

TP method consistently followed by assessee can't be changed by TPO if there is no change in circumstances

Summary – The Mumbai ITAT in a recent case of Glenmark Pharmaceuticals Ltd., (the Assessee) held that where TPO had changed over to CUP method as MAM by rejecting TNMM method consistently being applied by assessee without any change in facts and law, adjustment made by TPO was to be set aside

Where entities are operating in different geographical, political and economical environment, same have to be taken into account for benchmarking comparable transactions and TNMM would be MAM in such case

Facts

- The assessee was into manufacture and export of pharmaceutical products to its various AE's. The assessee was asked to provide CUP details in respect of exports to Russia.
- The assessee in reply furnished the CUP details for all products exported to Russia. Out of the total 26 products, details of two products where assessee's export price to Russia was lower as compared to export made to non-AE's was noted and after rejecting contentions of assessee, adjustment was done by taking CUP as most appropriate method in respect of these two transactions.
- On appeal, the Commissioner (Appeals) deleted the addition.
- On appeal by revenue to the Tribunal:

Held

- It is noted that the first objection of the assessee is that the TPO has changed the consistently applied MAM of TNMM for benchmarking the international transaction without any cogent reason. In this regard, it is found that without noting any change in the facts and law, the TPO has proceeded to hold that CUP is better method than TNMM. This reasoning of the TPO, is totally fallacious and not at all sustainable. In this regards this Tribunal in *Omni Active Health Technologies Ltd. v. Dy. CIT* [\[2018\] 92 taxmann.com 88 \(Mum.-Trib.\)](#) has examined similar issue and held that a consistently applied method can be changed only if there is a change in facts and law. In the instant case, no such case has been made out. Rather the Transfer Pricing Officer has proceeded to examine the issue on the basis of TNMM method. He has ordered for updated data of comparable. Thereafter, when even on the basis of updated data, the international transaction was found to be at arm's length, he laconically held that CUP method would be preferred. The DRP had summarily upheld the change from TNMM to CUP method without assigning any cogent reason whatsoever. By no means it is justified to keep on finding a method for addition by trial and error method. Accordingly, it is held that there was no justification in rejecting the TNMM method applied by the assessee as in the preceding year.

- It is found that the above case law is fully applicable on the facts of the instant case. Here also, the TPO has changed over to CUP method as MAM by rejecting the TNMM method consistently being applied by the assessee without any change in facts and law. It is noted that the Tribunal after elaborately deliberating upon the provision of the law has expounded that in absence of any justification for change in facts or law, the TPO is not justified in rejecting the consistently applied TNMM method and applying the CUP method as MAM. The above proposition is fully applicable here. Hence, the adjustment made by the TPO is liable to be set aside.
- Furthermore, on merit also, the assessee has made a good case that the CUP method adopted by the TPO is not correct. Out of 26 products, 24 products exported to Russia were at higher price. The T.P.O. has only picked up 2 products where prices are lower and has compared the rate adopted for Mauritius and West Indies to that of Russia. Here, the plea of the assessee is cogent that these are crucial difference of the geography as well as quantity involved. The quantity exported to Russia is huge (approximately 80 times) as compared to that exported to Mauritius and West Indies. When entities are operating in different geographical, political and economical environment, the same has to be taken into account. Furthermore, the assessee is correct in placing reliance upon the High Court decision in the case of *Pr. CIT v. Amphenol Interconnect India P. Ltd.* [2018] 91 taxmann.com 441 (Bom.) that geographical difference, volume difference are also to be considered in making the comparison in similar cases. The TPO is totally wrong in holding that these matters are of academic interest only. Hence, without factoring in the difference in FAR, the comparison done by the TPO is not sustainable. In the background of the aforesaid discussion and precedent, the order of the Commissioner (Appeals) that there is no proper reason to apply CUP method, instead of that consistently applied earlier method of TNMM, as the most appropriate method (MAM) is upheld.