consistency cannot be brushed aside. He has given a clear finding that the assessee has followed cost + method and no reasons had been given to reject the same. The second basis given by him is that the resale price method does not apply in the assessee's case as resale price method is applicable to imports into the country.
- From the provisions of clause (b) of sub-rule 1 of rule 10B, it is seen that resale price method is applicable where there is purchase of property or service from associate enterprise but in the present case, the assessee is not purchasing the goods from the associate enterprises but the assessee is selling the goods to associate enterprise. Based on this fact, this finding is given by Commissioner (Appeals) that resale price method does not apply to the assessee's case.
- In addition to these two basis discussed above, it is also stated by Commissioner (Appeals) that the T.P.O. has applied internal CUP method but wrongly nomenclated it as Resale Price Method. The Commissioner (Appeals) has also given a finding that the T.P.O. has adopted the gross margin of AEs at the rate of 5 per cent but this assumption of 5 per cent is not correct because as per the records, the average commission paid by the assessee to the AEs/non-AEs on similar product is upto 20 per cent and average is 7.2 per cent. After examining the facts and after giving this finding that the T.P.O., while dealing with international transactions with the AEs, has himself accepted the commission rates upto 10 per cent given to the US (AE) on referred sales and upto the 8 per cent to UK(A.E.) and therefore, the Commissioner (Appeals) has held that the gross margin available to the A.E. should have been benchmarked at 8 per cent and not at 5 per cent as the T.P.O. has himself

treated all these commission payment at arm's length and has made no adjustment in the commission transactions of the assessee. Thereafter, the Commissioner (Appeals) has examined the agency agreement and held that that certain adjustments on account of functional differences between a person who acts as 'principal to principal' *i.e.* a trader and a person who acts as a mere 'commission agent would be allowed because in case of 'principal to principal' transaction, person, *inter alia*, incurs expenditure on imports, storage and distribution of the goods which in normal course are not incurred by a commission agent and, therefore, suitable adjustments for such expenditure has to be given and then only the resultant gross margin can be compared with the benchmarked 8 per cent gross margin. On this basis, the Commissioner (Appeals) has reduced the import expenses of goods from sale price by the A.E. and worked out the gross margin of the A.E. at the rate of 7.04 per cent, which is less than 8 per cent even when no other expenses have been allocated except import expenses on goods and under these facts, it was held by Commissioner (Appeals) that the adjustment made by the T.P.O. is not justified and deleted the same. As per the above discussion, the order of Commissioner (Appeals) was after detailed examination of facts and no infirmity could be pointed out by department in these findings of Commissioner (Appeals) and therefore, there is no reason to interfere in the order of Commissioner (Appeals).