# Non-AE domestic transaction couldn't be considered for computing income of international transaction

**Summary – The Bangalore ITAT in a recent case of Cable & Wireless Networks India (P.) Ltd., (the Assessee) held that Non-AE transaction of assessee being domestic and carried out in a different geography than international transaction, said transaction cannot be clubbed together for computation of income of international transaction**

**Facts**

- The assessee-company was providing network services to AE for connecting the Indian end of the network with the global network of the AE. The assessee had taken network bandwidth from Tata on lease and paid total lease charges and earned revenue from AE and from non-AE domestic clients. The assessee benchmarked its international transactions by considering the entity level operating margin under TNMM.
- The TPO noted that, earlier the AE of the assessee was availing services from Tata and the same service continued with only difference that the assessee became the lease holder of the network owned by Tata. Thus, the assessee entered into the shoes of the Tata and raised bills on the AE for the services earlier provided directly by Tata. The TPO, thus, held that the cost base had been shifted by AE from their account to the account of the assessee. Therefore, the TPO was of the view that the certain amount ought to have been reimbursed with some mark up by the AE to the assessee. Accordingly, the TPO considered that the lease charges not utilized by the assessee as an international transaction as it represented the cost which the assessee should have been compensated by the AE. Consequently, the TPO disallowed the adjustment claimed by the assessee on account of under-utilization capacity and the Arm's Length Price (ALP) was determined on aggregate basis. Accordingly, the TPO proposed an adjustment under section 92CA.
- The assessee challenged the action of the TPO before the Commissioner (Appeals) but could not succeed.
- On appeal:

**Held**

- The assessee has carried out transactions with AE as well as non-AE therefore, the income of the transaction with AE has to be computed by comparing the same with ALP so determined as per the provisions of sections 92C and 92CA along with rule 10 of the Rules. The non-AE transaction of the assessee are domestic and carried out in a different geography than the international transaction. Thus the domestic transaction with non-AE were entirely different in nature from the international transactions and hence cannot be clubbed together for computation of income of the international transactions as mandated by sections 92(1) and 92C. Hence, entity level results comprising of international transactions and domestic transactions cannot be considered for the purpose of

testing the price of the international transactions with comparable price being ALP. It is also pertinent to note that while selecting the comparable entity for the purpose of determining the ALP of international transactions an appropriate filter of not less than 75 per cent of the revenue from exports is applied. This exercise of applying the filter is done to ensure similarity of the transactions being export or import as case may be for the purpose of comparison. Therefore, the contention of the assessee that the entity level results be considered for testing international transactions with ALP, rejected. The assessee has forcefully contended that segregation of results was not possible as various expenditure were common for the domestic and international transactions. In such a case, the appropriate method would be CUP and particularly when the AE of the assessee was receiving the same services from Tata just prior to the incorporation of the assessee. It was contended by the assessee that the quality of service is different as provided by the assessee in comparison to the Tata. However the assessee is using the same network bandwidth hired from Tata and also claimed that during the year under consideration the assessee is in the testing phase and was not able to provide proper services as manifest from the agreement with the client. Thus it is apparent that the services of the assessee were not better than the earlier services provided by Tata Communications to the AE of the assessee and therefore, the contention of the assessee is devoid of any substance or merit. Further in case CUP is adopted as a MAM the question of non-utilization of network and corresponding adjustment on account of lease charges would not arise.

- Accordingly, the matter is set aside to the record of the TPO for determination of the ALP on the basis of CUP.