

TP use of multiple year data permissible only from 1-4-2014

Summary – The Kolkata ITAT in a recent case of Lee Hours Pomeroy Architects., (the Assessee) held that Use of multiple year data and adopting weighted average data of comparables is permissible only in respect of international transactions entered into on or after 1-4-2014 as per amendment to rule 10B and rule 10CA of Income-tax Rules, 1962, and, thus, same would not apply to case of assessee, a foreign company, in respect of execution of metro rail project awarded in assessment year 2010-11

Facts

- The assessee was a company established under the laws of United States of America. It was awarded a contract by Kolkata Metro Rail Corporation Ltd. (KMRCL), to undertake the Kolkata East West Metro Rail project. For said purpose, the assessee had set up a project office in Kolkata which was a permanent establishment in India for the purpose of the Act.
- During relevant year the assessee provided services for Metro Rail project entailing labour expenses, overhead expenses and consultancy charges and also received payments for consultancy fees from KMRCL.
- For the purpose of computing the arm's length price (ALP) of the above mentioned international transactions, the assessee had adopted CUP method in its Form 3CEB filed along with the return of income.
- But before the TPO, the assessee did extensive transfer pricing (TP) study and shifted from CUP method to TNMM for determination of its ALP. Under TNMM, the Profit Level Indicator (PLI) of the tested party (*i.e.*, the assessee herein) was -3.03 per cent and whereas the PLI of comparables chosen by the assessee based on multiple year data was 2.95 per cent.
- The TPO determined the ALP using TNMM by rejecting the two comparables as against 11 comparables of the assessee and substituted two comparables based on his research. The arithmetic mean of the 11 comparables was arrived at 13.18 per cent. Accordingly, certain addition was made to the assessee's ALP.
- In appellate proceedings one of the contentions of the assessee before the Tribunal was that CUP was the Most Appropriate Method (MAM) for determination of ALP in the facts and circumstances of the assessee's case and the revenue authorities were not justified in adopting Transaction Net Margin Method (TNMM) as the MAM.
- The Tribunal accepted assessee's contention. It further directed adoption of use of multiple year data and weighted average data of financial information of the comparables.
- The assessee filed instant application seeking rectification of aforesaid direction of the Tribunal.

Held

- The selection of the most appropriate transfer pricing method for a particular case will depend on the availability of reliable information to apply it, and in particular, on the availability of reliable

comparable data. Where it is possible to locate comparable uncontrolled transactions, the CUP method is the most direct and reliable way to apply the arm's length principle. The comparable uncontrolled price method can be applied on the basis of the taxpayer's transactions with independent enterprises ('internal comparables'), or on the basis of transactions between other independent enterprises ('external comparables'). Among the two, internal comparable is preferable to external comparable.

- The observations of the Tribunal do not in any way stand in the way of the assessee making a claim before the Assessing Officer that one internal comparable would be sufficient to determine the ALP of the international transaction. The observations of the Tribunal should be construed as a direction that CUP method as MAM and liberty is given to the assessee to file TP study adopting CUP as the MAM. These observations, would be sufficient safeguard and there is no need to delete the same.
- As far as the direction with regard to use of multiple year data and weighted average data of financial information of the comparables is concerned, it has been pointed out that use of multiple year data and adopting weighted average data of comparables is permissible only in respect of international transactions entered into on or after the 1-4-2014 as per the amendment to rule 10B and rule 10CA of the 1962 Rules by the Income-tax (16th Amendment) Rules, 1962.
- These amendments show that the same do not apply to the determination of ALP of the international transaction in assessee's case. The direction given by the Tribunal regarding use of multiple year data and adopting weighted average data of financial information of the comparables, being contrary to the statutory provisions, is a mistake apparent on the face of the record and the same is hereby directed to be deleted.