

## Judicial Decisions

Foreign associated enterprise (AE) performing least complex functions as compared to Indian counterpart can be considered as tested party to benchmark international transaction. COMPUSTAT, a foreign database available on payment of subscription fees is considered as information available in public domain

**Tech Mahindra (P.) Ltd. (142 taxmann.com 29) (Mum.) (in favor of assessee)**

### Facts

The assessee was engaged in telecom software development services and hardware solutions. The assessee had available on-site software and offshore support services from its wholly owned subsidiary based in USA ('US entity'). The assessee had selected US entity as a tested party, since functions performed by US entity were less complex than functions performed by the assessee. The assessee has used transactional net margin method (TNMM) as most appropriate method and had conducted search on COMPUSTAT database, which is an international database.

The Transfer Pricing Officer (TPO) rejected the benchmarking analysis conducted by the assessee. The TPO treated the assessee as the tested party and benchmarked the international transaction by searching Indian comparables.

The assessee argued that the comparables selected using COMPUSTAT database is available in public domain, on subscription basis just like PROWESS and CAPITALINE as used by the TPO. The database is based on financials filed with USA SEC, and therefore, is as reliable as PROWESS and CAPITALINE for selecting comparable to the assessee.

### Held

The foreign AE performing least complex functions as compared to Indian counterpart should be selected as tested party, to benchmark international transaction. The comparable available on COMPUSTAT database was accepted, as available in public domain for benchmarking the international transaction, where foreign AE has been selected as tested party.

Segmental profitability has to be considered for benchmarking international transaction. Such segmental profitability ought to be accepted by the TPO, even though the same is not certified by the Chartered Accountant (CA)

**SMA Nutrition India (P.) Ltd. [2022] 142 taxmann.com 201 (Del.) (in favor of assessee)**

### Facts

The assessee was engaged in rendering IT administration and coordination services. The assessee was also in the process of setting up distribution business of infant nutrition products for which it had incurred only costs, with no corresponding revenue.

During the year under consideration, the assessee had received service fees from its AE for its IT administration and coordination services rendered. The assessee had computed Profit Level Indicator (PLI) of 10.01% taking into consideration only costs incurred for rendering IT administration and coordination services. The assessee, while computing PLI of 10.01% had not considered cost incurred for setting up distribution business. The comparable companies had PLI ranging from 9.01% to 15.10% and therefore, transaction was considered at Arm's Length Price (ALP).

The assessee in the course of TP proceeding had placed on record segmental workings and basis of allocation of costs between business support and distribution segments. The TPO/ Dispute Resolution Panel (DRP) arbitrarily rejected the segmental financial statements of the assessee and considered the entity level financial statements for the purpose of benchmarking analysis. The TPO had not pointed out any defect or deficiency in the segmental financial statements furnished by the assessee. The TPO also included the costs incurred for distribution business in the cost base for benchmarking IT

administration and coordination services. The TPO did not appreciate the fact that such cost had no connection with the international transaction undertaken by the assessee.

Further the segmental profitability of IT administrative and coordination services and distribution business was also rejected as the segmental profitability was not certified by a CA.

The DRP upheld the action of the TPO and rejected the segmental analysis of the assessee, taking the total costs to benchmarked transaction of IT administration and coordination services.

### Held

The foreign AE performing least complex functions as compared to Indian counterpart should be selected as tested party, to benchmark international transaction. The comparable available on COMPUSTAT database was accepted, as available in public domain for benchmarking the international transaction, where foreign AE has been selected as tested party.

## Circulars

### The Rules and Form for claiming refund of tax as per Section 239A

The Rules and Form for claiming refund of tax as per Section 239A inserted/ notified vide [Notification No. 98/2022/F. No. 370142/33/2022-TPL](#) dated 17<sup>th</sup> August 2022

Section 239A of the Act, was inserted by the Finance Act 2022 w.e.f. 1<sup>st</sup> April 2022. The said section lays down the procedure for claiming refund of tax, where the payer of income is bearing the tax liability on the income paid to non-resident and claims that such income paid is not taxable in India in the hands of non-resident. Form and manner in which the said refund claim was required to be made was to be prescribed.

The CBDT has inserted Rule 40G in the Rules as well as notified Form 29D. Rule 40G requires the application to be accompanied by a copy of an agreement or other arrangement referred to in section 239A. Further, the claim can be presented by the payer of the income or through a duly authorised agent.



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