

Foreign entity was to be taken as tested party when relevant data for its comparison was available in public domain

Summary – The Chandigarh ITAT in a recent case of IDS Infotech Ltd., (the Assessee) held that When an assessee wishes to take a foreign entity as a tested party, it can do so provided relevant data for comparison is either available in public domain or is furnished to tax department/administration

Facts

- During relevant year, the assessee-company was rendering IT enabled services to its AE. In order to benchmark its international transactions, the assessee adopted TNMM with operating profit to operating cost (OP/OC) as PLI.
- In transfer pricing proceedings, TPO noted that no reliable data was available in respect of the foreign comparables and, hence, the selection of the foreign entity as a tested party was rejected.
- Thereupon, on the basis of mean earned by comparables selected by the TPO, certain addition was made to the assessee's ALP.
- The Commissioner (Appeals) confirmed said addition.
- On appeal:

Held

- The issue comes up for consideration is whether the foreign entity in international transactions can be selected as a tested party for the purpose of carrying out comparability analysis.
- As per the OECD guidelines, the US Treasury Regulations and the UN practicing Manual of transfer pricing for developing country, there is a broad consensus that the tested party should be one:
 - (i) It is the least complex party to the controlled transaction.
 - (ii) The party in respect of which most reliable data for comparability is available and;
 - (iii) Which does not own valuable intangible or unique assets.
- In the present case, the TPO has rejected foreign AE as the tested party for the reason that no reliable data in respect of foreign comparables was available. Thus, as far as the foreign party being the least complex entity to the controlled transactions and not owning any valuable intangible or unique assets is concerned, there is no dispute that the foreign entity to the transactions *i.e.* IDS-A is the least complex and does not own any valuable intangible or unique assets. The only issue on which the acceptance or rejection of the foreign entity as a tested party rests is *vis a vis* availability of the appropriate foreign comparables.

- The only reason with the TPO for rejection of the foreign entity as the tested party, is that the data in respect of comparable transactions was not available. At this juncture, it is important to point out that the Tribunal in a number of decisions, pointed out by the assessee, held that if an assessee wishes to take a foreign entity as a tested party, it can do so provided relevant data for comparison is either available in the public domain or is furnished to the tax department/administration.
- On perusal of the transfer pricing study conducted by the assessee, it is found that it has been categorically mentioned therein that Global Symposium, a search engine covering financial and business datas for companies operating across the globe was used and it has data from four public databases/sources:
 - (i) Standard & Poor's Research Insight : Compustat North American data.
 - (ii) Standard & Poor's Research Insight : Compustat Global Data.
 - (iii) Primark Disclosure's SEC
 - (iv) Primark Disclosure's Worldscope
- It was also categorically mentioned that all the aforementioned sources of data were available in the public domain. The assessee in the TP report had given details of the search conducted for uncontrolled comparables and the determination of arm's length price. The report stated that the initial objective of the search of comparable companies was to identify such companies which performed activities comparable to activities undertaken by IDS-A. However, this search did not result in any comparable companies and, hence, it was broadened to identify companies in US involved in broadly functional similar operation to IDS-A. The activity codes selected for identifying the companies, quantitative filters applied for eliminating those which were not comparable and qualitative review conducted was outlined and finally a list of 11 comparable companies was arrived at.
- Clearly, information relating to the comparable companies was available in the public domain and it was also furnished to the TPO. In fact, even the TPO has admitted that the profit and loss account of the comparables selected by the assessee was also provided. It is not the case of the TPO that the results were unaudited. Further as stated above, business description of these companies was also provided. Therefore, there is no merit in the contention of the revenue that the reliable data in respect of foreign companies was not available as admittedly in the present case, the data was available in public domain and the sources was also made known to the TPO.
- The revenue with all resources available at hand could have accessed the said sources and conducted comparability analysis. Besides, the assessee had given entire detail of the search conducted by it so as to finally arrive at the 11 comparable companies given business description of these companies also and also provided their profits and loss accounts to arrive at the PLI *i.e.* OP/OC. Thus, all relevant data had been provided by the assessee to the TPO also. The TPO, besides giving a general statement which is also incorrect, that no description was given regarding activities

in which the comparable companies were involved, pointed out no other anomaly was in the data of the comparable companies furnished by the assessee. Therefore, the rejection of the foreign entity IDS-A as the tested party is set aside.

- It is pertinent to point out that for determining the ALP of the international transactions relating to marketing services provided by IDS-A and IDS-UK also the assessee had taken the foreign entities as the tested party. These were not rejected by the TPO. Clearly, therefore, there is inconsistency in the stand of the TPO rejecting the selection of foreign entity as a tested party for the purpose of IT enabled services while accepting the same for marketing support services. For this reason also, the rejection of the foreign entities as a tested party needs to be set aside.
- Further in the preceding assessment year also the assessee had taken IDS-A as its tested party, which was duly examined by the TPO. The TPO in the preceding year had accepted the same and made no adjustment in this regard. Thus, having accepted foreign entity as a tested party in the preceding year, the revenue cannot now take a different stand without pointing out any change in facts *vis-a-vis* the preceding year.
- In the light of the above, the action of the TPO, accepted by the Assessing Officer and Commissioner (Appeals), in rejecting the foreign entity in the controlled transaction, *i.e.*, IDS-A, as a tested party is wrong and is, therefore, set aside.
- Further, since the treatment of the foreign entity as a tested party has been upheld and since no other anomaly was pointed out in the arm's length price determined by the assessee by treating foreign entity as a tested party, the arm's length price determined by the assessee is treated as correct and adjustment made in this regard by the TPO is deleted.