

Failure to apply correct TP method attracts concealment penalty

Summary – The Mumbai ITAT in a recent case of Genom Biotech (P.) Ltd., (the Assessee) held that where in respect of international transactions relating to sale of pharmaceutical products to AEs, assessee failed to adopt CUP method and did not benchmark each of international transaction separately, TPO was justified in making addition to assessee's ALP on basis of CUP method and also passing penalty order under section 271(1)(c)

Facts

- The assessee-company was engaged in the business of 'manufacturing and trading of pharmaceutical products'. It recorded international transactions with Associated Enterprises (AEs) at Cyprus, UK and Switzerland. Those AEs eventually sold the goods to the buyers at Ukraine. The assessee benchmarked those transactions by adopting Cost Plus Method (CPM).
- In transfer pricing proceedings, the TPO found that AEs of the assessee were engaged in buying similar products for sale of the same at Ukraine from unrelated parties as well. Thus, TPO opined that those transactions would constitute CUP, which could be used for benchmarking assessee's international transactions.
- On the basis of CUP method, the TPO made addition to assessee's ALP which was duly accepted by assessee.
- Thereupon, the Assessing Officer passed a penalty order under section 271(1)(c) in respect of aforesaid addition.
- The Commissioner (Appeals) confirmed the penalty order.
- On second appeal:

Held

- On facts, the assessee had international transactions with the AEs at Cyprus, UK and Switzerland *etc.*, who in turn supply the materials to the buyers in the Ukraine. Similarly, some unrelated parties also supplied materials to Ukraine using the assessee's AEs at Cyprus, UK and Switzerland. Thus, there are direct CUP useful for TP studies of the impugned international transactions. Why the assessee did not use the same? Why the assessee preferred 'Cost Plus Method'? There is no discussion or justification in the orders. Therefore, assessee fairly conceded on this point and agreed for adjustment to its international transactions. Now, the issue under consideration relates to 'concealment of income' or 'furnishing of inaccurate particulars of income'. One needs to decide in the light of the provisions of Explanation 7 to section 271(1)(c).
- From the aforesaid explanation, one needs to see the due diligence and good faith of the assessee. Failures of the assessee include (i) not adopting for CUP method and (ii) not benchmarking each of the transaction separately. The assessee actually benchmarked all transactions in aggregation while

applying the CPM. Assessee is well aware about the availability of CUPs atleast for the two international transactions. In that sense, due diligence is not in existence in not using the CUP method and not benchmarking the transaction with the TP study. As such, assessee agreed to the above benchmark study of the TPO considering the merits of the TPO's proposals. Next condition relates to the 'good faith'. Good faith is not demonstrated by assessee.

- In fact, the assessee is silent in the explanations on both the 'due diligence' and 'good faith' issues. The assessee is casual and its explanation is general in nature.
- Considering the above factual matrix of the case, this is the fit case for levy of penalty and therefore, the decision taken by the lower authorities is affirmed.
- In the result, appeal of the assessee is dismissed.