

## **Loss making entity couldn't be excluded from list of comparable without assigning any cogent reason for the same**

**Summary – The Delhi ITAT in a recent case of Nortel Networks India (P.) Ltd., (the Assessee) held that on FAR analysis conclusion that a company is correctly chosen as a comparable remains unassailed, then it is necessary for revenue at that stage to bring some cogent reason, argument or fact justifying that still comparable needs to be excluded**

### **Facts**

- The assessee was engaged in the business of marketing and after sales support services to Nortel group companies. It had entered into a contract with Reliance Infocomm Ltd. (RIL) for provision of services in relation to installation, commissioning, operation, management and maintenance of its network and to provide training to RIL personnel in relation to software network being installed by the assessee. The contract also provided for training to be provided by expatriates from North America, Asia Pacific and Europe to assessee and, therefore, the assessee as per record was found to have availed of the services of expatriates from its AE's for provision of technical services to RIL under the agreement.
- The TPO considering the comparables chosen by the assessee excluded two loss making comparables. Accordingly, after retaining 5 comparables of the originally offered comparable companies by the assessee, he proposed an upward adjustment.
- On appeal, the assessee contended that a loss making company could not be discarded from the list of comparables just because it has incurred loss when its FAR is comparable with the tested party.
- The Commissioner (Appeals) noticed the TPO had not disputed FAR of HFCL so far as its comparability with the assessee is concerned. In view of above, it cannot be said that HFCL was a consistently loss making company and hence could be treated as comparable.
- On appeal:

### **Held**

- On a careful reading of the impugned order, it is found that in the absence of any infirmity in the reasoning adopted by the First Appellate Authority, the arguments of the department cannot be accepted. The revenue has not assailed the finding of the Commissioner (Appeals) that functional comparability of the assessee with HFCL stands established. Thus, where on FAR analysis the conclusion that a company is correctly chosen as a comparable remains unassailed, then it is necessary for the revenue at that stage to bring some cogent reason, argument or fact justifying that still the comparable needs to be excluded. Merely re-iterating the TPO's stand at this stage that it was consistently a loss making company does not hold good. In the face of the finding of the Commissioner (Appeals), the data placed on record by the assessee assails the conclusion and this

fact has been accepted by the Commissioner (Appeals). It remains unrebutted on record. In the aforementioned peculiar factual position, there is no merit in the departmental appeal.